Towards a New Law School Curriculum in Australia

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Contents

Abstract

Universities are increasingly adopting a neoliberal framework for education—one that is centred on employability, graduate outcomes and skills. Within this framework, teaching, assessments and subjects must adhere to the laws of the market; this prepares students for their roles in private or corporate firms and instils suitable kinds of skills for graduate employment. However, minimal attention is paid to the needs of students as holistic people, citizens, public advocates or members of their local communities, nor is attention paid to their contribution to democratic society. Specifically, subjects in the humanities and social sciences are designated as functionally useless, impractical and irrelevant.

The neoliberal style of education has recently come to dominate Australian law schools. Presently, law schools focus heavily on skills, and they avoid deep training in the liberal arts or training students to think for themselves and critique the law they learn. Various academics have addressed this crisis in legal education. They have proposed, on the one hand, a return to a classical and liberal arts style of education in which law is conceptualised in its political, social and economic context. Conversely, they have also proposed a focus on critical theory and critical perspectives of law.

The aim of this thesis is to investigate the adoption of a liberal arts approach to legal education through the research and proposal of a new law school curriculum in Australia. This includes proposing new teaching methods, assessments and subjects. This proposed broad liberal arts education in law aims to teach students to think for themselves and to develop their critical and analytical skills, sense of justice and injustice, their ability to comprehend and critique the law and their hard and soft transferable skills that are necessary for the broad range of jobs they will accept after graduation (beyond private and corporate practice). Specifically, this thesis aims to consider how and why law can be taught as part of a wider study of politics, history, civics, psychology and philosophy, and how it can consequently prepare students to become well-rounded citizens in their future jobs.

Statement of Originality

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name, in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint award of this degree.

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Introduction

> *Eat law, talk law, think law, drink law, babble of law and judgments in your sleep. Pickle yourselves in law—it is your only hope.*
>
> Karl N Llewellyn, *The Bramble Bush*[1]

Debates regarding the purpose of legal education have occurred for centuries.[2] Typically, these debates fall into one of three perspectives: firstly, that law should be taught as a liberal art or social science that is part of a wider study of politics, philosophy and history;[3] secondly, that law should be taught as a vocation or trade that prepares students for their future jobs as lawyers;[4] thirdly, that law should be taught as a combination of the first two, in which vocational training is embedded in a 'soft skills' curriculum of liberal arts electives, critical thinking and critical values (e.g., ethics and public service).[5]

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[1] Karl N Lewellyn, *On Our Law and Its Study* (Oceana Publications, 1969) 96.

[2] David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 1–5, 10, 25; Ralph Michael Stein, 'The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction' (1981) 57 *Chicago–Kent Law Review* 429.

[3] There are various methods and variations denoting what this might mean in terms of practice and in terms of teaching law as a liberal art or science. For example, Martha Nussbaum suggested that law should be taught alongside the humanities and in partnership with humanities departments to encourage 'democratic citizenship', including 'critical thinking' about the 'political issues affecting the nation'. In comparison, Margaret Thornton critiques the 'amoral' and 'depoliticized stance of legal positivism' and praises how 'liberal arts' legal education produces students who can 'think for themselves'. However, she also noted that it is unclear what a liberal arts education 'means today'. A more in-depth discussion regarding the definition of liberal arts and sciences in this context occurs at the end of this Introduction. For more on this topic, see Martha Nussbaum, 'Not for Profit: Why Legal Education Needs the Humanities' (Speech, Annual Hal Wooten Lecture, UNSW Faculty of Law, 11 August 2011) 3–5, 7–8, 11 <https://www.law.unsw.edu.au/sites/default/files/imce/files/wootten/prof_martha_nussbaum_-_2011_hal_wootten_lecture.pdf>; Margaret Thornton, *Privatizing the Public University* (Taylor and Francis, 2011) 59–61.

[4] Kurt Saunders and Linda Levine, 'Learning to Think Like a Lawyer' (2005) 29(121) *University of San Francisco Law Review* 1. This perspective is often implicit in texts suggesting that law students are future lawyers and that legal education is thus about training future lawyers; Thomas D Morgan, 'Educating Lawyers for the Future Legal Profession' (Research Paper No 189, George Washington University Law School Public Law Scholarly Commons, 2005) 26 <http://ssrn.com/abstract=881846>. It is also implicit in texts highlighting the 'breadth' of skills in law-related areas rather than highlighting the values or the idea of pursuing knowledge for its own sake; Fiona McLeod, 'Looking to the Future of Legal Education' (Speech, Australian Academy of Law Conference, 13 August 2017) 3. For a further discussion regarding the divide between theory and practice, see Timothy P Terrell, 'What Does and Does Not Happen in Law School to Prepare Students to Practice Law: A View from Both Sides of the Academic/Practice Dichotomy' (1991) 83(3) *Law Library Journal* 493.

[5] William Twining praises the National Bar School in Bangalore, India, which 'integrates a multidisciplinary approach to legal study with clinical experience, placements and skills training'; William Twining, 'Preparing Lawyers for the Twenty' (1992) 3(1) *Legal Education Review* 1. In comparison, liberal arts values (e.g., critical thinking, philosophical thinking, communication and writing) can be reframed as 'skills' that fit into a vocational curriculum's framework (in which skills are the main goal of learning) rather than being considered ends in their own right. This is often implicit in the texts themselves. In this way, for example, these texts consider critical

The aim of this thesis is to investigate the adoption of a liberal arts approach to legal education in Australia. To do so, this thesis considers alternative, diffuse ideas of teaching law as a liberal art that have arisen from both historical examples and modern innovations, along with ideas from modern pedagogical theory, humanities educational theory and critiques of legal education by past and present students. Specifically, this thesis proposes alternative teaching methods, assessments and subject lists that differ from a traditionally vocational orthodoxy. It concludes with the proposal of a new law school curriculum—one that has been rebuilt from its foundation to focus on a humanities-based learning experience that is empowered by the latest technology and teaching methods. This curriculum will aim to broaden, not narrow, student learning.

In this Introduction, core concepts will be introduced and defined, including the concepts of doctrinal knowledge, vocationalism and the liberal arts and sciences. This section begins by explaining how and why Australian law schools teach law in a vocational manner, and it investigates the limitations of vocational teaching. The thesis later substantiates how neoliberal economics has come to correlate with a rise in a vocational style of education in law schools. Finally, this Introduction concludes by outlining the arguments and solutions that have been proposed in this thesis.

1) The Dominance of Doctrine

Law schools in Australia have taught law in a 'doctrinal' and/or 'vocational' manner for much of their modern history.[6] It is important to define these two terms in the context of legal education. In some cases, the two terms can be and are used interchangeably; however, in other, and this thesis will argue, more crucial cases, the two terms must be kept distinct. The concept of 'doctrinal' used in this thesis refers to the learning of existing systems or rules, such as the system of precedent or the case

thinking a skill that should be taught for a vocational benefit rather than as an end in its own right. For example, see Michelle Sanson and Thalia Anthony, *Connecting with Law* (Oxford University Press, 2018) 2, 5–9. Alternatively, liberal arts subjects could be added as additional compulsory courses, or critical thinking can be emphasised in existing classes. This method blends the vocational approach with liberal arts add-ons. For example, see David M Moss and Debra Moss Curtis (eds), *Reforming Legal Education: Law Schools at the Crossroads* (Information Age Publishing, 2012) 15.

[6] Nickolas J James, 'A Brief History of Critique in Australian Legal Education' (2016) *Melbourne University Law Review* 37; Barker (n 2).

method.[7] Doctrinal also refers to black-letter law or the study of law as a science unto itself, without any contextual information on the origin or effect of law on society.[8] In contrast, the concept of 'vocational' in this thesis refers to teaching law for the purpose of job training or helping students become future lawyers.[9]

A vocational education can be taught by way of doctrine, in which the doctrine focuses on skills or knowledge essential to students who are entering the legal profession. For example, doctrinal knowledge can include legal principles that can be applied to a real-life client's factual circumstances.[10] However, doctrinal education can also extend beyond mere vocational skills to a highly theoretical realm that is somewhat impractical for the daily job of a lawyer (e.g., discussing legal principles in the abstract).[11] Further, doctrine can also be taught in a manner that extends beyond deductive and inductive reasoning altogether, in which even 'non-legal' theoretical questions are considered in class (as they are nevertheless questions of doctrine).[12]

In contrast, vocational education focuses on producing future lawyers by teaching students skills that can be used in the job (e.g., legal research and other specialist skills required in the profession of law).[13] These skills can relate to general legal practice, but they can also extend to public service and corollary professional responsibilities and duties.[14] In this way, vocational education can also prompt types of thinking regarding ethics and responsibility that may not arise in a doctrinal educational framework. It can be concluded that although vocational and doctrinal educational frameworks can often overlap, they differ in distinct ways that can lead to diverse educational outcomes (depending on which framework is prioritised).

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[7] Terry Hutchison and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Griffith Law Review* 1, 101.

[8] Ibid.

[9] Fiona Westwood and Karen Barton (eds), *The Calling of Law: The Pivotal Role of Vocational Legal Education* (Ashgate Publishing, 2014) 36.

[10] For more on the case method, see Peggy Cooper Davis, 'Desegregating Legal Education' (2010) 26 *Georgia State University Law Review* 1275.

[11] Henry Schlegel, 'More Theory, More Practice' (1988) 13 *Legal Service Bulletin* 71.

[12] Mathies Siems, 'Legal Originality' (2008) 28(1) *Oxford Journal of Legal Studies* 147.

[13] Westwood and Barton (n 9) 37.

[14] Ibid.

Various academics, including Margaret Thornton, Martha Nussbaum, Nick James and Lawrence Busch, have argued that doctrinal and vocational education frameworks, when taught on their own, are detrimental to students, graduates and greater society.[15] Their arguments can be categorised into three beliefs: first, that vocational education does not meet its own premise of preparing students for future jobs, as most law students do not enter the legal profession;[16] second, that doctrinal and/or vocational education leads students away from other areas of knowledge (e.g., social justice, critical thinking, the humanities, ethics and the liberal arts);[17] third, that doctrinal and/or vocational education entrenches social hierarchies and prevents students from becoming actively engaged in their communities as democratic citizens.[18] Each of these arguments will be addressed in the subsections below.

a) The Myth of 'Future Lawyers'

First, it should be stated that the belief that law schools exist to prepare all, or even most, law students for future jobs as lawyers is statistically inaccurate. Less than 50 per cent of Australian law graduates enter the legal profession.[19] After five years, a further 50 per cent leave their law careers in major law firms due to high staff turnover rates.[20] In other words, most law graduates will eventually work in an area other than legal practice five years after graduating from law school.[21] Part of the reason for this is the oversupply of law graduates.[22] Each year, approximately 12,000

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[15] There are distinctions regarding the extent to which these academics cite both frameworks; Thornton (n 3); Nussbaum (n 3) 3–5; James (n 6); Lawrence Busch, *Knowledge for Sale: The Neoliberal Takeover of Higher Education* (MIT Press, 2017).

[16] Letter from Margaret Thornton to Law Admissions Consultative Committee, Law Council of Australia, 31 March 2015 <https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/30.Submission%20-%20Professor%20Margaret%20Thornton.pdf>.

[17] Nussbaum (n 3) 3–5.

[18] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (NYU Press, 1983).

[19] Thornton (n 19); Tamara Walsh, 'Putting Justice Back into Legal Education' (2008) 17(1–2) *Legal Education Review*, 126; Erina Cervini, 'Law and the New Order', *Sydney Morning Herald* (online at 12 June 2012) <http://www.smh.com.au/it-pro/law-and-the-new-order-20120611-205o5.html#ixzz3g9Px7ltB>; Joel Barolsky, 'Good Times Roll but Law Graduates Miss Out on a Harvey Specter life', *Financial Review* (online at 31 January 2019) <https://www.afr.com/opinion/good-times-roll-but-law-graduates-miss-out-on-a-harvey-spector-life-20181213-h1920w> ('Good Times Roll').

[20] Beyond Billables, 'The Hidden Costs of Law Firm Attrition', *Beyond Billables* (Web Page) <https://www.beyondbillables.com/blog/the-hidden-costs-of-law-firm-attrition>.

[21] Ibid.

[22] Barolsky, 'Good Times Roll' (n 19).

students graduate from Australian law schools (or 7,583 students, if practical legal training and graduate students are excluded).[23] They enter a job market that permits only 60,000 working lawyers.[24] Simply stated, there are not enough law jobs for all law students to practice law. The boom of law schools over the past 30 years has contributed to this professional graduate glut. In the 1980s, only 12 law schools existed in Australia; presently, there are over 38—or 44, if accounting for universities with more than one campus (e.g., James Cook, Deakin, Notre Dame and the Australian Catholic University).[25]

Teaching a vocational training in law might thus not adequately prepare students for their *actual* future jobs. If law schools aim to prepare students for their future careers, then law schools should broaden their education to adequately accommodate other professions that law students may enter into such as politics, the media and business.[26]

b) Vocation as a Conversion Process

The second argument against vocational education in law schools is that it leads students away from other areas of knowledge, including their own interests. This argument is supported by the relevant statistics. When law students are surveyed in their first year, they indicate a greater concern for public service, charity and human rights.[27] However, by the end of their degrees, the same students indicate a greater concern for employment, money and prestige.[28] In other words, law school changes their convictions. Anthony Kronman recognised this trend in the United States (US) as early as the 1990s.[29] He contended that a law graduate in the 1990s would become

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[23] Ibid; Neil McMahon, 'Law of the Jungle: Lawyers Now an Endangered Species', *The Sydney Morning Herald* (online at 11 October 2014) <https://www.smh.com.au/national/law-of-the-jungle-lawyers-now-an-endangered-species-20141011-114u91.html>; Edmund Tadros, 'Graduate Glut: 12,000 New Lawyers Every Year', *The Sydney Morning Herald* (online at 14 February 2014) <https://www.smh.com.au/business/graduate-glut-12000-new-lawyers-every-year-20140214-32qnm.html>; Michael Douglas and Nicholas van Hattem, 'Australia's Law Graduate Glut' (2016) 41(2) *Alternative Law Journal* 3–5; Council of Australian Law Deans, 'Data Regarding Law School Graduate Numbers and Outcomes' (Online Document, 2017) 1–2 <https://cald.asn.au/wp-content/uploads/2017/11/Factsheet-Law_Students_in_Australia.pdf>.

[24] Tadros (n 23).

[25] Thornton (n 19).

[26] Ibid.

[27] Sandra Janoff, 'The Influence of Legal Education on Moral Reasoning' (1991) 76 *Minnesota Law Review* 193.

[28] Ibid.

[29] Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1993) 1.

much more concerned with being an 'expert in law' rather than with committing his or her time to public service or charity.[30] Students began demanding more corporate law electives rather than electives in social justice and human rights.[31]

At least one academic has warned students against attending law school altogether if they care about social justice.[32] In a document titled 'For Those Considering Law School', Dean Spade warned that law school is 'a very conservative training and rarely a critical intellectual experience'.[33] He argued that by the time students graduated, they would have been transformed, taught to entrench existing systems of 'maldistribution'.[34] The curriculum, by design, compels this through a vocational focus:

> Law school is like a language immersion program, but one in which the language you are learning is the language of rationalizing white supremacy, settler colonialism, patriarchy and capitalism. The traditional pedagogy of law school relies on humiliating students if they bring in other ways of thinking or knowing about the world, thereby whittling them down to a shadow of their former selves and reshaping them to make them think inside a very narrow box.[35]

Students have raised similar concerns in the Australian context in recent years and have urged law faculties to revise the content, style and direction of legal education.[36] Many have argued that legal education should move beyond vocational training and become more human centred and empathetic; it should encompass greater goals of public service, charity and human rights, as well as teach critical racial, gender and

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[30] Ibid 1–2.

[31] William Twining, *Blackstone's Tower: The English Law School* (Stevens and Sons, 1994) 24.

[32] Dean Spade, 'For Those Considering Law School' (Online Document, October 2010) <http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School.pdf> ('For Those Considering Law School').

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Annan Boag et al, *Breaking the Frozen Sea: The Case for Reforming Legal Education at the Australian National University* (Law School Reform Committee, 2010); Marie Iskander, 'The Ugly Truth about Being a Law Student', *Lawyers Weekly* (online at 3 October 2013) <https://www.lawyersweekly.com.au/opinion/14765-the-ugly-truth-about-being-a-law-student>; Joshua Krook, 'Clerking Mad', *Honi Soit* (Web Page, 12 May 2014) <https://honisoit.com/2014/05/clerking-mad/>; Critical Legal Students Network, University of Sydney, 'About' (Facebook Group, 2013) <https://www.facebook.com/groups/494410394007875/about/>; Justin Pen, 'Consider the Law School', *Honi Soit* (Web Page, 13 March 2014) <http://honisoit.com/2014/03/consider-the-law-school/>.

identity theories.[37] The *Breaking the Frozen Sea* report, written by law students at Australian National University (ANU) in 2010, is one example of a thorough, wide-ranging critique.[38] The report's four authors argued that law at ANU is being taught in a detached way, in which students learn to separate their own concerns about morality, ethics and social problems from the cases they study.[39] In their words:

> We discovered that the 'law' was a series of rules, handed down by old men on the bench to lawyers who 'neutrally' applied it. Law school was a process of learning and memorizing what 'is'—not dreaming of what could be, not arguing for what should be. Our lived experiences were irrelevant to our learning. Law hovered in a strange vacuum, outside of society, culture, politics, and even history.[40]

The official faculty response to the *Breaking the Frozen Sea* report was critical, with few concessions.[41] An ANU faculty committee tasked with reviewing the report found that it reflected an unrepresentative proportion of students' views.[42] By contrast, the report had surveyed 350 students, with a further 60 students and faculty members being consulted.[43] The faculty's committee described the report as 'outdated' and disagreed that the ANU Law School only focused on commercial law alone.[44] However, a significant concession was made. ANU Law School acknowledged that 'a commercial legal practice paradigm dominates the curriculum', according to some academics.[45] The faculty also acknowledged the importance of improving legal education,[46] and specific mention was made regarding improving student mental health and wellbeing.[47]

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[37] Boag et al (n 36).

[38] Ibid.

[39] Ibid iii–10.

[40] Ibid iii.

[41] Australian National University Faculty, 'Academic Staff Response to Breaking the Frozen Sea', *Law School Reform: ANU International Law Society* (21 November 2012).

[42] Ibid.

[43] Boag et al (n 36).

[44] Australian National University Faculty (n 41).

[45] Ibid.

[46] Ibid.

[47] Ibid.

One ANU academic, Bruce Baer Arnold, further suggested that the students' report was underwhelming and unoriginal.[48] He contended that the authors of the report were 'self-involved, naive and aimless princesses' with 'collective angst', and he wished that fewer such students attended his law school.[49] Arnold also claimed that the central contention of the report—that law schools produced hierarchy, privilege and a focus on private practice—was not a unique finding, and that it did not indicate how students may themselves be facilitating this hierarchical process.[50] Arnold finally suggested that the report highlighted more problems than it solved, and that the problems were not as significant as the authors believed them to be.[51]

c) Vocation as Training for Hierarchy

The third argument against vocational legal education is that it might entrench hierarchies. Duncan Kennedy famously proposed this argument in a self-published 'polemic' against US law schools in the 1960s.[52] Kennedy's view will be discussed in further detail below, including its application in the Australian context. In brief, he argued that law school involves a process of preparing students for their future role in the market as enforcers of the status quo—as guardians of hierarchical injustices.[53] As an example, he noted how law students were not confronted by questions of class, gender and racial inequalities in the classroom, even though these inequalities lie at the heart of the law.[54] Instead, students were taught an apolitical understanding of the law, in which judicial decision-making occurs devoid of any political context.[55] Similarly, law professors rarely, if ever, revealed their true political leanings in the classroom.[56]

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[48] Bruce Arnold, 'Legal Warming', *Barnold Law* (Blog Post, 9 April 2011) <http://barnoldlaw.blogspot.com/2011_04_03_archive.html?m=1>.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] Kennedy (n 18).

[53] Ibid 30–40.

[54] Ibid 3.

[55] Ibid 3–4.

[56] Ibid.

Similar work on hierarchy has been written since Kennedy's polemic. Dean Spade, for instance, suggested that 'most legal work maintains systems of maldistribution'.[57] Becoming a lawyer is more likely to aid the status quo in society rather than to lead to broad, revolutionary changes to institutional racism, inequality and other issues.[58] Law schools typically train students in conservative modes of thinking by prioritising the memorisation of rules over critical thinking.[59] In Spade's view, 'No one exits law school without having been changed and conservatized at least a bit'.[60] He affirms that 'it took years of social movement engagement for [him] to shed some of the internalized dominance behaviors [that he] gained in law school'.[61]

When neoliberal values are prioritised above everything else in law school, then questions about distribution and social equality are ignored.[62] As one example, South Africa had great economic metrics during the apartheid, but it was also rife with injustices. Considering economics alone is thus not enough to determine whether a legal order is successful.[63] Instead, law students should receive a broad and critical education in the political and empathetic side of the law.[64] They must 'deliberate well about political issues', 'think about the good of the nation as a whole' and, crucially, 'have concern for the lives of others' rather than just for themselves.[65]

2) The Liberal Arts and Social Sciences

A vocational education in law can be contrasted to the opposing idea of pursuing learning or knowledge, for its own sake.[66] This is typically known as a liberal arts education or an education in the liberal arts and/or social sciences.[67] It is important here to briefly define what these two concepts mean, for they are often used

[57] Spade, 'For Those Considering Law School' (n 32).

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Ibid 4.

[63] Ibid.

[64] Ibid 8.

[65] Ibid.

[66] Mark William Roche, *Why Choose the Liberal Arts* (University of Notre Dame Press, 2010) 15.

[67] William Deresiewicz, 'The Neoliberal Arts' (September 2015) *Harper's Magazine* 2.9.

synonymously. In this thesis, a liberal arts education refers to a broad-minded, interdisciplinary education of a non-vocational nature that is mostly understood to include subjects from the humanities (e.g., history, philosophy and literature).[68] Note here that although these subjects are often defined as non-vocational, they do have career outcomes (i.e., students can become historians, philosophers or novelists). However, a liberal arts education is considered an interdisciplinary activity in which students use their base subject not necessarily as an end point for a career, but as a launching pad from which to investigate broader questions that extend across multiple disciplines.[69] To create a liberal arts curriculum is to create a curriculum full of these 'big questions' that students must confront.[70] As Roche elucidated:

> Even as students bring great questions with them to college, the university cultivates in them a curiosity about questions they had yet to consider: Why are there wars? What is the highest good? Is it better to suffer or to commit an injustice? What are the best conditions for human flourishing? What are the defining characteristics of the just state, and how might we most effectively change our state to approximate that ideal? What are the great artworks of the ages?[71]

The term 'liberal arts' is often used synonymously with the term 'social science'—or, more accurately, it is understood to include the social sciences.[72] If liberal arts is interdisciplinary by nature and extends to 'knowing the best which has been thought and uttered in the world', then it would, by nature, include 'a free and right use of reason and [the] scientific method', which includes humanities subjects that use the scientific method of research.[73] However, this definition of a liberal arts education is so broad that it would include vocational topics that are not necessarily interdisciplinary (e.g., the best business thoughts of all time). For greater clarity, a

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[68] Ibid; Roche (n 66); Kara A Godwin and Philip G Altbach, 'A Historical and Global Perspective on Liberal Arts Education: What Was, What Is, and What Will Be' (2016) 5 *International Journal of Chinese Education* 8 ('A Historical and Global Perspective on Liberal Arts Education').

[69] Ibid.

[70] Roche (n 66) 17.

[71] Ibid.

[72] Godwin and Altbach, 'A Historical and Global Perspective on Liberal Arts Education' (n 68); Deresiewicz (n 67); Sarah Morrisey, 'The Value of a Liberal Arts Education' (2013) 8 *Philosophy, Politics and Economics Undergraduate Journal* 131 ('The Value of a Liberal Arts Education').

[73] Morrisey, 'The Value of a Liberal Arts Education' (n 72).

line can be drawn between the liberal arts and the social sciences by defining what is meant by the term 'social sciences'.

In this thesis, the term 'social sciences' refers to subjects in the humanities that combine a close study of society with the scientific methods of qualitative and quantitative research methodologies.[74] This includes subjects such as political science, economics, anthropology, sociology, psychology and geography, among others.[75] What unites these subjects as social science subjects (as opposed to liberal arts subjects) is a focus on 'contemporary human societies, economies, organizations and cultures', understood through the systematic collection of data and information.[76] The 'science' aspect is evidenced in the theories or model hypotheses that are tested against the qualitative and/or quantitative data collected.[77]

It should also be noted here that the social sciences are closely related to the liberal arts. In some ways, they can even be considered a subset of the liberal arts educational philosophy, as they also prompt students to consider 'big', interdisciplinary questions about human society.[78] The topics of these questions can range from 'how our own society works—from the causes of unemployment or what helps economic growth, to how and why people vote, or what makes people happy'.[79] For example, Nicholas Christakis, a professor of medical sociology at Harvard, combines his medical and sociological interests to question 'how the social becomes biological'.[80] He does so 'to explain, for instance, the evolutionary basis for phenomena such as emotional contagion (the way one person's mood can "rub off" onto another)'.[81]

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[74] 'What is Social Science?', *Economic and Social Research Council* (Web Page, 2021) <https://esrc.ukri.org/about-us/what-is-social-science/>; Simon Bastow, Patrick Dunleavy and Jane Tinkler, *The Impact of the Social Sciences: How Academics and Their Research Make a Difference* (SAGE Publishing, 2014) 4 ('*The Impact of the Social Sciences*').

[75] 'Social Science Disciplines', *Economic and Social Research Council* (Web Page, 2021) <https://esrc.ukri.org/about-us/what-is-social-science/social-science-disciplines/>.

[76] Bastow, Dunleavy and Tinkler, *The Impact of the Social Sciences* (n 74).

[77] Ibid.

[78] John Harvard, '"Hard Problems" in the Social Sciences' (July–August 2010) *Harvard Magazine* <https://harvardmagazine.com/2010/07/hard-problems-in-the-social-sciences> ('"Hard Problems" in the Social Sciences'); 'Solving the Social Sciences' Hard Problems' (27 April 2010) *Harvard Magazine* <https://harvardmagazine.com/2010/04/social-sciences-hard-problems>.

[79] ECSRC (n 77).

[80] Harvard, '"Hard Problems" in the Social Sciences' (n 78).

[81] Ibid.

The concept of a liberal arts education is still contested in terms of its modern definition. As such, an exploration of the definition's history could offer greater clarity.[82] The concept of a liberal education—that is, a broad-minded, multidisciplinary education that goes beyond vocational goals alone—dates as far back as the ancient Chinese and ancient Greeks.[83] In ancient China, both Confucian educational philosophy (551–479 BCE) and traditional Chinese higher education (771–221 BCE) emphasised education as a 'broad understanding of knowledge' that ranged across different fields and that included moral and philosophical ideals at its core.[84] For example, Confucius believed that education was a way to 'cultivate and develop human nature so that virtue and wisdom and ultimately moral perfection would be attained'.[85] Similarly, several of the ancient Greeks (e.g., Socrates and Cicero, in the tradition of the sophists) believed that a broad-minded education should be embedded in the humanities and that excellence should be pursued beyond just a narrow specialist and vocational goal.[86] For example, Cicero outlined an *artes liberalis* education that included 'the study of music, literature and poetry, natural science, ethics and political science'.[87] However, in both ancient China and ancient Greece, a liberal education was also often linked to the vocational goal of crafting political leaders or public servants.[88] To varying degrees, through the ancient Chinese civil service examinations and the ancient Greek political system of democracy (which eliminated aristocracy in place of civic leaders), a liberal arts education (no matter how broad-minded) was considered a means to a vocational end.[89] It was

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[82] Bruce Kimball, *The Liberal Arts Tradition: A Documentary History* (University Press of America, 2010), see for instance 'Section VIII: Experimentation and Search for Coherence, 1910s–1930s'; Daniel E Kleinman, 'Sticking Up for Liberal Arts and Humanities Education' in Feisal G Mohamed and Gordon Hutner (eds), *A New Deal for the Humanities: Liberal Arts and the Future of Public Higher Education* (Rutgers University Press, 2016).

[83] For more on ancient Chinese education, see Godwin and Altbach, 'A Historical and Global Perspective on Liberal Arts Education' (n 68) 9–10. For more on the ancient Greeks, see Martha C Nussbaum, 'A Classical Defense of Reform in Liberal Education' in Bruce Kimball (ed), *The Liberal Arts Tradition: A Documentary History* (University Press of America, 2010) 67; Christina Elliott Sorum, 'The Problem of Mission: A Brief Survey of the Changing Mission of the Liberal Arts' in American Council of Learned Societies, *Liberal Arts Colleges in American Higher Education: Challenges and Opportunities* (ACLS Occasional Paper, 2005).

[84] Godwin and Altbach, 'A Historical and Global Perspective on Liberal Arts Education' (n 68); Ruth Hayhoe, 'Knowledge and Modernity' in Ruth Hayhoe (ed), *China's Universities and the Open Door* (M.E. Sharpe, 1989).

[85] Ruiqing Du, *Chinese Higher Education: A Decade of Reform and Development (1978–1988)* (Martin's Press, 1992) 2.

[86] Sorum (n 83) 28, 31.

[87] Ibid 31.

[88] Ibid 28, 31; Godwin and Altbach, 'A Historical and Global Perspective on Liberal Arts Education' (n 68) 9–10.

[89] Ibid.

believed that someone who trained broadly in either cultural or moral terms would be well placed to serve in the civic roles of their society.[90] However, this should not undervalue the fact that this type of education was still interdisciplinary in nature and drew directly from topics in the humanities.[91]

In the common-law legal educational context, the concept of a broad-minded, liberal education based on moral or cultural ideals would surface again in the seventeenth-century in England. Specifically, a liberal education was taught at the Inns of Court in London from the 1680s, aiming to transform law students into 'gentlemen'.[92] A gentleman's education involved more than mere vocational training in law; it included training on the 'moral and social' aspects of life, including the fine arts, 'music and dance'.[93] The notion of a gentleman's education might be considered a vestige of the landed gentry or of a specific class of British society, one of the few groups with access to higher education at the time.[94] In modern times, people might regard the notion of a 'gentleman's education' as discriminatory to other genders, races or classes outside the white aristocracy.[95] However, this does not necessarily signify that the education taught at the Inns of Court in London was not liberal. It was still a broad, multidisciplinary education that extended beyond purely vocational aims to produce students with a broader understanding of their own culture and place within their culture, regardless of how elitist that culture might have been.

A liberal arts education is still often considered a privilege for a certain class of society—and this notion of privilege is still a contested part of its definition today.[96] Jesse Vogt, writing as a liberal arts student, suggests that 'the possibility to enjoy a

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[90] Ibid.

[91] Sorum (n 83) 28.

[92] David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar: 1680–1730* (Clarendon Press, 1990); T Raleigh, 'Legal Education in England' (1898) 10 *Juridicial Review* 1–5.

[93] Ibid.

[94] Peter Clark, *British Clubs and Societies 1580–1800: The Origins of an Associated World* (Oxford University Press, 2000) 37, as quoted in Michael Segre, *Higher Education and the Growth of Knowledge: A Historical Outline of Aims and Tensions* (Routledge, 2015) 113.

[95] Lani Guinier, Michelle Fine and Jane Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change* (Beacon Press, 1997) 86, 97.

[96] Deresiewicz argues against the idea; see Deresiewicz (n 67). Nussbaum also disagrees; see Martha C Nussbaum, 'The Liberal Arts are Not Elitist' (2010) *The Chronicle of Higher Education* 56. In contrast, Vogt argues in favour of this idea; see Jesse Vogt, '(Neo-)Liberal Education' in Jacob Tonda Dirksen et al (eds), *What Is Liberal Education and What Could It Be?* (LESC, 2017) 46–7.

liberal education may be a given privilege that comes with little sense of responsibility for … people from mainly Western societies that are financially and mentally supported by relatives'.[97] The implied argument is that only those who can afford to ignore a vocation can afford to enrol in a non-vocational course. However, a contrary argument was voiced by the civil rights activist, WEB du Bois,[98] who argued that 'future leaders in the African-American community deserved a college level liberal education—that is, the best kind of higher education, not just narrow occupational training'.[99] This line of thinking partially originates from the history of various slave states in the American south, in which laws prevented the teaching of black men and women to read and write.[100] These laws were enacted in response to a race riot in 1831 on the basis that reading and writing encouraged African-American slaves to seek their own liberation.[101] Whether a liberal arts education is purely a matter of privilege or a form of emancipation—or indeed both, a form of privileged emancipation—is a continued discussion today.

[97] Vogt (n 96) 45.

[98] Carol G Schneider, 'Practicing Liberal Education: Formative Themes in the Reinvention of Liberal Learning' (2004) 90(2) *Liberal Education* 6.

[99] Ibid.

[100] 'Literacy as Freedom' (2014) *Smithsonian American Art Museum* 1–2.

[101] Ibid.

Liberal Arts as a Proposed Alternative to Neoliberal Legal Education

The aim of this thesis is to propose the adoption of a liberal arts law school curriculum in Australia by drawing on the numerous modern and historical examples of law schools and legal educators who have taught law as a liberal art. As discussed in the previous section, it is worth noting that the notion of teaching any topic as a liberal art or science is contested today—and this notion has changed throughout time. To this end, this thesis will investigate a modern liberal arts law school education that teaches students to both think for themselves and develop critical and analytical skills, a sense of justice and injustice, an ability to comprehend and critique the law and hard and soft transferable skills. Specifically, this thesis considers how and why law can be taught as part of a broader study of politics, history, civics, psychology and philosophy, and how and why doing so would prepare students to become well-rounded citizens for the broad range of jobs they will accept after graduating law school.

This thesis makes an original contribution to the field by providing concrete steps that lead from the theoretical arguments of how to teach law to the practical aspect of implementing a new curriculum. It combines various ideas of teaching law from history and modern innovation, as well as ideas from education theory, humanities education and critiques by past and present students. Specifically, this thesis proposes new and alternative teaching methods, assessments and subjects that differ from traditional recommendations in both their scope and breadth. This thesis concludes by proposing an entirely new law school curriculum rebuilt from the ground up to focus on humanities-based learning that is empowered by the latest technological and teaching methods.

This thesis contains three parts. Part 1 analyses the history of legal education in common-law countries, revealing competing views of legal academics—some of whom advocated for a vocational education while others advocated for a liberal arts education in law. It is possible to draw out, from this analysis, a few diffuse examples of a liberal arts pedagogy used historically in the law school setting. These examples act as a springboard for the argument advanced in this thesis, setting out the

possibility of a liberal arts law school and what the adoption of a liberal arts curriculum in Australia might look like--albeit one which substitutes modern teaching and assessment methods for traditional historical arts and humanities approaches--linked to modern educational standards (as discussed in Part 3). Part 1 considers the early education of lawyers at the English Inns of Court, followed by a discussion of the apprenticeship method and the introduction of law as a subject in universities. The early law schools in common-law jurisdictions (the US, Australia, the United Kingdom and Canada) will also be analysed, including the first common-law law school in England at Oxford, the first law school in the US at the College of William and Mary, and the first law schools in Australia in Sydney, Melbourne and Adelaide, respectively. Part 1 concludes by reviewing the core compulsory subjects in Australia (the 'Priestley Eleven') and their effect on preventing curriculum reform.

Part 2 will explore modern legal education in Australia. This part analyses the neoliberal and instrumental aspects of modern Australian law schools and examine how a neoliberal education affects students. It identifies a neoliberal style of education in Australian law schools in terms of the content, style and assessments of the curriculum, which lends itself to a vocational style of teaching law. Part 2 will address the common objections to, and counterarguments of, a liberal arts law curriculum, including the notion that law schools should only teach pure law and that the responsibility for a broad-minded education lies elsewhere—or, briefly, that all law students are essentially future lawyers. Finally, this part will argue that by focusing on employment outcomes rather than on public service, community service or public advocacy, a neoliberal legal education might affect students in terms of their moral education, or society, in terms of the ethical conduct of future law graduates.

Part 3 will propose a new kind of law school in Australia—one in which law is taught as a broad liberal art or science, embedded in the contextualised education of politics, history and philosophy. It will do so by considering alternative teaching methods and assessments and combining ideas from the past and present. The aim is to offer students a chance to learn how to think for themselves, think critically about the law and propose new ideas for law reform. Finally, Part 3 concludes by proposing a new law curriculum that, if adopted, would represent the values of a liberal arts education, enshrined in the types of subjects that students study at law school. The proposed

subjects are unique in terms of how they combine a long history of liberal arts education with newer approaches to law, including technology and gamification.

The thesis concludes with the contention that a new liberal arts law school in Australia would require discarding the current compulsory subjects (the Priestley Eleven) in favour of new electives and humanities subjects. The current curriculum would require significant change and overhaul, and black-letter law subjects and the case method would require significant changes in terms of their structure, their assessment and content. Legal principles would need to be contextualised in class with philosophical questions about the law's origins, purpose and effect. Finally, it is argued that the Socratic method should be reversed, empowering students to question their professors, judges and the law itself.

Part 1: A History of Legal Education in Common-Law Countries

The history of legal education in common law countries is one of transformation. From the Inns of Court in London to modern universities, from informal ad hoc teaching to formalised accreditation, and from law schools' experimentation with various techniques and methods to the dominance of a single method of instruction.

The history is also a battle of ideas. Ideas of what the law is, how it should be taught and the kinds of students that a law school should produce. Law schools have frequently been the battleground for fierce intellectual rivalries, where opposing schools of thought have battled for supremacy and control over the future of the curriculum.[1] The major battle has been between those who consider law a liberal art and those who consider it a science or trade, where law is taught with an instrumental, technocratic or doctrinal mindset. Admittedly, there have been other beliefs, such as the notion that law should be taught as a 'gentlemanly' art or as part of a Christian mission or to cement the status quo. However, even in these few instances, the main battle has occurred between the idea of teaching law broadly and teaching it narrowly. Over time, the latter group has largely prevailed, creating the modern legal education system known today—one that is influenced by the belief that law is a technical skill that should be taught narrowly as a vocation or trade.

The vocational philosophy of law arose for many reasons, including the formalisation of legal training over the last 200 years, the creation of professional peak bodies, the addition of rules and regulations to teaching and learning and the creation of admission requirements, examinations, grades, graduate attributes and university procedures.[2] From the 1980s onwards, the semi-privatisation of universities—and universities' consequent drive to compete for students in a market—has led to an

[1] Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6(1) *Oxford Journal of Legal Studies* 11; PE Nygh, 'Memorandum to: Law School Staff', as quoted in Gill H Boehringer, 'Historical Documents' (1988–1999) 5 *Australian Journal of Law & Society* 57.

[2] Margaret Thornton, *Privatizing the Public University* (Taylor and Francis, 2011) 3; Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (MIT Press, 2015) 190–2.

increased focus on numerical outcomes above all other considerations.[3] The new neoliberal paradigm has influenced and established educational methods, and it has interfered with more experimental legal education reform.[4] The more formal the curriculum became, the more rigid it became, and the more immune it became to experimentation and innovation. The early experimental nature of some legal educators at the first law schools (who taught law as a liberal art, a political activity, a simulation environment or a mock legislative assembly) and the even earlier haphazard and personalised apprenticeship method have given way to the solidification of accreditation methods, the establishment of core units of study and compulsory subject requirements, and the rise of the case method of instruction.[5] The result has been a shift towards a standardised method of instruction, with standardised and compulsory subjects for all law schools. Today, all Australian law schools teach the Priestley Eleven and have adopted the same core subject list.[6]

Reformers who sought to change legal education after its initial solidification into a more vocational degree (arguably between 1890 and 1920) frequently faced derision for trying to upset the status quo.[7] The case method was believed to produce lawyers who thought in the right way, possessed the right skills and were fit to serve their roles in the market economy. In at least one case, an attempt was made to eliminate competing views out of history.[8] This occurred when WPM Kennedy, the first dean of the University of Toronto Faculty of Law and a liberal arts law dean, was omitted from the history books of the law school itself and related documents by his successor, Caesar Wright, a more vocational law dean.[9] As the number of law schools increased in common-law countries, a narrower image of legal education developed.

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[3] Thornton (n 2).

[4] Ibid.

[5] Andrew Boon and Julian Webb, 'Legal Education and Training in England and Wales: Back to the Future' (2008) 58(1) *Journal of Legal Education*; Robert Robson, *The Attorney in Eighteenth-Century England* (Cambridge University Press, 2013) 60–2; David M Douglas, 'Jefferson's Vision Fulfilled'(Winter 2010) *William & Mary Alumni Magazine* <http://law.wm.edu/about/ourhistory/index.php>.

[6] Grace Ormsby, 'Priestley 11 "Not Keeping Up" with Reality', *Lawyers Weekly* (26 May 2019).

[7] Philip Girard, *Bora Laskin: Bringing Law to Life* (University of Toronto Press, 2005) 82, 172–4.

[8] Ibid.

[9] Ibid.

This produced a more technical training environment that did not always accommodate critical thinking and reasoning.

This section will explore key early examples of liberal arts educators and law schools in common-law countries, later examples of vocational and professionally focused law schools, and the transitionary moments at each law school. The example educators discussed in this section have been chosen because they embody the competing ideas mentioned earlier or because they founded law schools that were based on one of the competing ideas (or a hybrid approach of both). Although not a conclusive history of law schools, this section will emphasise key turning points at the selected representative law schools over time, in which the schools typically shifted from a liberal art educational focus towards a vocational focus. The analysis has been limited to common-law countries so that an understanding can be gained of how the case method influenced changing educational models. The selected countries include the UK, the US, Canada and Australia. Most of this account will consider the era during which legal education can be said to have been in a molten state (between the 1800s and 1930s).

This historical examples presented in this part of the thesis contextualise the liberal arts education in law. The examples form the background to Part 3, which explores a modern version of a liberal arts law school in Australia, as adapted to modern pedagogical theory and teaching and assessment methods. It is not argued here that historical methods should be applied to a modern law school without adaptation. Looking to history merely provides the critical distance by which to evaluate modern practices and consider alternative curriculum options that have arisen in the past.

This section contains four parts. The first part presents the origins of modern legal education in the common law—from the 1200s in England, to the apprenticeship era of the Middle Ages, and then to the 1800s and establishment of common-law courses at English universities. The second part examines the US law school, the first of which was founded by George Wythe and Thomas Jefferson, and their bold ideals for a political school of law centred on the liberal arts. The third part investigates legal education in the 1800s and early 1900s and recounts the ensuing battle of ideas between those who considered law a liberal art and those who considered law to be a science. Finally, the third part suggests how the case method (specifically through the

introduction of casebooks, along with case-based assessments) and vocational training emerged in Australia and the other English colonies.

1) Early Law as a Liberal Art

a) From the Inns of Court to Apprenticeships to Law Schools

From the Dark Ages to the Middle Ages, legal education in England was centred on Roman and canon law.[10] Training in law was informal and undertaken outside of a centralised system.[11] Although much can be written about legal education in this period, there is little to mention of the training of lawyers in the common law, which only began in the 1200s.[12]

The history of legal education in the common law began at the Inns of Court in London in the 1200s.[13] Established as institutions that provided 'legal training' to aspiring lawyers, the Inns were residential premises located conveniently close to Fleet Street and the royal courts.[14] Students were trained by observing barristers and 'observing proceedings in court' while also debating each other in residence as they held moots and mock trials.[15] The training provided was informal, and it varied on a case by case basis.[16] This changed after the invention of the printing press, when the Inns of Court offered students 'manuals and books' to aid them in their studies.[17] By the fifteenth century, 'readings and lectures' in law were presented by senior students and practising lawyers.[18] This was a more formal style of education, but it remained informal by modern standards because it lacked any formal requirements aside from

[10] Encyclopædia Britannica, Inc., *Encyclopaedia Britannica* (online at 18 June 2021) 'Inns of Court: British Legal Association' <https://www.brittanica.com/topic/Inns-of-Court> ('Inns of Court'); TW Tempany, 'The Legal Profession in England—Its History, Its Members, and Their Status' (1885) 19 *American Law Review* 677–8.

[11] Encyclopædia Britannica, Inc., 'Inns of Court' (n 10); Tempany (n 10).

[12] Boon and Webb (n 5) 82.

[13] Ibid.

[14] Ralph Michael Stein, 'The Path of Legal Education from Edward I to Langdell' (1981) 57(2) *Chicago Kent Law Review* 430.

[15] Encyclopædia Britannica, Inc., 'Inns of Court' (n 10); Boon and Webb (n 5) 82; Stein (n 14) 431.

[16] Encyclopædia Britannica, Inc., 'Inns of Court' (n 10); Boon and Webb (n 5) 82; Stein (n 14) 431.

[17] Encyclopædia Britannica, Inc., 'Inns of Court' (n 10); Boon and Webb (n 5) 82.

[18] Chief Justice Robert French, 'Legal Education in Australia—A Never Ending Story' (Conference Paper, Australian Law Teachers' Association Conference, 4 July 2011) 8; Boon and Webb (n 5) 82; Stein (n 14) 431.

'attendance at a required number of meals'.[19] Vestiges of this education still exist in the Inns today, with prominent members of the profession still holding lectures and talks. However, the more formal aspects of legal training have since shifted to the newer English universities.[20]

The Inns were considered elitist institutions.[21] Their aim was not to produce law clerks or employees in the modern meaning of the term but to create 'gentlemen' for a particular class of society.[22] Students were trained not only in law but in the 'moral and social' aspects of life, including the fine arts, music and dance.[23] This was similar to the broader focus of tertiary education in England in the 1600s, in which education mainly acted as a foray for the rich.[24] The major universities at the time were more like 'summer camps' for the landed gentry, many of whom 'rarely [bothered] to graduate' and spent most of their time 'gaming and feasting' instead of studying.[25] Those aspiring to become lawyers at the Inns were of this higher-class background and voluntarily sought a career in law rather than out of necessity for wealth or prestige.[26]

The Inns aimed to produce 'gentlemen' who were broadly trained in art and music, and this can be considered different from the kind of 'broad-minded' aims that liberal arts colleges possess today.[27] While the Inns were motivated by class or social status

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[19] Stein (n 14) 432.

[20] Encyclopædia Britannica, Inc., 'Inns of Court' (n 10); Boon and Webb (n 5) 82.

[21] Encyclopædia Britannica, Inc., 'Inns of Court' (n 10); Boon and Webb (n 5) 82.

[22] 'Gentlemen' here refers to a student who is cultured (in a broad sense) in the liberal arts—which includes taking subjects such as art, music and civics—rather than someone who is a specialist of law alone. Admittedly, the term is considered outdated, and it might not coincide with a modern perspective of the liberal arts. It also has connotations of wealth and class; David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar: 1680–1730* (Clarendon Press, 1990); T Raleigh, 'Legal Education in England' (1898) 10(1) *Juridicial Review* 1–4; Robert Lefcourt, 'Democratic Influences on Legal Education from Colonial Times to the Civil War' (PhD Thesis, The Union for Experimenting Colleges and Universities, 1983) 70.

[23] Lemmings (n 22); Raleigh (n 22) 1–5; Stein (n 14) 432–3.

[24] Donald A Bligh, Ian McNay and Harod Thomas, *Understanding Higher Education: An Introduction to Parents, Staff, Employees and Students* (Intellect Books, 1999) 20; Michael Segre, *Higher Education and the Growth of Knowledge: A Historical Outline of Aims and Tensions* (Routledge, 2015) 179.

[25] Peter Clark, *British Clubs and Societies 1580–1800: The Origins of an Associational World* (Oxford University Press, 2000) 37, as quoted in Michael Segre, *Higher Education and the Growth of Knowledge: A Historical Outline of Aims and Tensions* (Routledge, 2015) 113.

[26] Ibid.

[27] Hugh Hawkins, 'The Making of the Liberal Arts College' in Steven Koblik and Stephen Richards Graubard (eds), *Distinctively American: The Residential Liberal Arts Colleges* (Routledge, 2000) 4–6.

in their teaching, a liberal arts college today is motivated by the cultural enrichment of the individual or the creation of 'citizens' or well-rounded human beings.[28] However, in both cases, the content that is taught amounts to a broad-minded education in music, art and critical thought.[29] Although early examples of a liberal education might be different from their modern counterparts, this thesis includes them in order to understand how legal education became what it is today.

The Inns can be considered a medieval precursor to the modern law school and the apprenticeship method of training—mainly because the Inns trained students through lectures and court observation (much like the training that occurs today).[30] However, the Inns were not the same as modern law schools. Their aim of producing 'gentlemen' can be considered outdated, even discriminatory, in the present day because it excluded female practitioners.[31] Moreover, the link between the Inns and the court was far closer than that of a modern law school and the modern court, and the 'summer camp' atmosphere differs markedly from the modern law student's experience of rigorous study, high stress, competition and discipline.[32] The different economic, cultural and social circumstances of students in both is worth further consideration, but it is beyond the scope of the present discussion.

Legal education at the Inns ended at the start of the English Civil War in 1642, after which it was replaced by apprenticeships in barristers' chambers and law firms.[33] Apprenticeships involved students 'observing all the work' of a solicitor before trying

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[28] Jeffrey A Becker, 'Beyond C's Getting Degrees' in Susan McWilliams and John E Seery (eds), *The Best Kind of College: An Insider's Guide to America's Small Liberal Arts Colleges* (SUNY Press, 2015) 190; William Deresiewicz, 'Don't Send Your Kids to the Ivy League' (22 July 2014) *The New Republic* <https://newrepublic.com/article/118747/ivy-league-schools-are-overrated-send-your-kids-elsewhere>.

[29] Lemmings (n 22); Raleigh (n 22) 1–5.

[30] Lemmings (n 22); Raleigh (n 22) 1–5.

[31] Richard Collier, 'Naming Men as Men in Corporate Legal Practice: Gender and the Idea of "Virtually 24/7 Commitment" in Law' (2015) 83(5) *Fordham Law Review* 2401; Rose Pearson and Albie Sachs, 'Barristers and Gentlemen: A Critical Look at Sexism in the Legal Profession' (1980) 43(4) *The Modern Law Review* 411.

[32] Rachel Casper, 'The Full Weight of Law School: Stress on Law Students Is Different', *Lawyer Well-Being & Mental Health: Massachusetts LAP Blog* (Blog Post, 18 January 2019) <https://www.lclma.org/2019/01/18/the-full-weight-of-law-school-stress-on-law-students-is-different/>.

[33] Boon and Webb (n 5) 5.

their ‘own hand at the work’.[34] By 1729, English law required attorneys and solicitors to spend five years in a legal office before they could be admitted to a practice.[35]

The work of apprentices was often dull and repetitive;[36] they mainly ‘took care of paperwork’, ‘ran errands’, noted precedents and scrambled to learn ‘as best they could’ between these various tasks.[37] The quality of the training provided depended almost entirely on the personality of the supervising solicitor.[38] The most interesting training accounts can be derived from the American colonies.[39] The American colonies never had an Inns of Court equivalent, and from 1700, legal education was taught exclusively through apprenticeship.[40]

One key to a positive experience was whether or not the supervising solicitors provided their apprentices with a diverse reading list.[41] This would lead to extensively different experiences, both positive and negative. One of the most famous examples of a positive experience is that of the young Thomas Jefferson, who was apprenticed to the solicitor, George Wythe, in 1762.[42] Under Wythe, Jefferson was trained not only in the law (mainly English texts, including Blackstone’s *Commentaries*) but also in books on ‘history, moral philosophy and ethics’ and the philosophy of governance.[43]

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[34] AV Dicey, ‘Can English Law Be Taught at the Universities?’ (Speech, All Souls College, 21 April 1883) 3.

[35] Robson (n 5) 60–2.

[36] Lefcourt (n 22) 73.

[37] Danielle Thorne, *People That Changed the Course of History: The Story of Andrew Jackson: 250 Years after His Birth* (Atlantic Publishing, 2016) 29; Robson, *The Attorney in Eighteenth-Century England* (n 5) 61; Lefcourt (n 22) 73.

[38] Robson (n 5) 53.

[39] Note: the American colonies provided a greatly different legal context to that of England, in which lawyers had different roles. For example, the first 100 years of the colony of Virginia exhibited a hostility towards the legal profession and a lack of professionally trained lawyers. This was partly motivated by the landed gentry’s antipathy towards lawyers (and a preference to resolve disputes without them) and the utopian ideal of a society that could exist somehow without lawyers—‘especially the professional common-law lawyer’. Judges were also typically landed gentry rather than professionally trained legal practitioners; Anton-Herman Chroust, ‘Legal Profession in Colonial America’ (1958) 34(1) *Notre Dame Law Review* 45–6.

[40] James S Heller, ‘From Oxford to Williamsburg: Part 2—The College of William & Mary Law School and Wolf Law Library’ (2012) 12(4) *Legal Information Management* 290, 292; Jonathon Bush and Alan D Wijfells, *Learning the Law: Teaching and Transmission of English Law, 1150–1900* (Bloomsbury, 1999) 329.

[41] Philip Girard, *Lawyers and Legal Culture in British North America: Beaming Murdoch of Halifax* (University of Toronto Press, 2011) 32.

[42] David M Douglas, ‘Jefferson’s Vision Fulfilled’ (Winter 2010) *William & Mary Alumni Magazine* <https://law.wm.edu/about/ourhistory/index.php>.

[43] Ibid.

However, the drawbacks of the apprenticeship model were apparent in the extensively different experiences of various apprentices—from a positive, broad-minded training like Jefferson's to the daily 'drudgery' and boredom of other apprentices.[44] Having to rely on a supervisor's personal preference in books limited a truly broad-minded education. One risk was that a supervising solicitor would only train an apprentice in his own office's narrow area of law rather than in law as a general field. Jefferson was fortunate in his experience, as Wythe owned a large private library from which Jefferson could borrow books on various topics.[45] The variations in training in the apprenticeship model were due to a lack of any formalised accreditation or structure that denoted how someone should apprentice.[46] There were no examinations, rules or credentials for students or supervisors,[47] and apprentices received no lectures or centralised training.[48] In the absence of a central curriculum, many students relied on famous English law books as a substitute such as Blackstone's *Commentaries*.[49] However, this lack of broad reading resulted in training that was frequently practical and technical in nature, rather than training that illuminated the broader contextual background and theory of the law.[50]

Those who defended the apprenticeship model at the time argued that law was a technical skill that could only be learned on the job rather than in a school or university.[51] The famous legal theorist AV Dicey suggested at the time that only 'from actual business' could a student learn how to discern the facts of a case and apply 'the appropriate principles of law' to a new set of circumstances.[52]

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[44] Robson (n 5) 60–2; Anthony T Kronman, *History of the Yale Law School: The Tercentennial Lectures* (Yale University Press, 2008) 20.

[45] Douglas (n 42).

[46] Ibid.

[47] Dicey (n 34) 1–5.

[48] Ibid 3; Steve Sheppard (ed), *The History of Legal Education in the United States* (The Lawbook Exchange, 1999) 863.

[49] William T Coleman, *Counsel for the Situation: Shaping the Law to Realize America's Promise* (Brookings Institution Press, 2010) 44.

[50] Dicey (n 34) 1–5; Lefcourt (n 22) 73.

[51] Dicey (n 34) 7.

[52] Ibid.

Consequently, when the notion of university law schools emerged, Dicey described them as completely impractical.[53] He stated:

> The merits, in short, of the present [apprenticeship] system may all be summed up in the one word 'reality'. It brings a student in contact with the real actual business, and fosters in him qualities **which cannot be produced by any theoretical teaching, however excellent** [emphasis added].[54]

Decades earlier, William Blackstone argued the opposing view. Blackstone was appointed the first professor of common law at Oxford in 1758, and he established the first university-based law school in the common-law world.[55] According to Blackstone, the apprenticeship model was inadequate in its scope, means and aims. Apprenticeships only gave students a practical understanding of the law, rather than an understanding of the 'principles upon which the rules of practice [were] founded'.[56] Instead of a vocational education, Blackstone asserted that students should study law at a university that was founded on the liberal arts, in which law could be taught as part of a broader field of study.[57]

In his *Commentaries*, Blackstone wrote that law could only be taught as part of a broader liberal education at a university rather than as a 'mechanical part of business' in an apprenticeship.[58] The study of law would 'flourish best in the neighbourhood of [and] in assistance drawn from [the] other arts'.[59] Law could be combined with a study of logic and reasoning, legal history, comparative law, 'experimental philosophy' and the classics of Greece and Rome.[60] Blackstone asserted that trusting peoples' lives and the governance of a country to men without a liberal education and without a wider reading of the liberal arts would be dangerous and lead to the creation

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[53] Ibid.

[54] Ibid 8.

[55] Boon and Webb (n 5) 85; Wilfred Prest, *William Blackstone* (Oxford University Press, 2008) 150 ('*William Blackstone*').

[56] Christopher Brooks and Michael Lobban (eds), *Lawyers, Litigation & English Society Since 1450* (Bloomsbury, 1998) 153; Kronman (n 44) 20.

[57] William Blackstone, 'Introduction' in William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–1769).

[58] Ibid 30.

[59] Ibid 18.

[60] Ibid.

of bad laws.[61] However, Blackstone's claims should be interpreted in their proper context—with the knowledge that the notion of a liberal arts education has changed dramatically over time.[62]

Although he claimed to value the liberal arts, Blackstone's actual methods of instruction at Oxford were relatively scientific and grounded on legal principles, as evidenced in his lectures in the 1750s that ultimately culminated in his famous *Commentaries*.[63] At Oxford, Blackstone did not teach on the basis of cases; he taught by summarising legal principles as they existed at the time.[64] Although different from modern law schools, this was still a fairly formalistic education. He frequently cited statute law instead of case law to highlight how the law specifically operated.[65] He also encouraged law students to obtain their own scientific method of understanding the law, rather than proscribing a specific method himself.[66] This scientific method contrasts against the idea of teaching law as more of an art. To obtain this scientific understanding, Blackstone suggested that students should consider the 'origins' and original purposes of the law rather than view the law as a 'mechanical practice' of government.[67] Specifically, his *Commentaries* criticised the failings of several legal cases and suggested various law reforms.[68] His approach to law was to write in an essay format, in a way that 'even laymen could read without disgust', so that his writing was easily accessible to students.[69] Consequently, his *Commentaries* have stood the test of time. They were widely celebrated at the time and are still widely regarded today; they also became the basic teaching materials of the original US law schools.[70]

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[61] Ibid 18, 30.

[62] For example, see Bruce Kimball, *The Liberal Arts Tradition: A Documentary History* (University Press of America, 2010).

[63] For more about the development of the *Commentaries*, see Raleigh (n 22) 5.

[64] William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–1769) 1–5, 18, 30.

[65] Ibid.

[66] Ibid; Wilfrid Prest, 'Antipodean Blackstone: The *Commentaries* "Down Under"' (2002) 6 *Flinders Journal of Law Reform* 154.

[67] Raleigh (n 22) 5.

[68] Prest, *William Blackstone* (n 55) 153.

[69] Raleigh (n 22) 5.

[70] Douglas (n 42); Prest, *William Blackstone* (n 55) 168.

Blackstone's initial forays into university education had a minimal immediate influence on legal education in the subsequent decades.[71] It would be 50 years until a second law school, Cambridge, would start a curriculum in 'English Law'.[72] The first full degree in law would emerge 76 years after Blackstone's lectures—as a Bachelor of Laws (LLB) at the University College in London in 1826.[73] By 1846, the House of Commons Select Committee on Legal Education wrote that there was 'no legal education [in England] worthy of its name'.[74] The Committee recommended that legal education should be taught at the major English universities, combining both professional and broader educational aims and teaching culture and vocational skills, while producing 'gentlemen'.[75]

Following the Committee's findings, Queen's College Birmingham created a law department in 1849.[76] The college offered the first English LLB, taught by Charles Rann Kennedy.[77] Kennedy believed that students should be taught law as part of a broader 'classical education'.[78] His law faculty stated that it was 'highly desirable' for future solicitors and attorneys to be trained in 'Classics, Mathematics and General Science' before they commenced their study of law.[79] To this end, entry into Queen's College Law School required a Bachelor of Arts as a first and/or combined degree.[80] Students in the law faculty were taught using Blackstone's and Kent's respective *Commentaries*; however, they were also taught English legal history, Bentham's treatise on morals and the role of Parliament and the church in creating new laws.[81]

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[71] William Twining, *Blackstone's Tower: The English Law School* (Stevens and Sons, 1994) 24.

[72] Ibid; 'History of the Faculty', *University of Cambridge: Faculty of Law* (Web Page) <http://www.law.cam.ac.uk/about-faculty/history-faculty>.

[73] Twining (n 71) 25.

[74] Ibid.

[75] William Wesley Pue, 'Guild Training vs. Professional Education: The Committee on Legal Education and the Law Department of Queen's College, Birmingham in the 1850s' 33(3) (1989) *The American Journal of Legal History* 242, 253.

[76] Ibid 243.

[77] Ibid; note that the nickname 'Rann' is here used to not confuse the reader with the two later Kennedys in this chapter.

[78] Ibid 267.

[79] *The Queen's College, Birmingham: 1851–52* (Tonks, 1851) 14.

[80] Ibid.

[81] Ibid.

Charles Kennedy insisted that the law faculty should cater to the 'general student' and that law should be considered a general degree originating from the faculty of arts.[82] To this end, he taught the 'science of jurisprudence' while aiming to create a 'cultured' people in his students.[83] He insisted that law should be studied as 'an institution of [the student's country]' and that it had an intimate relationship with politics, 'natural and … moral law' and the study of ethics.[84] In this, he aimed for the creation of cultured gentlemen who were not only trained in the law, but who had a wider understanding of the world in which the law operated.

Charles Kennedy's term as a professor at Queen's College was short lived however, and much of what he worked to achieve was abandoned.[85] He resigned from the law school after two years, having only taught nine students, mainly due to conflicts with the legal profession and his own personal circumstances.[86]

After the experiments at Queen's College, degrees at other universities in England soon followed.[87] The ABA in jurisprudence began at Oxford in 1852, followed by an LLB at 'Cambridge … in 1855, and Durham … in 1858' and at 'Owen College Manchester in 1880 and University College Liverpool in 1892'.[88]

Examinations 'for solicitors and attorneys' were established in England in 1860, in part due to a new Royal Commission into legal education in 1855.[89] These initial examinations cemented the modern law school in England and initiated the beginnings of the formalisation of legal education, which continued for the next 200 years.

Despite the emergence of new degrees and examinations, students would continue undergoing apprenticeships after their studies. This remains the case in the present

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[82] Pue (n 75) 270.

[83] Ibid 271.

[84] Ibid.

[85] WPM Kennedy, *Address to the Mutual Law Association* 9, as quoted in Pue (n 75) 276–7.

[86] Pue (n 75) 276.

[87] Twining (n 72) 24.

[88] Boon and Webb (n 5) 85; Loyita Worley and Sarah Spells (eds), *BIALL Handbook of Legal Information Management* (Routledge, 2nd ed, 2016) 29.

[89] Raleigh (n 22) 6; Boon and Webb (n 5) 83.

day, as trainee solicitors in England are still required to fulfil a 'training contract' or period of apprenticeship after graduating from a law school.[90] The vocational nature of legal education was therefore enshrined as a core requirement—England ended up adopting a hybrid approach of both formal education followed by an apprenticeship.[91] No direct path existed historically—or exists in the present—between law schools and the legal profession in England, and there are no formal examination requirements that can supplement the requirement of an apprenticeship at a law firm.[92]

b) The First US Law School

The first US law school was established in 1779 at the college of William and Mary in Virginia[93] by the then governor of Virginia, Thomas Jefferson. Jefferson asked his former mentor and supervisor, George Wythe, to become the first professor of law in the country.[94] Wythe brought the same approach to legal education as he had when he apprenticed Jefferson.[95] His intent was to teach law in its wider context, allowing students to read landmark legal texts (e.g., Blackstone's *Commentaries*) while also considering a greater scope of law in political theory, classical literature, civics, history and economics.[96] Wythe instructed his students to visit parliament frequently, as well as 'attend other lectures at the college'.[97] He suggested that law could only be understood within this wider understanding of the liberal arts. In this way, Wythe mimicked the earlier thoughts of Blackstone.[98] Indeed, the law school at William and Mary can be considered a spiritual successor to Oxford's original approach.

That being said, at William and Mary, Wythe was arguably more experimental than the earlier approach of teaching law at Oxford. He believed that law related directly to

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[90] 'Becoming a Solicitor: Training Contract', *Solicitors Regulation Authority* (Web Page) <https://web.archive.org/web/20081227075521/http://www.sra.org.uk/students/training-contract.page>.

[91] Boon and Webb (n 5) 83.

[92] Ibid.

[93] Douglas (n 42).

[94] Ibid; Lefcourt (n 22) 142.

[95] Douglas (n 42).

[96] Ibid.

[97] Paul D Carrington, 'The Revolutionary Idea of University Legal Education' (1990) 31(3) *William and Mary Law Review* 535.

[98] Blackstone (n 64).

politics and government and that this relationship should be taught at the school.[99] From the start, Wythe established a mock legislative assembly at the school, in which students debated legislative proposals, proposed amendments and law reform and learned about legislative procedures—with Wythe acting 'as speaker of the house'.[100] He also trained students to read in the fields of government and public policy, which augmented their practical training in law.[101]

At the time, Thomas Jefferson described Wythe's law school as one of the foremost places to 'train students to take positions of leadership in the national councils of America'.[102] He was more prescient than he could have imagined when he made the comment. Wythe's students ultimately assumed almost every senior position in America's fledgling government.[103] These positions included two presidents, numerous judges, a chief justice of the Supreme Court, a federal secretary of state and a federal attorney-general, among other legislators.[104] His class arguably contained the most successful generation of law students in US history.[105] His methods, unconventional as they might seem today, appear to be the origins of this success.

Wythe's training had an indelible influence on the young and aspiring Jefferson, who has revealed much in his own writings about how Wythe taught. The two men thought similarly when it came to the study of law.[106] When a mentee asked Jefferson about the study of law, he recommended a diverse reading list, much like Wythe would have done in his place.[107] His reading list included an extensive range of topics, such as 'history, politics, physics, oratory, poetry, criticism' and more, all of which Jefferson considered essential for forming 'an accomplished lawyer'.[108] This notion of

[99] W Edwin Hemphill, 'George Wythe, America's First Law Professor' (Master's Thesis, Emory University, 1933) 53.

[100] Ibid.

[101] Douglas (n 42).

[102] Ibid.

[103] Ibid; Carrington (n 97) 538.

[104] Douglas (n 42); Carrington (n 97) 538.

[105] Douglas (n 42).

[106] Ibid; Carrington (n 97) 538.

[107] Letter from Thomas Jefferson to Francis Eppes, 16 September 1821, as quoted in Morris L Cohen, 'Thomas Jefferson Recommends a Course of Law Study' (1971) 119 *University of Pennsylvania Law Review* 828.

[108] Ibid.

a broadly trained lawyer has been lost in recent times, and it is interesting that Jefferson's ideals of law are more 'cosmopolitan' in their scope and teaching than the ideals of a modern law school today.[109] Indeed, Jefferson's ideal law school was 'liberal, well-rounded in both its legal and general aspects, and supported by well-chosen readings'.[110] He did not believe that law school was a place for practical training alone; rather, he believed that the study of law could be undertaken through intense periods of private readings in broad range of subjects.[111] That is, Jefferson believed that the university was not created to teach students the law but to expand their minds beyond what they could otherwise accomplish in their own time.[112] It should be noted here that the notion of a liberal arts education has changed over time, and that Jefferson's views should not necessarily be transplanted into modern universities. These historical examples are merely a 'launching pad' from which to engage with more modern understandings and practices of teaching law today.

The law school at William and Mary was also intended to serve society. According to Jefferson, a proper university education would create a generation of lawyers who were dedicated to 'public virtue' or to 'the preference for the greater good over one's individual interest'.[113] Jefferson argued that the 'spirit of commerce … knows no country, and feels no passion or principle but that of gain'.[114] The idea that lawyers should serve themselves or their clients above the public fundamentally opposed Jefferson's conception of the law. With Jefferson's foundational view of the Republic, America was to be a place that would practice Montesquieu's ideals of self-sacrifice and public service, over and above the ideas of greed and personal, monetary pursuits.[115]

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[109] Cohen (n 107) 832.

[110] Ibid 831–2.

[111] Thomas Jefferson, *The Papers of Thomas Jefferson* (1970) 480, as quoted in Cohen (n 107) 828; Carrington (n 97) 144.

[112] Ibid.

[113] Carrington (n 97) 528; Douglas (n 42).

[114] Letter from Thomas Jefferson to Larkin Smith, 15 April 1809, *Founders Online* <https://founders.archives.gov/documents/Jefferson/03-01-02-0118>.

[115] Carrington (n 97) 528; Douglas (n 42).

c) Other Early Innovators

The history of legal education in Australia reveals a similar vocational trajectory as that of Canada, the UK and US. At the start of the colonial period in the 1800s, Australia had neither law students nor an established legal profession. Instead, students who wanted to become solicitors would have to be trained by means of apprenticeship in legal offices either in England or Ireland before returning home at great personal expense.[116] This was inhibitive in practical terms. The training they did receive was often practical, in the sense that students lacked a theoretical understanding of the law.[117] The type of education that a student received depended entirely on the supervising lawyer (as discussed above), and this, in turn, depended on the education that that supervising lawyer had received in his own apprenticeship.[118] Consequently, the quality and scope of apprenticeships for Australian lawyers who were trained overseas varied extensively.[119]

This section will consider early examples of legal education that emerged in Australia. It includes a discussion of early legal educators in Australia, some of whom advocated for a liberal arts style of education, along with the gradual formalisation of legal teaching in various written rules and regulations. Although this section does not definitively account for the entire early history of Australian law schools (other studies have done so at great length), it will document key turning points in various law schools as they responded to the widespread, gradual introduction of legal educational standards. These standards sometimes resulted in a more professionalised curriculum that aimed to train students for the profession of law rather than aiming to teach an academic or liberal arts study of law. Some examples of this professional approach will be documented towards the end of this section; however, they do not represent the only approach to teaching law in modern Australian law schools.

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[116] John Waugh, *First Principles: The Melbourne Law School, 1857–2007* (Melbourne University Press, 2007) 5; David Weisbrot, *Australian Lawyers* (Longman, 1990) 121.

[117] French (n 18) 14.

[118] Ibid.

[119] Ibid.

The first Australian universities opened in the late 1850s, during which some of the early law schools pursued, briefly, a liberal arts education in law.[120] Beginning in 1857, Melbourne Law School offered lectures in law which drew influence from Oxford.[121] These early lectures relied heavily on Blackstone's *Commentaries* and other English jurisprudential texts.[122] Blackstone's approach of combining substantial law with jurisprudence might have influenced these early university lectures and prompted them to extend beyond a strictly doctrinal approach to law.[123] Richard Sewell, the first law lecturer at Melbourne Law School, aimed to produce 'gentlemen'—but, as a working criminal lawyer, he embodied the more vocational model of a professional as a teacher.[124] Henry Chapman, the second lecturer at Melbourne Law School, stated that his classes were meant to 'elevate [students'] views above the mere practice of law as a trade'.[125] His lectures covered extensive branches of the common law and extended beyond case law.[126] Chapman also aimed to teach students to become gentlemen rather than tradesmen, but he recognised that most of his students intended to become lawyers.[127] At first glance, the aim of these early lecturers seems to be non-vocational, until the context of the time reveals otherwise.

Melbourne Law School was created partly because the University of Melbourne had low student numbers in its opening two years.[128] To attract more students, the university sought to establish a law school that counted towards legal admission in the state.[129] The admission rules in Victoria were decided by the Supreme Court, and the Chancellor of the University of Melbourne, Redmond Barry, happened to be a

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[120] It is important to note here that 'the ideas of the early professors about how law ought to be taught and studied had very little bearing on the foundation and early progression of law schools. Instead, the impetus for creating and maintaining university legal education came from outside the university—from judges and barristers'—Susan Bartie, *Free Hands and Minds* (Hart Publishing, 2019) 19.

[121] Weisbrot (n 116) 120.

[122] Waugh (n 116) 12–14; Prest (n 55) 155, 161.

[123] Prest (n 55) 161.

[124] Waugh (n 116) 12–13.

[125] Ibid 15.

[126] Ibid.

[127] Ibid.

[128] Ibid 6–7.

[129] Ibid 7.

Supreme Court Justice.[130] Justice Barry managed to influence the admission rules so that by the time that Melbourne Law School opened in 1857, law students would be exempted from the Supreme Court law exams.[131] This was a significant change in how law was taught compared to other state universities, such as Sydney Law School (which had a similar exemption only in the 1890s).[132] Melbourne's law degree thus originally aimed to satisfy 'the court's requirements' for admission, rather than to become a 'longer degree course' with non-vocational aims.[133] This vocational focus was also evident in 1880, when classes were moved from the university to the city centre, mainly to facilitate the demand of part-time students and lecturers who worked in the legal sector.[134] Melbourne Law School was here, again, catering to the needs of the profession.

Sydney University was the second university to start teaching law in Australia, offering law lectures from 1859.[135] The experiences at Sydney would differ markedly from those at Melbourne Law School. From its inception, Sydney 'provided for the granting of degrees in law' from a non-technical focus, in a 'general or classical sense in which it had been customarily included in Literature or Arts'.[136] However, it took until 1859 for John Fletcher Hargrave, then solicitor-general, to begin a set of experimental lectures at the university in law itself.[137] These early lectures were non-vocational,[138] and they were regarded 'as part of a general education, not training for legal practice'.[139] Hargrave himself 'doubted the value of academic legal education' in preparing students for legal practice, and instead regarded technical training in law

[130] Ibid.

[131] Ibid.

[132] Ibid.

[133] Ibid.

[134] David Barker, *A History of Australian Legal Education* (The Federation Press, 2017) 36.

[135] French (n 18) 16.

[136] Sir William Montague Manning, *Chancellor's Address* (1894), as quoted in Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9(2) *UNSW Law Journal* 121.

[137] Martin (n 136) 122.

[138] Patrick Kavanagh, 'Legal Education and the "Functionalisation" of the University' (1988–1989) 5 *Australian Journal of Law & Society* 16.

[139] Waugh (n 116) 6.

to be the purview of the legal profession itself.[140] By contrast, his law lectures at Sydney primarily focused on the conceptual side of law.[141] Hargrave aimed to teach law as a humanities subject, and he therefore trained his students in jurisprudence.[142] Since the admission bodies did not recognise his course as a pathway to practice, Hargrave was not pressured to teach law as a vocational degree.[143] Instead, he taught a non-vocational study of law as part of a humanities education.[144] He aimed to make the law 'popular, accessible, intelligible and interesting', and his lectures 'spanned a wide range of subjects' including jurisprudential approaches to law from 'Burke, Blackstone, Bacon and others'.[145] One of his lectures 'was prefaced by a quote from Bolingbroke' regarding the necessity of a liberal education in law; it extolled that lawyers should be 'Orators, Philosophers, Historians'.[146] At the time, this was as liberal an education as one could find. At the same time, Hargrave struggled to ensure high student attendance without the 'recognition of the profession' and with students finding legal work more lucrative than studying.[147] He resigned in 1865, but his successor, Judge Alfred MacFarlance, also experienced similar attendance problems until the lectures were discontinued in 1869.[148]

In the 1880s, Sydney University began offering professional degrees in law that aimed to prepare students for private practice (although these degrees did not guarantee admission).[149] These degrees were preceded by similar ones at Melbourne University in 1857 and followed by Adelaide Law School in 1883.[150] This mirrored the broader movements towards vocationalism evidenced in the universities more broadly. In the 1860s and 1870s, various changes were suggested for admission to practice requirements, including 'exemptions from preliminary examinations' for

[140] Ibid.

[141] Kavanagh (n 138) 16.

[142] Ibid.

[143] Ibid.

[144] Ibid.

[145] Martin (n 136) 122.

[146] Ibid.

[147] Ibid 127–8.

[148] Ibid.

[149] Weisbrot (n 116) 122.

[150] French (n 18) 16.

university law graduates.[151] In 1877, a committee on the admission to practice (led by Hargrave, William Manning and others) reduced the time of articles for university law graduates.[152] However, these and other changes were made mainly on the terms of the profession rather than the terms of the universities.[153] Due to these changes, Sydney Law School's focus began to drift towards vocationalism. In 1878, the newly elected Chancellor of the University of Sydney, William Manning, proclaimed that '[Sydney] university should provide not only a liberal education [in law but also] direct legal training'.[154] He claimed that the earlier notion of a gentleman's education was 'better suited to a leisure class than to such a busy working world as ours', further adding that Sydney should start teaching 'technical instruction' instead.[155] Manning had completely reverted from his original views on the topic. This was partly due to the public pressure being placed on the University of Sydney at the time for being too elite, as well as the promises of reciprocal admission arrangements in the other colonies.[156]

A professional Faculty of Law was established at the University of Sydney in 1890, but there was still 'no guarantee that the degree would entitle [students] to practice'.[157] Nevertheless, as Martin elucidated, the vocational nature of Sydney Law School was enshrined in three distinct ways.[158] First, the school was located in the heart of the city's legal district rather than on campus.[159] Second, the 'lectures were free' (and university funded), and students paid professional associations directly 'in lieu of the final examinations'.[160] Third, the faculty would 'comprise a Supreme Court

[151] Martin (n 136) 128.

[152] Ibid 130.

[153] Ibid.

[154] Sir William Montague Manning, as quoted in Kavanagh (n 138) 16.

[155] Sir William Montague Manning, as quoted in Martin (n 136) 132.

[156] Martin (n 136) 133–4.

[157] Ibid 140; Barker (n 134) 32.

[158] Martin (n 136) 141.

[159] Ibid.

[160] Ibid.

Judge and practicing barristers', which ensured that the quality of teaching would have 'a sufficiently practical bias'.[161]

Among the other early law schools, Adelaide Law School (founded in 1883) stands out in its pursuit of blending professional and liberal arts goals.[162] Adelaide Law School was founded after the 1877 changes discussed above, which allowed university law graduates to have shorter articles in a law firm compared to non-graduates. Consequently, the school was less affected by the issue of 'purpose' that other early law schools faced, as it already possessed an in-built incentive for students to attend. The school's law degree was designed as a three-year course that taught eight legal subjects, including Roman law, property, jurisprudence, constitutional law, the law of obligations, the law of wrongs and the law of procedure.[163] The subjects aligned with the admissions requirements of the time (barring the three 'cultural subjects' of jurisprudence, Roman law and optional Latin).[164] Two local lawyers, Aretas Young and Robert G Moore, obtained part-time lectureships, while Walter Ross Philips later began his profession as a full-time lecturer.[165]

The style, if not the content, of Adelaide Law School shifted its focus in 1888 due to the replacement of Philips with FW Penefather.[166] Penefather believed in a model of legal education that was based on the 'Oxbridge tutorial', in which students would write essays that were then read aloud in class and critiqued by other students and professors.[167] He believed that 'the study of law should include the study of ethics, history, politics and economics, all of which [are] involved in the full understanding and scientific development of legal systems'.[168] The original law course at Adelaide Law School in 1883 thus included jurisprudence and Roman law, with a heavy

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[161] 'The Establishment of the Law School', *Sydney Morning Herald* (16 July 1890), as quoted in Martin (n 137) 141.

[162] Paul Babie, '125 Years of Legal Education in South Australia' (2010) 31 *Adelaide Law Review* 107.

[163] Victor Allen Edgaloe, 'The Adelaide Law School 1883–1983' (1983) 9(1) *Adelaide Law Review* 1–4.

[164] Ibid 3–4.

[165] Ibid 5–7.

[166] Ibid 7–8.

[167] Babie (n 162) 107.

[168] Edgaloe (n 163) 7–9.

historical focus.[169] The aim was to teach law in its historical context, to demonstrate the origin of modern English case law in earlier Roman thoughts and practices.[170] However, this liberal arts education did not last. In 1896, Penefather was forced to resign due to illness, and the law school thereafter became more vocationally focused —it adopted a 'thoroughly practical character' that aligned with the desires of the profession.[171] The profession's influence on the law school was greater than the legacy of one professor—a theme that has remained consistent throughout the history of law schools.[172]

By 1894, law graduates from every major Australian law school were exempted from solicitor exams for admission.[173] This meant that there was a direct pathway that led from a university degree into the legal profession.[174] This pressured law schools into providing a more vocational style of education so that students would be sufficiently prepared for the profession at graduation.[175] A law degree was now the main, vocational pathway. Consequently, the admission authorities began demanding that specific topics be taught in law schools, which drove the universities away from conceptual teaching.[176]

In subsequent years, Australian law schools began considering the US model of legal education for crafting more practical and technical degrees.[177] A combination of 'limited funding, small libraries [and] scant research funds' prompted the law schools to focus more on producing professionally trained lawyers instead of gentlemen or thinkers.[178] As teaching began with this revised focus, the older theoretical approaches to law lost their prior influence.[179] Less time was spent teaching the

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[169] Ibid.

[170] Ibid.

[171] Edgaloe (n 163) 7–9; Babie (n 162).

[172] Ibid.

[173] Kavanagh (n 138) 16.

[174] Ibid.

[175] Ibid.

[176] Weisbrot (n 116) 122.

[177] Ibid.

[178] Ibid.

[179] Michael Kirby, 'Right Now' (Speech, Melbourne Law School, January 2007).

jurisprudential and sociological aspects of law.[180] Law schools became more professional over time.[181] This practical focus rendered Australia especially susceptible to the teaching methods of Christopher Columbus Langdell and his case method, which was developed at Harvard.[182] By the late 1880s, some Australian law schools had begun introducing casebooks in their courses and thereby introducing the prerequisite texts for teaching the case method (even though some resistance to the case method yet remained).[183]

Section 2 below chronicles the rise of the case method in its various forms at Harvard Law School, as well as how the method was initially taught in some US, UK, Canadian and Australian law schools. The section also discusses how this method fundamentally changed legal education from its prior textbook and lecturing mode of study.

2) Moving towards Vocation

a) Law as a Science and the Rise of the Case Method

The modern US law school is considered to have begun with the teaching of Christopher Columbus Langdell at Harvard Law School (from 1869–1870).[184] With the reforms that began in 1869, Langdell subsequently taught students at Harvard Law School for the first time using the case method and the (now less used) Socratic method.[185] The case method involves students finding legal principles in a case and applying those principles to a new set of factual circumstances.[186] This method is said to mirror the professional or technical work of a lawyer. The Socratic method involved quizzing students about those facts and principles in a classroom as part of an interrogation so that flaws in logic could be highlighted, the logic of judicial decisions could be unpacked, and students could be guided to think 'critically … like

[180] Ibid.

[181] Susan Bartie, 'Towards a History of Law as an Academic Discipline' (2014) 38(2) *Melbourne University Law Review* 13–15, 19.

[182] Peggy Cooper Davis, 'Desegregating Legal Education' (2010) 26 *Georgia State University Law Review* 1275.

[183] Kirby (n 179); Waugh (n 116) 178–9.

[184] Davis (n 182).

[185] Ibid.

[186] Ibid.

a lawyer'.[187] The case method and, to a lesser extent, the Socratic method still dominate legal education in the Western world—from England to the US to Australia.[188]

In contrast to earlier lectures at law schools and apprenticeships, students of Langdell's Harvard classes in the late 1800s were taught exclusively through cases. In an earlier law school, one might learn broad legal principles from books like Blackstone's *Commentaries*. In Langdell's classes, students were told to examine cases alone, in which they were to find no 'right' answers, only competing judicial opinions.[189] Almost instantaneously, legal education became more adversarial in nature. Instead of laws arising from the government, to be documented in essay-like prose, laws were to be regarded as arising from competing perspectives that were posited before a judge. Although this had always been the case, prior forms of university instruction had never so explicitly framed the law as solely about competing claims. Langdell's law school was thus more personal and transactional; it tended to focus more on the individual than on the government or wider social context.

Langdell wanted a purely scientific study of law at Harvard. He frequently referred to law as a science—that is, as a set of objective principles rather than as a set of subjective opinions.[190] Law was to be taught as a method for discovering and applying legal principles alone, which were themselves established rather than part of a broader conceptual knowledge of politics.[191] He focused on professional and analytical training, as well as on the belief that law students would become lawyers who would argue their cases in court. His style of solely using case law to teach students everything about law linked to a rising, popular legal philosophy of his age: the philosophy of legal positivism.

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[187] Lowell Bautista, 'The Socratic Method as a Pedagogical Method in Legal Education' in *Faculty of Law, Humanities and the Arts—Papers* (University of Wollongong, 2014) 3–4.

[188] Ibid.

[189] Ibid 1282.

[190] Christopher Columbus Langdell, as quoted in William Schofield, 'Christopher Columbus Langdell' (1907) 55(5) *The American Law Register* 278.

[191] Ibid.

In 1934, the legal philosopher Hans Kelsen described legal positivism as 'pure law' or the teaching of law without the 'baggage' of the social sciences of politics, philosophy, morality, religion and history.[192] Kelsen believed that law should be studied as an objective body of rules that were divorced from any other field of study or discipline.[193] This mirrored Langdell's approach at Harvard in 1869. By teaching law exclusively through cases, Langdell could instil in his students the belief that law was a scientific study and that it did not require background knowledge—much like how one would study mathematics without needing to know why or how a maths textbook was written. Although this appeared to be a banal philosophy in the law school, legal positivism, when properly considered, was controversial and radical in its application. Oliver Wendell Holmes Jr, a contemporary of Langdell, frames this notion in a rather dark context by stating:

> Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down.[194]

This obsession with framing rules and procedures as a science characterised law school as a place in which students were systematically obliged to document a body of rules without reason. In this sense, a student at Harvard Law School was reminiscent of a protagonist in a Kafka novel, in which systems and rules existed, which were not to be questioned, explained, justified or reasoned with.[195]

To the present day, some scholars still contend that Langdell's case method reveals to students 'how open is the future of the law'.[196] In contrast, Langdell himself perceived law as being mostly static. His aim was not to teach legal history, comparative law or

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[192] Hans Kelsen, *Pure Theory of Law* (University of California Press, 2007); Stanford Center for the Study of Language and Information, *Stanford Encyclopedia of Philosophy* (2016) 1 The Pure Theory of Law [xx] ('The Pure Theory of Law') <http://plato.stanford.edu/entries/lawphil-theory/>.

[193] Ibid.

[194] Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457.

[195] Franz Kafka, *Before the Law*, tr Ian Johnston (Kurt Wolff, 1919).

[196] John R Morss, 'Part of the Problem or Part of the Solution? Legal Positivism and Legal Education' (2008) 18(1–2) *Legal Education Review* 3.

how law could change over time. These subjects barely interested him, beyond the basic call for students to study 'the principles of law' in cases.[197]

By 1914, Langdell's case method had come to dominate US professional law schools, as well as the greater common-law schools in England and Australia.[198] The method was also adopted in Canada at the University of Manitoba, in which several casebooks were created for students between 1914 and 1915.[199] At the University of Manitoba, the case method was considered a means of making students 'conversant with the law'—in a way that had been impossible with the previous 'dry lecture' method.[200] In addition to the case method, prominent law schools often taught legal writing, legal research and, occasionally, clinical legal education. In all these areas, technical skills were considered far more important than soft or transferable skills, and law was framed as a science that should be studied in its own right, without reference to other areas of thought.

The next section will consider the 'molten state' of law schools (from the 1920s to 1930s). At this time, Langdell's reforms had not yet solidified; as such, a wave of alternative law schools was observed, as they sought to move in a different direction.

3) The Resistance

a) The Great Debate over the Future of Law Schools: 1920s–1930s and Legal Education in a 'Molten State'

Langdell's reforms did not occur in a vacuum, nor did they escape criticisms both at the time and in the following decades. However, the innovative experiments at the Inns of Court—as well as those in the apprenticeships in London and Virginia (at William and Mary)—became rarer following Langdell's reforms; this was because

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[197] Schofield (n 190) 277.

[198] Davis (n 182) 1275; Bruce A Kimball, 'The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic "Abomination," 1890–1915' (2006) 46(2) *History of Education Quarterly*. In the early 1900s, Jethro Brown toured some US law schools, including those at Harvard and the University of Missouri, Columbia, Boston and several others. He found widespread use of the case method in his travels; William Jethro Brown, 'The American Law School' (1905) 21(1) *Law Quarterly Review* 69.

[199] William Wesley Pue, '"The Disquisitions of Learned Judges": Making Manitoba Lawyers: 1885–1931' in G Blaine Baker and Jim Phillips (eds), *Essays in the History of Canadian Law: In Honour of R.C.B. Risk* (University of Toronto Press, 1999) 525–30 ('"The Disquisitions of Learned Judges"').

[200] James Aikins, 'Inaugural Address of the President, Sir James Aikins, K.C., KIL, Lieutenant-Governor of Manitoba' (1918) 54 Can. L.J. 344, as quoted in Pue (n 199) 531.

various rules, procedures and processes had developed to limit the flexibility of newer law schools. Admission requirements and examinations began to cement a kind of educational formula that centred Langdell's case method at the heart of instruction. This occurred in the wider educational developments of the period in both England and the US:

> By the latter part of the 19th Century the organization, scope and role of schooling had been fundamentally transformed. In place of a few casual schools dotted across towns and country there existed in most cities true educational systems: fatefully articulated, age graded, hierarchically structured … administered by full time experts and … taught by specially trained staff.[201]

However, there were still those who sought to change legal education at the time, as well as restore the earlier vision of law as a liberal art. Legal education had not yet become completely established in Langdell's formulation, and between 1890 and 1920, it was still in a 'molten state'—that is, it could still be swayed one way or another.

One attempt to sway it occurred at Yale and Harvard Law Schools, between 1910 and 1919, under the leadership of Wesley Newcomb Hohfeld and his mentor, Roscoe Pound, respectively.[202] Pound would later become a leading voice of American sociological jurisprudence, and he would refute Langdell's understanding of law as a static set of objective rules.[203] Although Pound later adopted the case method as the dean of Harvard Law School in the 1930s, in his younger days, he vocally opposed strict and rigid understandings of the law.[204] In this period, the two men worked on an ambitious agenda to transform legal education and engender a greater emphasis on 'social realities', philosophy and jurisprudence.[205]

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[201] MB Katz, 'The Origins of Public Education: A Reassesment' (1976) 16(4) *History of Education Quarterly* 381, as quoted in Kathleen Fulton, Ethan T Leonard and Kathleen McCormally, *Education & Technology: Future Visions* (Diane Publishing, 1995) 41.

[202] NEH Hull, 'Vital Schools of Jurisprudence: Roscoe Pound, Wesley Newcomb Hohfeld, and the Promotion of an Academic Jurisprudential Agenda, 1910–1919' (1995) 45(2) *Journal of Legal Education* 236.

[203] Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, 1983) 157.

[204] Hull (n 202) 234–8.

[205] Ibid 237.

Beginning in 1903, Pound launched a blistering attack on the dominant method of legal education, which was formulated under Langdell.[206] Instead of merely teaching legal principles that were found in cases, Pound asserted that law schools 'can and should do more'.[207] For example, he argued that comparative law, legal philosophy and legal history should be taught in their own right.[208] More fundamentally, he wanted law schools to be centres of law reform, and he thought they should teach students the 'social realities' of law in practice to serve the currents of 'public opinion' in a democratic society.[209] Without this link to the public, Pound feared that law students and law professors would remain 'legal monks' who were disconnected from the society they were meant to serve.[210] In 1912, Pound insisted that law professors needed to 'reconsider the attitudes' of their teaching and begin teaching law in a manner that served 'the purposes and policies of modern lawmaking'.[211] He believed that law schools should start teaching 'sociology, economics and politics to "fit new generations of lawyers to lead the people," rather than merely giving students vocational training'.[212] In many ways, his writings are reminiscent of those by Jefferson and Wythe at William and Mary, who advocated for a law school that primarily focused on government, advocacy and politics.

Professor Hohfeld of Yale Law School joined Pound in his pursuit. In 1914, Hohfeld began demanding a suite of liberal arts–focused reforms at Yale Law School.[213] His vision was for a law school that taught 'analytic, historical, critical, legislative, functional and empirical' understandings of the law.[214] Hohfeld believed that only out of the chaos of these competing perspectives could the order of understanding the law correctly arise in a student.[215] Students should be taught to question the 'intrinsic

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[206] Roscoe Pound, *The Evolution of Legal Education: An Inaugural Lecture Delivered September 19, 1903* (Thomson Gale, 2004) 15.

[207] Ibid.

[208] Ibid 15, 17, 19.

[209] Hull (n 202) 236–7, 241.

[210] Stevens (n 203) 59.

[211] Roscoe Pound, 'Taught Law' (1912) 3 *American Law School Review* 172 (1912).

[212] Stevens (n 203) 59.

[213] John Henry Schlegel, 'Wesley Newcomb Hohfield: On the Difficulty of Becoming a Law Professor' (Research Paper No 2016–036, University at Buffalo Law School, 2016) 4.

[214] Ibid.

[215] Karl N Llewellyn et al, 'Wesley Newcomb Hohfeld. Teacher' (1919) 28(8) *Yale Law Journal* 796.

[and] extrinsic' logic of law, including the 'psychological, ethical, political, social and economic bases of the various competing doctrines'.[216] Extending beyond mere case law, students could question from where the cases originated, how they emerged and why. In this, both Hohfeld and Pound were inspired by the French legal sociologist, Eugene Ehrlich, who suggested that 'it is not enough to be conscious that the law is living … we must rather be conscious that it is part of human life … in a sense, everything human is a part of it'.[217]

Hohfeld's pursuit to sway the trajectory of US legal education was largely unsuccessful. Some have argued that this was due to personal failures: a tendency to make laundry lists of demands rather than focusing on simple principles.[218] After all, the case method was simplistic, and simplicity often dominates a field when teachers consider complex ideas too difficult to implement. Nonetheless, Hohfeld did influence Yale Law School by prompting several faculty members to accept his reform proposals. In Hohfeld's time, Yale Law School staff envisioned a new law school that offered 'civic and cultural education' for 'non-professional college men' and 'scientific and constructive' instruction for 'jurists broadly trained for service in many fields of useful and far reaching activity' who would study 'law and its evolution, historically, comparatively, analytically and critically, with the purpose of directing its development in the future, improving its administration and perfecting its methods of legislation'.[219]

One of the reform writers at Yale Law School was Arthur Corbin, who pushed for legal education reform at Yale between 1909 and 1943. According to Corbin, law was not to be found definitively in cases in the form of simple legal principles.[220] Instead, students should regard these principles as 'tentative working rules … to be tested and re-examined in the light of the sources from which they were drawn'.[221] The origin of

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[216] Wesley Newcomb Hohfeld, 'A Vital School of Jurisprudence and Law: How American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day' (1915) *Address to the Association of American Law Schools* 24.

[217] Eugene Ehrlich, as quoted in a letter from Roscoe Pound to Oliver Wendell Holmes, this letter is quoted in Hull (n 202) 269.

[218] Hull (n 202).

[219] Schlegel (n 213) 30.

[220] Friedrich Kessler, 'Arthur Linton Corbin' (1969) 78(4) *Yale Law Journal* 521.

[221] Ibid.

law was as important, if not more so, than the content of law.[222] Consequently, the common law itself could not be regarded as perpetually self-justifying lists of precedents but rather as 'living law'.[223] Corbin felt that both judges and students at Yale Law School needed to constantly re-evaluate the 'principles, maxims, purposes and policies' of law.[224]

Thomas S Swan, Dean of Yale Law School during this tumultuous period, adopted a slightly more conservative approach than many in his dissenting faculty.[225] He argued that the case method was essential as a basis for understanding the law; however, he also recognised, along with Pound, Hohfeld and Corbin, that law schools should 'aim … to aid in improving the law by scientific and analytical study'.[226] Swan argued that students should be empowered to criticise the law as it currently stood, as well as suggest 'improvements … by relating laws to other institutions of human society'.[227] This can be considered a more scientific way of adapting a liberal arts legal education. By studying laws as they currently stood, and then comparing those laws to other institutions, students at Yale could conclude whether current laws 'fit' the society for which they were intended. Swan adopted this wider view of legal education, and it extended Yale Law School beyond mere vocational training.

Even at Yale, these reforms did not last.[228] Legal education would eventually solidify according to the vocational view—which was partly due to advocates for the movement failing to properly advance the argument for a liberal arts education in law. As Myres McDougal of Yale Law School concluded in 1943, 'Heroic, but random, efforts to integrate "law" and "the other social sciences" [have failed] through lack of clarity about *what* is being integrated, and *how*, and *for what purposes*'.[229]

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[222] Ibid.

[223] Ibid.

[224] Ibid.

[225] Thomas W Swan, 'Report of the Dean' *Yale Law School* (1919–1920) 393–4, as quoted in Robert Bocking Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (The University of North Carolina Press, 1983) 135.

[226] Ibid.

[227] Ibid.

[228] Myres S McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 *The Yale Law Journal* 204.

[229] Ibid.

Conversely, the Langdell model and the case method were clear in terms of what was integrated (the case method), how it was integrated (via casebooks) and for what purpose it was integrated (to instil a scientific understanding of the law). It is this lack of detail, of concreteness, that made the movement for a liberal arts education in law fail in the 1930s and 1940s.[230]

In addition to the battles at Yale Law School in the 1920s and 1930s, lessons can also be drawn from the University of Toronto's liberal arts approach in Canada from the 1920s to the 1940s. Both law schools opposed the dominant case method and aimed to teach a more liberal arts understanding of the law instead—which was accomplished to varying degrees of success. Perhaps the most notable author on the topic of 'law as a social science' in the period was the little-known dean and founder of the University of Toronto Law School, William Paul Maclure ('WPM') Kennedy.[231] From 1926 (as a professor) and from 1944 to 1949 (as dean of the new law faculty), Kennedy pursued the most ambitious agenda of any dean of the period—to radically change legal education.[232] However, his contributions were intentionally erased from history by his successor, 'Caesar' H Wright, who largely favoured Langdell's case method of instruction.[233] This is a vital point to highlight, as it demonstrates how vocational approaches to law have come to dominate the curriculum—sometimes by subterfuge, but often by fierce intellectual rivalries.[234]

However, Kennedy's notions of a liberal arts–based law school are worth rehabilitating, not only because of their unique scope and depth but also because they emerged at a time when legal education was distinctly moving in the opposite direction—away from the liberal arts and towards vocationalism.[235] If anything is to be learned about Kennedy's liberal arts curriculum, then he must be written back into the history books and considered a forerunner to the more modern ideals of a broad-

[230] Ibid.

[231] WPM Kennedy, 'Law as a Social Science' (1934) 3 *South African Law Journal* 100.

[232] Ibid.

[233] Girard (n 7) 82, 172–4.

[234] Ibid.

[235] Ibid.

ranging liberal arts education in law.[236] It is worth noting that the forms of liberal arts and social sciences that Kennedy advanced were different from their modern conceptions. The social sciences were in their infancy in the 1930s, having only started uniting the various sciences.[237] This thesis does not intend to argue for wholly adopting Kennedy's approach to these topics, but rather for using his ideas as a foundation for more modern discussions of incorporating social sciences and the liberal arts into law school. Finally, although Kennedy himself used the term 'social sciences', his proposals included both social science topics and philosophy and humanities topics that are typically considered liberal arts. Therefore, in discussing Kennedy, the broader term 'liberal arts' can be used to denote the superstructure under which social science falls.

When WPM Kennedy became dean of the University of Toronto Law School in 1944, he was inspired by the traditions of Oxford and Cambridge.[238] In 1934, he explicitly condemned Langdell's prominent case method and quoted the Dean of Columbia, who called the method 'intellectual inbreeding'.[239] According to Kennedy, if law students are taught to learn rules from casebooks, then they will be totally unprepared for legal practice.[240] They will learn 'nothing of the history and meaning of the rules', how the rules relate to everyday life or how those rules can be developed or reformed 'to serve society'.[241] At Kennedy's law school, the prerogative was to 'relate law to life not life to law'.[242] Students were tasked with considering how laws operated in the world rather than basing their lives on the recitation of legal principles.[243] In

[236] Ibid.

[237] ERA Seligman, 'Preface Abstracted Largely in the Words of Professor E.R.A Seligman' in *The Encyclopedia of the Social Sciences* (Macmillan, 1930) 186–7.

[238] Girard (n 7) 46, 82, 172–4; G Blaine Bake, 'Legal Education in Upper Canada 1785–1889' in David H Flaherty (ed), *Essays in the History of Canadian Law* (Osgoode Society, 2012) 58.

[239] Kennedy (n 231) 100.

[240] Ibid.

[241] Ibid.

[242] WPM Kennedy, as quoted in RCB Risk, 'The Many Minds of W. P. M. Kennedy' (1998) 48(3) *The University of Toronto Law Journal* 366.

[243] Ibid.

contrast, the professional schools had trained law students to be 'tradesmen' or 'mere technician[s]' rather than actual lawyers.[244]

In somewhat radical contrast, Kennedy wished to establish the Toronto Law School as a school with 'no professional ends to serve'.[245] The school's 'impracticality' permitted a great degree of experimentation in its curriculum content and method of instruction. In Kennedy's school, professors were 'absolutely free' to run their own classes as they saw fit—specifically in terms of their teaching methods, as the school lacked a standardised teaching style or method of instruction.[246] The case method was used in all subjects, but Kennedy preferred 'to fit methods to a subject rather than to fit all subjects into a uniformity of [one] method'.[247] This style was radically different from those of the professional schools in the period.

Teaching law at Toronto was intended to extend beyond vocational training so that a deeper 'educational purpose' of teaching law as a social science could be pursued.[248] Law could only be understood 'amid the intellectual clash of university activities … in relation to the other social sciences'.[249] Students at Toronto Law School were thus taught courses in history, legal philosophy, 'economics, psychology [and] political theory'.[250] They were also taught the philosophical foundations of law[251] and the skill of 'critical thinking'.[252] Students were encouraged to 'criticise what is accepted' and 'reflect critically on the "why," not just the "what" and the "how," of the law'.[253] Bora Laskin, a student who would later become Chief Justice of Canada, wrote that 'even more important than the law he learnt [in Kennedy's law school], was what he

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[244] Kennedy (n 231) 100.

[245] Ibid.

[246] Although the text suggests that teachers were 'absolutely free,' the only aspect mentioned is teaching style and freedom to move beyond the case method. It is worth remembering here that Kennedy also had non-vocational goals, giving teachers room to teach in a manner different from a vocational school, and indeed, to teach different subjects, as substantiated above: WPM Kennedy, 'Legal Subjects in the Universities of Canada' (1933) 23 *Journal of Society of Public Teachers of Law* 27.

[247] Ibid.

[248] Ibid 26–7.

[249] Girard (n 7) 48.

[250] Ibid.

[251] Kennedy (n 231) 100.

[252] Girard (n 7) 47.

[253] Ibid.

learned "about things that affected the law"'.[254] Kennedy's law school 'gave [Laskin] a feeling that law was something more than a narrow discipline'.[255]

Kennedy's wider focus was on using law for social and political change. Students were asked to inquire 'into the social worth of legal doctrines' and deduce whether laws served 'the ends of society'.[256] Essentially, all law students were trained to be law reformers. However, seeking to serve the ends of society was a vague ambition. It could be asked of Kennedy' students: Whose ends would be served? And by what judgement could a student understand society's aims? Kennedy answered this by referencing democracy. Students required a 'comprehensive survey of social values', in which 'survey' signified a literal undertaking of understanding the public perception of social issues.[257] Specifically, he highlighted broad-ranging principles of governance prevalent in his time, such as 'the interest of a child in a good home, and the interest of the state in conserving resources'.[258] Law was a means for resolving these 'problems in political science', in which it acted as a functioning arm of democratic government.[259]

This fundamental conception shaped Kennedy's belief that 'law is one of the greatest of university subjects … the fundamental social science on which every aspect of our civilization must inevitably rest'.[260] Law was not simply a means for governing transactions in property or injury in tort; it was a fundamental means of the government for 'social engineering' the kind of society that it wished to exist.[261] Kennedy's students were an important part of this social engineering plan, and he intended to produce students who were trained as reformers of the law—'the finest of

[254] Ibid 49.

[255] Ibid.

[256] Kennedy (n 231) 26–7.

[257] Risk (n 243) 366.

[258] WPM Kennedy, 'Some Aspects of Family Law' (1937) 49 *Judicial Review* 18, as quoted in Risk (n 243) 367.

[259] Kennedy (n 231) 100.

[260] WPM Kennedy, 'A Project of Legal Education' (1937) *Scots Law Times* 1.

[261] Kennedy (n 231) 100.

all instruments in the service of mankind'.[262] In doing this, he was inspired by the belief of then Harvard Law Dean Roscoe Pound that the law:

> May well be thought of as a task or as a great series of tasks of social engineering; as an elimination of friction and precluding of waste, so far as possible, in the satisfaction of infinite human desires out of a relatively finite store of the material goods of existence.[263]

Kennedy's bold vision, much like that of Wythe and Jefferson before him, produced an impressive class of alumni. 'Canada's greatest criminal lawyer', G Arthur Martin, was taught at Toronto, as were two chief justices of Ontario, a judge of the Ontario Court of Appeal, a Stanford professor of law and a chief justice of Canada.[264] These alumni were all taught in the five years that Kennedy oversaw the Toronto Law School as dean.

His other contribution was creating the *University of Toronto Law Journal* in 1935. It was a first in Canada—the only 'scholarly legal journal in Canada' at the time.[265] It quickly came to dominate legal research before it began facing competition from other journals.[266] Kennedy intended the journal to be an outlet in which his ideas for a law school could come to fruition in the academy; it was to be an outlet in which law was considered part of 'community life, of ordered progress, and of social justice'.[267]

Kennedy was joined in this pursuit by various other Canadian thinkers,[268] the foremost of whom was James Aikin. Aikin was the founder of the Canadian Bar Association in 1914, and he similarly pushed for a broader and more social role for lawyers in Canada.[269] Aikin believed that lawyers should move beyond becoming

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[262] Ibid.

[263] Roscoe Pound, *Interpretations of Legal History* (Macmillan, 1923) 160.

[264] Martin Friedland, 'Introduction' in WPM Kennedy, *The Constitution of Canada: An Introduction to Its Development and Law* (Oxford University Press, 2014) xxix.

[265] Ibid xxviii.

[266] Ibid.

[267] Risk (n 242) 375.

[268] William Wesley Pue, *Lawyers' Empire: Legal Professions and Cultural Authority, 1780–1950* (UBC Press, 2016) 174.

[269] Ibid 167–9; 'History', *The Canadian Bar Association* (Web Page, 2021) <http://cbant.org/Who-We-Are/About-us/History>.

politicians in their advocacy for social movements and social goals.[270] A lawyer defined as such would never have a purely private role in society but would rather always be engaged with the public and work on their behalf as a political actor.[271] By extension, law schools would be involved in teaching students 'moral fiber' and the knowledge of 'law in a big way' or law in its proper political context to serve public ends.[272] According to Aikin, the law played a role in upholding the values of civilization, including Christian and British values.[273] Therefore, it was the law school's role to teach its students values rather than merely teaching them technical knowledge.[274]

However, the innovations that occurred in Canada under Atkin and Kennedy did not last. Replaced by Caesar H Wright as dean, Kennedy was sidelined, and Toronto Law School became dedicated to the same practical and vocational outlook as other common-law schools in America.[275] As dean, Wright firmly committed to the case method and specified a focus on law being taught as a social science or liberal art.[276] He was joined in this view by various other Canadian lawyers, who criticised Kennedy's law school as 'being of limited practical importance, and indeed having very little to do with the law'.[277]

The professional law school at Osgoode Hall also criticised Kennedy's methods.[278] At the time, Osgoode Hall considered using the case method in all subjects impractical, and it only adopted the method in half of its curriculum.[279] However, this law school had also rejected jurisprudence completely; it was trialled temporarily 'as a first year

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[270] Pue (n 268) 168.

[271] Rob McQueen and William Wesley Pue (eds), *Misplaced Traditions: British Lawyers, Colonial Peoples* (Federation Press, 1999) 91.

[272] Pue (n 268) 171.

[273] McQueen and Pue (n 271) 91.

[274] Pue (n 268) 171.

[275] Girard (n 7) 82, 172–4.

[276] Ibid.

[277] Clifford Ian Kyer and Jerome Edmund Bickenbach, *Fiercest Debate* (Osgoode Hall Society, 1987) 58, as quoted in Pue, '"The Disquisitions of Learned Judges"' (n 199) 532.

[278] 'Legal Education in Canada' (1933) 4 *Society of Public Teachers of Law* 34.

[279] Ibid.

course' before being quickly removed from the curriculum.[280] Writers at the time justified the discarding of jurisprudence by condescendingly suggesting that students could 'hardly be expected to be competent to inquire why' the courts acted how they did without being 'conversant with a considerable body of law'.[281] This prompted the now common refrain that students cannot question the law without knowing its content—which realistically resulted in students never being able to question the law. In the 1930s, Osgoode Hall adopted a list of compulsory black-letter subjects, which were similar to Australia's Priestley Eleven: torts, contracts, criminal law, civil procedure, company law, equity, constitutional law, evidence and others.[282] Under Wright, Toronto Law School quickly followed suit.[283] Consequently, Kennedy's vision of law as a social science did not eventuate in Canadian law schools.

However, Kennedy's movement had a final chance decades later. In 1983, Harry Arthurs, then Dean of Osgoode Hall Law School, wrote a report on legal education reform—which reawakened Kennedy's social science vision.[284] The report identified a distinct lack of critical Canadian legal research,[285] for which it blamed the 'narrow vocationalism' in Canadian law schools and the teaching of black-letter law.[286] Arthurs noted a 'tension between the humane intellectual goals of a law faculty and its professional training activities'.[287] He worried that black-letter law was eroding the social and public roles of Canadian law schools.[288]

Arthurs argued that to serve their 'humane intellectual goals', law schools would have to develop a curriculum that 'identified with the humanities and social sciences'.[289] Arthurs's report concluded with several recommendations to this end, including that

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[280] Ibid.

[281] Ibid 36.

[282] Ibid 33–4.

[283] Ibid 36.

[284] Harry W Arthurs and the Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Social Sciences and Humanities Research Council of Canada, 1983).

[285] Ibid ii, iv.

[286] Ibid.

[287] Ibid 49; Robert W Gordon, 'The Law School, the Profession, and Arthurs' Humane Professionalism' (2006) 44 *Osgoode Hall Law Journal* 157.

[288] Ibid.

[289] Social Sciences and Humanities Research Council of Canada (n 284) 59.

law schools should adopt new elective subjects with clear 'social goals' and 'encourage interdisciplinary study [of] legal theory', and that 'Undergraduate law school curriculum should include … comparative law, legal problems of disadvantaged groups [and the] legal implications … of social and political problems'.[290] These recommendations aimed to revolutionise the way that law was taught, as well as open the subject to new disciplines, ideas and discussions.

Unfortunately, the report had a minimal tangible effect in Canada.[291] The law schools continued teaching a narrow, black-letter and vocational version of law.[292] Although Arthur offered sound recommendations, he proposed few teaching methods by which to implement his reforms.[293] This was a crucial flaw in the report. Without a practical 'how-to' guide, it was difficult for lecturers to understand how they should implement what amounted to conceptual goals and visions.[294]

In his recent reflective work, Arthurs stated that 'Toronto's Faculty of Law in the 1950s [under Kennedy] could properly be described as Canada's most progressive law school, even though it might not be regarded as such by today's standards'.[295] This comment is useful on two levels: it highlights the uniqueness of Kennedy's approach to legal education historically while simultaneously suggesting that a modern, progressive law school might act slightly differently. First, Kennedy's approach (as documented above) uniquely contributed a non-vocational framework for teaching law that was embedded with humanities subjects—in a manner that contrasts a modern neoliberal educational framework (which will be discussed in the next section). Kennedy's work offers lessons on the concept of a non-vocationally focused curriculum embedded with the humanities at its core.

Although one can learn from Kennedy's work, one can also strive for newer forms of teaching, content and methods that suit the context of the modern world (these

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[290] Ibid 155; Gordon (n 287) 158.

[291] Gordon (n 287) 158; Julian Webb, 'The "Ambitious Modesty" of Harry Arthurs' Humane Professionalism' (2006) 44 *Osgoode Hall Law Journal* 122.

[292] Gordon (n 287) 158; Webb (n 291) 122.

[293] Webb (n 291) 130.

[294] Ibid.

[295] Harry W Arthurs, *Connecting the Dots: The Life of an Academic Lawyer* (MQUP, 2019) 14–15.

methods will be discussed at the end of this thesis). A more progressive and modern law school (as aligned with Arthurs's point) might prioritise discussions of race, gender or class through a critical framework. However, Kennedy's work as discussed in this thesis—as well as the works of other authors in this chapter—is intended to help differentiate unique and older methods of education from modern methods so that this uniqueness can be used as a springboard for new ideas. In tracking the development of certain law schools in certain places (and how they changed over time), it is evident that the lessons learned from teaching law as a non-vocational humanities discipline should not be lost. This idea will be discussed in greater detail in the next section.

4) The Great Resistance: The Return of Law as a Liberal Art

a) Legal Process School in the 1950s

The latter half of the twentieth century observed several movements that challenged the traditionally vocational approach of US law schools. These movements help explain the beginning of the critical thinking approach to law (which will be discussed later in this thesis), and they help substantiate how legal education has developed in specific contexts over time. The first of these movements was the legal process movement. Beginning in the 1940s and 1950s, a group of legal scholars at Harvard began exploring a different method for comprehending the legal system. Instead of focusing on the outcomes of case decisions, this group focused on the processes of legal institutions.[296] The legal process theorists believed that law was 'purposive' and that it derived from 'human needs' and social purposes rather than the sovereign alone (as in legal positivism) or God (as in natural law theory).[297]

A core principle of the legal process movement was that institutions who interpreted the law had to ask 'how [the original social] purpose might best be furthered'.[298] With this principle, legal process theorists mirrored the legal realist movement by believing that multiple right answers existed for a court case, that 'the law was not determinate'

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[296] Macmillan, *Encyclopedia of the American Constitution*, vol X.

[297] 'Henry M. Hart Jr. and Albert M. Sacks' in David Kennedy and William Fisher III (eds), *The Canon of American Legal Thought* (Princeton University Press, 2018) 245 ('Henry M. Hart Jr. and Albert M. Sacks').

[298] Ibid.

and that social and general values underlay the law.[299] However, the legal process theories differed in their focus—which was on the different processes of law in the separate branches of government. For example, process theorists argued that decisions of 'preference' belonged to the legislature, that decisions of 'expertise' belonged to the executive and that decisions of 'reason' belonged to the judiciary.[300] By focusing on these institutional differences, the legal process theorists could discern nuances of the law in action rather than perceive the law as a mere decree of the executive branch or judiciary.

One of the most notable scholars of the legal process movement was Lon Fuller. During his time at Harvard, and specifically during his time as chairman of Harvard's curriculum committee in 1947, Fuller was committed to broadening the law school curriculum's scope to include the social sciences.[301] He was 'especially emphatic that the various interrelations between the legal and the nonlegal must become a central part of the curriculum'.[302] He wrote that to 'teach men to think freely', law schools could not 'rope off whole areas of reality' such as metaphysics and ethics.[303] Instead, the gates should be 'swung open' to these areas in the classroom.[304] Responding to the vocational idea that such questions do not arise in legal practice, Fuller argued that the social sciences are considered irrelevant in practice partly because they are considered irrelevant in law school.[305] Rather than conceding the point, he argued for integrating the social sciences into law school, and thereby making them relevant in practice.[306]

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[299] William W Fisher III, 'Legal Theory and Legal Education: 1920–2000' in Michael Grossberg and Christopher Tomlins (eds), *The Cambridge History of Law in America* (Cambridge University Press, 2008) 11, 34–72.

[300] Ibid 12.

[301] Fuller took a particular interest in legal education across his lifetime, writing 'twelve articles on the subject and two books of teaching materials': Robert S Summers, 'Fuller on Legal Education' (1984) 34(1) *Journal of Legal Education* 8–9, 19.

[302] Ibid 12.

[303] Lon Fuller, 'On Teaching Law' (1950) 3 *Stanford Law Review* 47.

[304] Ibid.

[305] Lon Fuller, 'Preliminary Statement of the Committee on Legal Education at the Harvard Law School' (1947), as cited in Summers (n 301) 8.

[306] Ibid.

He maintained that law could not be taught as a 'descriptive science' alone, for it is impossible to separate what the law was with what the law ought to be:[307]

> For about twenty years now American professors of law have been agreeing with one another that we ought to do something about the integration of law with the other social sciences. In view of this general agreement, it is remarkable how little of real significance has actually been accomplished in this direction. The explanation lies, I believe, in a failure to work out a conception of legal education that will make the integration something real.[308]

According to Fuller, a real integration of law and the social sciences would involve two significant steps: adopting non-legal materials in class and hiring non-legal educators.[309] The first step involves students solving problems (i.e., assignments) that are a 'synthesis' of both legal and non-legal considerations.[310] The second step involves drawing 'on the resources of the university as a whole' by inviting faculty from other departments (e.g., economics and psychology).[311] Fuller tried this and observed it in other law schools, commenting that it worked effectively if the non-legal problem could be attributed legal relevance.[312]

One area in which Fuller could test his ideas was the design of a hypothetical course on jurisprudence.[313] The course was described as a 'critical examination [of] the basic premises that underlie reasoning about legal problems'.[314] As a second year course, it would be taken after students had learned about the law but before the third year, when they no longer had time to question the law they had learned.[315] According to Fuller, a course on jurisprudence could help students question the 'unstated premises' behind legal reasoning, 'raise fundamental issues not mentioned by court, counsel,

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[307] William N Eskridge Jr and Philip P Frickey, 'The Making of the Legal Process' (1994) *Yale Faculty Series* 2040.

[308] Lon Fuller, 'What the Law Schools Can Contribute to the Making of Lawyers' (1948) 1(2) *Journal of Legal Education* 200.

[309] Ibid 201.

[310] Ibid.

[311] Ibid.

[312] Ibid.

[313] Lon Fuller, 'The Place and Uses of Jurisprudence in the Law School Curriculum' (1949) 1 *Journal of Legal Education* 495.

[314] Ibid.

[315] Ibid 495, 504–5.

casebook editor, or teacher, and generally point out when "the king doesn't have any clothes on"'.[316] This would help students become active in class, challenge their teachers and interrogate legal principles.[317] The core of the course would focus on justice. According to Fuller, 'Even the simplest problem of contract or tort law contains implicit within it issues concerning "the justification and ends of the state, about the ethics of human conduct"'.[318] The course would be taught by 'reading and discussing … representative authors [say ten to 15]' about a topic, and the authors would be 'selected because they represent divergent points of view'.[319]

Despite ardently defending new teaching methods, Fuller never advocated for discarding the traditional case method.[320] He loathed the 'black letter mind' that was preoccupied with the mechanical and narrow application of law, but he believed that the case method was distinctly separate to this mindset.[321] In 1950, he wrote that 'some of us are inclined to be critical of the appellate case as the exclusive focus of legal education … but all would agree, I suppose, that the core of our instruction ought to be the close analysis of cases [however defined]'.[322] He believed this because he regarded the case method as a tool rather than an end in itself.[323] He argued that had the tool been created in a different time, it would have had a different contextual imprint upon it (e.g., not that of legal positivism but legal process or some other thought period).[324]

The legal process movement ended partly due to its core focus on process over outcome. For example, by advocating for the judiciary to act on 'reason' rather than on the 'immediate result' of a case, the movement failed to grapple with the oncoming wave of the civil rights era.[325] Wechsler, a famous process theorist, used this logic to

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[316] Ibid.

[317] Ibid 505.

[318] Ibid 500.

[319] Ibid 501, 503.

[320] Summers (n 301) 11.

[321] Ibid 11–12.

[322] Fuller (n 305) 35.

[323] Summers (n 301) 11.

[324] Ibid.

[325] William W Fisher III (n 299) 12–13, 34–72.

argue that the *Brown v Board of Education* decision (which ended segregation) was poorly decided.[326] Many, but not all, legal process theorists agreed, which made it difficult for the movement in the 1960s.[327] The new social movements 'attacked' legal process theory from both sides—including law and society theorists, critical legal studies (CLS) scholars and law and economics theorists, mostly for failing to properly situate legal decision-making in its social, hierarchical and economic contexts, respectively.[328] It was one thing to ensure a proper process of law but quite another to separate this process from its political and social ramifications.

b) Law and Society in the 1960s

Another attempt to reconcile law with the social sciences occurred in the 1960s with the law and society movement. Beginning in 1964, a 'group of sociologists, political scientists, psychologists, anthropologists' and law professors formed the Law and Society Association, as well as the Law and Society Review in 1967 and various annual conferences thereafter.[329] The first editor of the review observed that its publication came 'from a growing need on the part of social scientists [economists, social workers, psychologists, psychiatrists, anthropologists] and lawyers for a forum in which to carry on an interdisciplinary dialogue'.[330] The aim was 'simple but ambitious': law and legal institutions would be examined with the empirical scientific tools of the social sciences, which would provide a unity of 'theory and data' to form a 'critical judgment' of how the law realistically worked in society.[331] This critical approach substantiated the origins of a certain critical thinking of law (which will be discussed in more detail in Part 3 of this thesis).

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[326] Ibid.

[327] Ibid 1, 14.

[328] Ibid.

[329] Susan S Silbey, 'Law and Society Movement' in Herbert M Kritzer (ed), *Legal Systems of the World: A Political Social and Cultural Encyclopaedia* (ABC–CLIO, vol 2, 2002) 861; Cf Daniel Blocq and Maartje van der Woude, 'Making Sense of the Law and Society Movement' (2018) 11(2) *Erasmus Law Review* 135; Cf Rita J Simon and James P Lynch, 'The Sociology of Law: Where We Have Been and Where We Might Be Going' (1989) 23 *Law and Society Review* 830.

[330] Richard Swartz, as quoted in Simon and Lynch (n 329) 830.

[331] Silbey (n 329) 860.

An early contributor to the law and society movement, Philip Selznick, phrased the movement's motto as 'law in action' and 'law in context'.[332] This motto was driven by two key realisations: that the law was human made and that law varied over time according to the context in which it was created.[333] The research methods that were delivered varied greatly, but the projects in each centre aimed to 'explain legal phenomena … in terms of their social setting'.[334] Integrating the law and society movement into legal education aimed for the same outcome—to encourage students to situate legal institutions in their social context, and thereby understand the law as it works in society.

A core weakness of the law and society movement was its dedication to inclusivity and plurality. By the 1980s, it had become a 'big tent' or 'pluralistic association', in which different academics brough different methods to pursue the central aims.[335] The movement's loose focus was considered a significant contributor to its gradual decline.[336] As early as 1989, Lawrence Friedman observed that 'law and society people are more common outside law school than inside. But their position is nowhere very strong.'[337] He highlighted a 'substantive weakness in the field'—that the work being produced was an 'incoherent or inconclusive jumble of case studies [with] no foundation'.[338] Robert Temper mirrored these thoughts at the time, writing that the movement was 'wracked by anguish, self-doubt, role confusion, and occasional impotence'.[339] The richness of the early years was considered increasingly eroded by a 'breadth or inclusiveness', which had begun being regarded as not necessarily 'cost free'.[340] One core problem was that the movement became divided

[332] Philip Selznick, 'Law in Context Revisited' (2003) 30 *Journal of Law and Society* 177.

[333] Lawrence M Friedman, 'The Law and Society Movement' (1986) 38 *Stanford Law* Review 764.

[334] Ibid 763.

[335] Blocq and van der Woude (n 329); Cf HS Erlanger, 'Organizations, Institutions, and the Story of Shmuel: Reflections on the 40th Anniversary of the Law and Society Association' (2005) 39 *Law and Society Review* 1; Cf M Friedman, 'Coming of Age: Law and Society Enters an Exclusive Club' (2005) 1 *Annual Review of Law and Social Science* 2.

[336] Blocq and van der Woude (n 329) 138; Erlanger (n 335) 8.

[337] Lawrence Friedman, 'The Law and Society Movement' (1986) 38(3) *Stanford Law Review* 779, as quoted in Simon and Lynch (n 329) 825.

[338] Ibid.

[339] Robert Temper, as quoted in Simon and Lynch (n 329) 825.

[340] Blocq and van der Woude (n 329) 138; Erlanger (n 335) 8.

between those striving for normative ideas about the law or how it should be and those striving for a 'detachment and neutrality' about the law's empirical reality (i.e., between natural lawyers and legal positivists, respectively).[341] On the side of natural law, Selznick argued that 'sociological theory and research would have little to gain from a rigid separation of fact and value'. He even argued that there was an 'interdependence' between the two.[342] Donald Black, a Yale scholar, termed this perspective 'sociological jurisprudence' (citing Roscoe Pound), and the more traditional, detached and positivist view 'the sociology of law.[343] This conventional division separated the law and society movement rather than united it in a common vision to challenge the status quo of law schools.

In the 2000s, some academics began proclaiming that the law and society movement was dead due to a loss of focus.[344] It had seemingly shifted from being a broad movement to a mere 'mentality'.[345] Schlage critiqued the movement for being unable to reproduce itself after its initial period of excitement.[346] This perception of the movement might have been premature, given the survival of law and society journals that were dedicated to the topic throughout the 2000s, along with various other 'law and __' offshoots in the ensuing years.[347] However, it is worth noting that law and society have not systemically changed legal education in the long term by radically transforming teaching methods or content; they have merely provided a different 'mindset' by which to regard the law and legal institutions.[348] To transform law schools, something more is needed than recognising, or even diagnosing, the relationship between law and society.

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[341] Donald J Black, 'Law, Society and Industrial Justice' (Book Review) (1972) 78(3) *American Journal of Sociology* 709, as quoted in Paul van Seters, 'From Public Sociology to Public Philosophy: Lessons for Law and Society' (2010) 35(4) *Law & Social Inquiry* 1140.

[342] van Seters (n 341) 1140–1.

[343] Black, as quoted in van Seters (n 341) 1140.

[344] Blocq and van der Woude (n 329) 138; Cf Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)' (2009) 97 *Georgia Law Review* 803–4.

[345] Blocq and van der Woude (n 329) 138; Kitty Calavity, *Invitation to Law and Society: An Introduction to the Study of Law* (University of Chicago Press, 2010) 1.

[346] Schlag (n 344) 821.

[347] Hacker pointed in 2011 the continued prevalence of law and society research in Israel for example, building off of the American movement, though she concedes a lack of focus as a continued cause for concern. Daphna Hacker, 'Law and Society Jurisprudence' (2011) 4 *Cornell Law Review* 729–32.

[348] Blocq and van der Woude (n 329) 138; Calavity (n 345) 1; Cf Schlag (n 344) 803–4.

c) Critical Legal Studies in the 1970s

Legal education was observed to become purely vocational after the attempts to resist vocationalism at Yale and Toronto in the 1930s and 1940s, as mentioned above (in addition to the legal process and law and society movements).[349] The notion of a critical law education that connected students with a broader, contextual vision had been ignored in favour of casebooks and the case method.[350] The fight appeared to be over until a new wave of resistance emerged in law faculties decades later.

In the 1970s, a wave of dissent against vocational education emerged in various US and English law schools, ultimately formalising into a movement known as critical legal studies (CLS). CLS aimed to critique the political, moral and social influences of law on society rather than narrowly focus on teaching law as a set of rules.[351] The CLS movement frequently referred to the law's interaction with Marxist ideas about class, hierarchy, gender, race and sexuality.[352] In this way, CLS was a new tool with which to attack the vocational curriculum—by stating that it ignored the biases of the law, entrenched hierarchy and promoted inequality and disadvantage.[353] Rather than accepting the law as a system of rules to be applied, CLS criticised the law, law professors and legal institutions, even asserting that law itself should be put on trial.[354]

One of the foremost writers in the CLS movement in the 1970s was Duncan Kennedy, a professor at Harvard Law School from 1976 to the present day. In 1983, Kennedy wrote a polemic against law schools in which he evaluated law schools from a CLS perspective, by reflecting on his days studying as a student in the 1960s.[355] Kennedy's polemic began by suggesting that law schools are intensely 'political places', despite

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[349] Webb (n 291) 130.

[350] Ibid.

[351] Guyora Binder, 'Critical Legal Studies' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 267; for more on legal realism, see Karl S Coplan, 'Legal Realism, Innate Morality, and the Structural Role of the Supreme Court in the U.S. Constitutional Democracy' (2011) 86 *Tulane Law Review* 189; Oliver Wendell Holmes Jr, *The Common Law* (Dover Publications, 1991).

[352] Ibid.

[353] Ibid.

[354] Ibid.

[355] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Afar, 1983).

their claims that they neutrally train lawyers for practice.[356] He argued that their political aim was to shape students into a corporate mould 'for willing service in the hierarchies of the corporate welfare state'.[357] By discouraging moral and political dissent, law schools aimed to drive all students—conservative, liberal or radical—towards taking jobs in private and corporate firms and serving private and corporate interests.[358] It is difficult to translate these findings into the Australian context; however, it is worth noting that this idea was echoed decades later in Australian National University's *Frozen Seas Report*, in which Melanie Poole returned to law school in her final year to find:

> The students who had once marched for Indigenous land rights, who had spent their summers volunteering at clinics in Africa, had, somewhere during their legal education, decided that the only 'viable' career involved working 12 miserable hours a day to enhance the profits of wealthy clients. They referred to their work not as a conscious choice they had made, but as result of there being 'no other options', because everyone had to 'do their time' in corporate practice.

The preference for private practice at law schools is thus revealed not as a real, intrinsic preference of students but as a covert political ideology that is driven by the law schools.[359] According to Kennedy, law schools 'channel their students into jobs in the hierarchy' of private practice by making alternative careers (e.g., serving the poor or legal aid) seem 'hopelessly dull and unchallenging'.[360] Students are explicitly told that 'alternatives are risky', and they are persuaded to regard themselves as weaker, lazier and more incompetent than they actually are.[361] The bargain is clear: if students offer themselves to a major law firm, then they will always be cared for; if students do not offer themselves, then they must suffer the consequences.[362] Kennedy believes that this is an ideological agenda that requires dismantling.[363]

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[356] Ibid 54.

[357] Ibid.

[358] Karl E Klare, 'The Law School Curriculum in the 1980s: What's Left?' (1982) 32 *Legal Education* 336; Kennedy (n 355) 64.

[359] Klare (n 358); Kennedy (n 355) 64.

[360] Kennedy (n 355) 28–9.

[361] Ibid.

[362] Ibid.

[363] Klare (n 358).

Dismantling the corporate agenda is when the liberal law professor emerges. According to Kennedy, liberal law professors can challenge the dominant corporate narrative in three distinct ways.[364] First, they can be a 'known liberal on the faculty' and thereby protect progressive students 'from being bulldozed out of their liberal values' by conservatives.[365] This includes supporting a student's liberal arguments 'against conservative students and conservative professors'.[366] Second, the liberal law teacher can push liberal students further towards the left, away from moderation and towards radicalism.[367] Kennedy admits that this could lead to a form of 'indoctrination', and he concedes that it would contradict his instinct that the liberal teacher is not intended to 'impose his or her political beliefs' onto his students.[368] However, Kennedy resolves this by stating that it is a law lecturer's job to teach 'his own truth of the subject'.[369] Kennedy committed to creating his own teaching materials with his 'version of the truth', but at the same time, he aimed to arm students to help them 'defend themselves against [him] with the very stuff [he's] giving them'.[370]

Here, Kennedy makes several unconventional decisions: he admits that law is subjective and his own bias, he teaches that bias, and then he arms students to 'defend themselves' against what he teaches. This is considered a critical education in law because the students can see behind the curtain at all times. They are not told that the law is objective, and that the lecturer is providing factual, decided principles. Instead, they learn that the law is both political and subjective. One might argue here that professors can, and should, teach a value-neutral version of the law rather than impose their own ideology. According to Kennedy, such a position is impossible to defend.[371]

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[364] Duncan Kennedy, 'Liberal Values in Legal Education' (1986) 10 *Nova Law Journal* 605–6.

[365] Ibid.

[366] Ibid. Kennedy here might be creating an overly simplistic 'us v them' narrative, which might not reflect the real experience of students—as some might consider themselves moderate and/or apolitical rather than conservative or liberal.

[367] Ibid 606.

[368] Ibid 607.

[369] Ibid 608.

[370] Ibid.

[371] Ibid 608–9.

Any 'value-neutral teaching is implicitly to the right', he stated.[372] The doctrinal kind of education consists of students learning legal principles with a 'one sentence' policy justification for each rule, so each rule thus seems inevitable.[373] The intellectual kind of teaching comprises the notion that there is no right answer to a case.[374] This makes students passive because it bombards them with 'a trillion possible interpretations'—which signifies that a search for the truth or justice is futile.[375] In either scenario, a value-neutral education simply serves to reinforce the status quo.

The third and final goal of the liberal law teacher is to 'undermine the confidence of conservative students'.[376] Kennedy suggested that liberal lecturers should offer 'dumb [conservative] ideas that pretty clearly will disintegrate in the light of day'.[377] As his example, he cited the idea that 'redistribution is always inefficient'.[378] Here, he did not aim to exclude conservative students from the discussion, but rather to welcome them by challenging their views.[379] The risk of this approach—as he himself has admitted (and as evident in the redistribution example)—is that he may 'strawman' the conservative argument or choose an easy target instead of challenging more nuanced conservative positions.

By the 1990s, Kennedy's perspective of legal educators imposing their own views on students so directly had shifted. In 1994, he wrote, 'I'm not in favour of preaching … I think I can politicize my classroom without being guilty of indoctrination [or using] my authority as a teacher'.[380] He created a novel teaching method to draw out the politics from the students. This indirect technique is especially novel because it relies on the traditional use of cases rather than on non-legal materials to make an untraditional point about law being political. Although this method will be briefly

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[372] Ibid.

[373] Ibid.

[374] Ibid.

[375] Ibid.

[376] Duncan Kennedy, 'Politicizing the Classroom' (1994) 4(81) *Review of Law and Women's Studies* 87.

[377] Ibid.

[378] Ibid.

[379] Ibid.

[380] Ibid 84.

outlined below, contesting its usefulness is beyond the scope of the present discussion.

In his method, Kennedy began by selecting a case or hypothetical scenario that posed 'a gap, conflict or ambiguity in the system of doctrine' and that divided the class into two camps of liberal and conservative students.[381] His goal was 'to polarize the class' so that students argued 'hard among themselves'.[382] Over time, students would form 'political alliances' in the classroom, which could shift according to new and contested cases with political resonance.[383] In this method, students began to learn that 'legal argument is indistinguishable from political argument'.[384] It is beyond the scope of this chapter to unpack or critique this technique. However, for the purpose of the current topic, this technique is considered another example of a novel way to challenge the traditional objectivity of legal education.

In his critique of law schools, Kennedy was joined by another CLS author and Harvard alumni, Karl E Klare.[385] Together, they argued that the politically conservative ideology of law school was taught almost exclusively via the case method.[386] According to Klare, the case method was used to separate 'public' and 'private' thought, in which the core law subjects focused on private cases from a market-centric perspective.[387] Kennedy believed that cases were used in law schools to position 'legal reasoning' above moral thought and social justice, often without any explicit justification.[388] From their earliest lectures, students are taught that their initial reaction of 'outrage' to when a 'bad guy wins' in a case is 'naïve, non-legal [and] irrelevant … and maybe even substantively wrong'.[389] Consequently, most

[381] Ibid 81–4.

[382] Ibid.

[383] Ibid.

[384] Ibid.

[385] Klare (n 358).

[386] Ibid 58.

[387] Klare (n 358) 338–9.

[388] Kennedy (n 355) 73.

[389] Ibid 58.

students become disillusioned or detached from their own morality.[390] Instead of critiquing the law, they begin to accept it for what it is—'normalized' and apolitical.

As will be argued in Parts 2 and 3, vocational education thus does not teach the whole student; it treats their moral and ethical views as separate to their core function of being trained for a job. When it is learned that the law is ideological and serves 'particular groups' above others, students do not have the required tools to argue this point or defend themselves from being ideologically indoctrinated into a corporate world view.[391] Students are instead bullied into accepting 'legal reasoning [as] different from policy analysis', and they are expected to accept a case decision even when the logic of the case is 'circular, question-begging, incoherent, or so vague as to be meaningless'.[392] In a worst-case scenario, an unjust outcome of a case is to be accepted based on appeals to authority alone.[393] Students are thus trained to separate themselves—on one side are their technical skills required for legal practice, and on the other are their ethical and moral integrity.[394]

To challenge the 'law's ideological neutrality', Kennedy, Karle and other CLS scholars argued against the status quo that all law was apolitical, entirely vocational or somehow separate from the public sphere.[395] Realistically, the core subjects of law school obscured an ideological agenda of hierarchy, status and class—for example, 'Property rights are understood to confer power … contractual bargaining is never truly equal'.[396] Karle stated that the curriculum itself 'is emblematic of the notion that the core of … capitalism is rational, structured and central to the lawyering identity'.[397] To be a lawyer is to think of 'incremental reform through governmental regulation' rather than through fundamental social change.[398]

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[390] Ibid 73.

[391] Sally E Hadden and Alfred L Brophy (eds), *A Companion to American Legal History* (Wiley-Blackwell, 2013) 172.

[392] Kennedy (n 355) 60.

[393] Ibid.

[394] Ibid.

[395] Hadden and Brophy (n 391) 463.

[396] Binder (n 350) 268.

[397] Klare (n 358) 339.

[398] Ibid.

One of the CLS movement's central questions in the 1980s was: 'How is it that those who are systematically disadvantaged by the existing order [of law, can come to accept] the legitimacy of the institutions … which perpetuate their subordination?'[399] Kennedy answered this question simply: the disadvantaged accept the existing order because they are taught to—through appeals to authority, circular logic and the prevailing notion that the law is not political at all and does not serve one group over another.[400] In contrast, Kennedy argued for law schools to admit that this is not the case—that they are political and promulgate a hierarchy of social values through their teaching content and methods. Instead of merely teaching vocationally, law schools should admit to the political content of the law and teach it to students.

This core ideal of the CLS movement took root at Macquarie Law School in Australia, in which the movement's principles and ideals were practised in the mid-1970s.[401] In a new, mainly Marxist faculty, CLS was considered a way of critiquing the 'traditional norms' of law from a new and more radical perspective, which prompted dissenting views.[402] The lecture hall was essentially abandoned in an attempt to encourage a critical style of learning.[403] Although students were discouraged 'from seeing themselves as passive recipients of information', they were instead forced to 'defend their views' in small, tutorial-style classrooms.[404]

The curriculum at Macquarie Law School had moved away from black-letter law, Langdell's case method and the dominant ideology of legal positivism. Instead of teaching legal doctrine as 'pure law', core subjects were reframed as historical, contextual and philosophical subjects.[405] For example, Macquarie had 'no [specific] courses in torts or criminal law' at the time; instead, 'The law on those matters could be found in courses such as Standards of Legal Responsibility, Personal Injury and

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[399] Alan Hunt, 'The Theory of Critical Legal Studies' (1986) 6 *Oxford Journal of Legal Studies* 11.

[400] Ibid.

[401] Thornton (n 2) 62.

[402] Drew Fraser and Patrick Kavanagh, 'Readings in the History and Philosophy of Law' (1995) *Macquarie University School of Law* 2.

[403] Kavanagh (n 138) 22.

[404] Ibid.

[405] Ibid 22–3.

Notions of Property'.[406] These broader, philosophical subjects examined the historical context of legal doctrine, how it arose and whose aims it served.[407]

Instead of sidelining legal history and jurisprudence as 'irrelevant' or 'soft' subjects, Macquarie Law School took the CLS approach of considering these subjects essential to a legal education.[408] The intention of teaching jurisprudence in all subjects was to provide students 'intellectual tools' with which they could critically examine the law they were being taught.[409]

Macquarie Law School's experiment with CLS teaching did not last. In 1977, the dean of the law school, PE Nygh, began dismantling the faculty.[410] In a letter to the staff, Nygh wrote that, as dean, he was 'given a mandate … to create a course of professional training' for students rather than one of ideological training.[411] He feared that training students in a Marxist framework would lead to violence, as students became 'defeatist [about their legal training, and that some could] come to the conclusion that the only answer to the problems of our society is to throw bombs around'.[412] Nygh also referred to the Second World War and his belief that ideology, in all its forms, was a source of evil.[413]

In 1987, the government-commissioned Pearce Report recommended that Macquarie Law School should be closed due to a lack of 'solid legal substance'.[414] Although the law school did not close, the CLS teaching style was abandoned.[415]

Caution is advised when considering Macquarie Law School's example of categorising critical thinking as left-wing or Marxist. Historically, critical thinking was advocated by thinkers on both sides of the political divide. The Christian

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[406] Ibid.

[407] Fraser and Kavanagh (n 402) 2.

[408] Kavanagh (n 138) 23.

[409] Ibid.

[410] Nygh (n 1) 57.

[411] Ibid.

[412] Ibid.

[413] Ibid.

[414] Thornton (n 2).

[415] Ibid.

philosopher, Thomas Aquinas, was arguably the greatest critical thinker of the Middle Ages.[416] Aquinas used dialectical reasoning to contrast different arguments and test their effectiveness, in much the same way that Socrates did.[417] He also 'answered all criticisms of his ideas as a necessary stage of developing them'.[418] In more recent times, the Jesuits perform a kind of classical training in critical thought: they question what they are taught and by whom they are taught:[419]

> Education in the Jesuit tradition is a call to human excellence. It develops the whole person, from intellect and imagination to emotions and conscience, and approaches academic subjects holistically, exploring the connections among facts, questions, insights, conclusions, problems, and solutions … Jesuit education also examines the history of injustices, often subtly embedded within systems and cultures, while also generating hope so that students feel called to address significant world problems with courage, commitment, and good faith.[420]

Framing progressives as 'sceptics' and 'critical thinkers' and conservatives as 'market-centric' is a relatively recent phenomenon. This framing does not serve the purpose of an objective study into critical thinking in law schools. It is more effective to celebrate the history of critical thinkers on both sides of the political divide so that it can be ensured that critical thinking continues in universities.

By the mid-1990s, the CLS movement was in decline, with key members of the initial movement declaring that it was dead.[421] Notably, this included Duncan Kennedy and other scholars at Harvard Law School.[422] Following the decline of the CLS movement, vocational education came to be cemented in various common-law countries.

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[416] Dave Luukkonen, 'You Never Run Out of Why: Critical Thinking and Pre-Service Teachers' (Master's Thesis, University of Saskatchewan, 2008) 14.

[417] Ibid 96.

[418] Ibid 14.

[419] 'Jesuit Educational Philosophy', *Fordham University* (Web Page) <https://www.fordham.edu/info/21418/teaching_and_scholarship/10848/jesuit_educational_philosophy>.

[420] Ibid.

[421] James Gilchrist Stewart, 'Demistifying Critical Legal Studies' (PhD Thesis, University of Adelaide, 2019) 13, 63.

[422] Ibid 63–8.

The next section concludes with a description of how Australian law schools became vocational, which can be considered a precursor to the rest of this thesis; however, it is also worth mentioning the parallel descriptions of other jurisdictions. Following the decline of the CLS movement, the notion of a liberal arts curriculum never truly recovered. It was eventually replaced with the political philosophy of neoliberalism that entered law schools (as discussed in Part 2 below).

5) Vocation Triumphant

From the 1950s to the 1970s, Australian law schools grew exponentially—more students enrolled, and 'full-time academic staff' (replacing earlier part-time practitioners) were appointed, which formed a new full-time academic community.[423] Whether these new academics were vocationally focused or able to pursue a liberal arts teaching style remains debatable. On the one hand, Susan Bartie made a compelling case that 1950s law academics in Australia resisted the vocational pull and remained wedded to a liberal arts education.[424] Indeed, many academics were followers of the growing realist movement in the US, which was inspired by the Harvard Law School academics (e.g., Roscoe Pound) who aimed to critique the law rather than just blindly follow it.[425] Various 1950s law professors also 'viewed law as an instrument for social change' and believed in the flexibility and adaptability of legal doctrine rather than a strictly formalistic understanding of law.[426]

Conversely, a Harvard Law School dean who visited Australia in the 1950s stated that the Australian 'Law Faculties [were] dominated by practical rather than intellectual interests'.[427] These practical interests seemed to prefer doctrinal knowledge over morality or social and contextual views of the law. Peter Brett, a University of Melbourne Law School professor in 1960, condemned that the 'whole … profession in England and Australia has reduced itself to the status of a body of priests [who are

[423] Susan Bartie, 'A Full Day's Work: A Study of Australia's First Legal Scholarly Community' (2010) 29(1) *University of Queensland Law Journal* 67.

[424] Ibid 68.

[425] Ibid 68, 82–3.

[426] Ibid.

[427] Erwin Griswold, as quoted in Weisbrot (n 116) 123.

convinced] that law and morality [are] utterly distinct'.[428] An Adelaide Law School professor at the time also commented that 'for a variety of reasons, lecturers at Australian law schools have not made many significant contributions to legal literature. Most publications have been teaching tools—with "case books" becoming increasingly popular'.[429] These accounts seemingly portray Australia's law professors of the 1950s and 1960s as priests of the case method who lacked a commitment to the morality or social context of law and were more concerned with 'practical interests' than with offering students a liberal arts education.

In 1971, a new law school was established at the University of New South Wales (UNSW).[430] From its inception, UNSW Law School aimed to focus on social justice—or, in the words of the founding dean, the school possessed 'a keen concern for those on whom the law may bear harshly'.[431] However, despite this public aim, the law school did not begin with experimental teaching methods.[432] At its inception, UNSW Law School had adopted the Socratic method and the case method instead of experimenting with critical teaching methods.[433] The dominance of the case method once again is worth noting here, as is the knowledge that a new law school would start with the case method as the default method despite its potential moral ambiguity (which shall be discussed in further detail below).[434] Nevertheless, the establishment of the case method evidences a doctrinal, black-letter and vocational outlook that continued even in the establishment of new institutions.

In 1992, the Australian Law Admissions Consultative Committee (LACC) created a list of 11 compulsory subjects ('The Priestley Eleven'), which embedded vocational

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[428] Peter Brett, 'Review of Julius Stone, Legal Education and Public Responsibility' (1960) 2 *Melbourne University Law Review* 569.

[429] Donald MacDougal, 'Review of Norval Morris and Colin Howard, *Studies in Criminal Law*' (1963–1966) 2 *Adelaide Law Review* 270.

[430] Chief Justice Robert French, 'University of New South Wales Law School 40th Anniversary' (Speech, University of New South Wales, 17 September 2011) 5.

[431] Marion Dixon, *Thirty up: The Story of the UNSW Law School 1971–2001* (2002) 2, as quoted in French (n 430) 6.

[432] Ibid.

[433] French (n 18) 5.

[434] Ibid.

education into the curriculum.[435] Due to their nature, admission requirements homogenised legal education in Australia.[436] Compulsory subjects in students' early years at law schools left little room for diversity in subject offerings, and there was very little flexibility for curriculum reform for law deans.[437] Instead, compulsory subjects forced law schools to focus primarily on teaching vocational skills (in core subjects) above other types of knowledge.[438] In Australia, the Priestley Eleven subjects contained only one liberal arts–focused subject: legal ethics.[439] The rest were black-letter law or doctrinal in nature, including subjects such as torts, contracts, evidence, equity, property law, criminal law, company law, constitutional law and civil and criminal procedure.[440] Black-letter law units like these tended to be taught via the case method, with a strict focus on learning and applying the law without contextual and theoretical knowledge.[441] This aligned with a similar development in other jurisdictions. Starting in Ontario in 1957, the Law Society of Upper Canada 'prescribed eleven mandatory' subjects for law students.[442] This was reduced to seven in 1969, following a petition from several law deans.[443] In 1999, the UK Law Society and the General Council of the Bar created a list of seven compulsory subjects.[444] No compulsory subjects were created in the US, but law schools were required to teach 'substantive and procedural law'.[445] It is significant to note that Australia has the highest number of compulsory subjects out of all these jurisdictions.

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[435] LACC, 'Law Admissions Consultative Committee: Uniform Admission Requirements' 3 <www.lawcouncil.asn.au/LACC/images/pdfs/UniformAdmissionArrangementssubmissiontoCOAGTaskforce.pdf>.

[436] Ibid 3–5.

[437] Ibid.

[438] The Pure Theory of Law (n 192); Kelsen (n 192).

[439] The Pure Theory of Law (n 192); Kelsen (n 192).

[440] The Pure Theory of Law (n 192); Kelsen (n 192).

[441] Michael Robertson et al (eds), *The Ethics Project in Legal Education* (Routledge, 2011) [8.3.3].

[442] Taskforce on the Canadian Common Law Degree, *Consultation Paper* (Federation of Law Societies of Canada, 2008) 10–11 <https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/notices/08-10_consultation-paper.pdf>.

[443] Ibid.

[444] Bar Standards Board and Solicitors Regulation Authority, *Academic Stage Handbook* (Bar Standards Board and Solicitors Regulation Authority, 2014) 18 <https://www.sra.org.uk/globalassets/documents/students/academic-stage/academic-stage-handbook.pdf?version=4a1ac3>.

[445] American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools (2015–2016)* (American Bar Association, 2015) 15 Standard 302(a).

The rise in compulsory subjects in Australia and abroad was influenced by the increasing dominance of the political philosophy of neoliberalism. As mentioned earlier, the neoliberal policies of the 1980s and 1990s (under the Hawke–Keating and Howard governments) aimed to privatise public services (including university education) and place them into a new private market.[446] The withdrawal of public funding for universities in the 1990s led to a greater sense of competition among universities in the market and, consequently, prioritising numerical outcomes, graduate attributes and professional accreditations to 'win' a greater market share of prospective students.[447] An increasingly instrumental view of education formed in legal education, in which law schools began focusing on skills acquisition and aligned their teaching with professional bodies and employer priorities.[448] It is perhaps unsurprising that it was in this era that the professional bodies in Australia won by establishing the Priestley Eleven.[449] Even if neoliberalism did not create the Priestley Eleven, due to its nature (its focus on vocational and market outcomes), it has certainly correlated with the rise of these core subjects.[450]

By the 1990s, admission requirements forced all law schools to adopt a one-size-fits-all approach. Any liberal arts or critical law subject was sidelined to the non-compulsory, elective units that were to be taught in later years; they were considered optional and arguably subsidiary to the core black-letter law units.[451] As Thornton suggested, the new neoliberal context of legal education attributed diminishing value in these liberal arts subjects, which were not considered relevant to students' future job prospects.[452] Instead, a renewed focus was placed on the practical teaching of law as pure law, without the baggage of the social sciences. Politics, moral philosophy,

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[446] Paul Dibley-Maher, 'Friend or Foe? The Impact of the Hawke–Keating Neoliberal Reforms on Australian Workers in the Australian Public Sector' (Master's Thesis, Queensland University of Technology, 2012) 6–10; Jean Parker, 'Labor's Accord: How Hawke and Keating Began a Neo-Liberal Revolution' (12 October 2012) *Solidarity* <https://www.solidarity.net.au/mag/back/2012/50/labors-accord-how-hawke-and-keating-began-a-neo-liberal-revolution/>.

[447] Thornton (n 2); Brown (n 2).

[448] Thornton (n 2); Brown (n 2).

[449] Thornton (n 2); Brown (n 2).

[450] Thornton (n 2); Brown (n 2).

[451] LACC (n 445).

[452] Thornton (n 2).

anthropology and other subjects were regarded as irrelevant to this aim.[453] More than ever before, the role of law schools was to prepare students to meet admission requirements rather than to broaden their minds.[454] This devolved into the reduction of essays, critical thinking tasks and reflective tasks for the even more dominant role of the case method above all else.[455] By 2010, Professor David Weisbrot suggested that if Christopher Langdell, the inventor of the case method, were to appear in Australian law schools at the time, he would 'hit the ground running'.[456] Therefore, Weisbrot believed that little had changed in legal education in the previous few decades.[457] Whether this is a positive insight or not will be discussed in following sections of this thesis.

The increasing prevalence of compulsory vocational subjects had a deleterious effect on student culture outside Australia in the UK and US. In 1994, Professor William Twining of University College London found that law students had come to internalise a preference for vocational, black-letter law units, even in the non-compulsory elective subjects.[458] When liberal arts subjects were offered as electives in the early 1990s, students would not pick them, instead preferring electives that 'look[ed] good on the CV'.[459] In brief, as soon as liberal arts units were no longer compulsory, they were avoided by the student body. Subjects that 'looked good' in CV's were those that extended admission units or that focused on black-letter law alone;[460] they were vocational subjects, which became the main focus of both students and, consequently, faculty staff.[461]

Various studies in the ensuing decades revealed a disturbing trend among law students; they prioritised career success over ethical integrity, marks over leadership,

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[453] Robertson et al (n 444) [8.3.3].

[454] Ibid.

[455] Thornton (n 2).

[456] David Weisbrot, 'Reimagining Legal Education in Australia' (21 May 2010), *ANU Law Students Forum*, as quoted in Barker (n 136) 45.

[457] Ibid.

[458] Twining (n 71) 74–5.

[459] Ibid.

[460] Ibid.

[461] Ibid.

networking over friendship and private practice over public advocacy.[462] The shift towards a more corporate, technical focus in the curriculum was correspondingly followed by a corporate, technical approach to life among the student body.[463] Law students began to learn that liberal arts and humane perspectives were irrelevant, in addition to morality, ethics, justice, fairness and other concepts that arose from those domains.[464]

After witnessing these trends in 1993, future Yale Law Professor Anthony Kronman declared a 'crisis in the legal profession'.[465] He stated that law school graduates used to be devoted to an ideal of public service and charity, but that they had become increasingly devoted to being mere experts in the law.[466] According to Kronman, the best lawyers of the past were 'lawyer–statesmen';[467] that is, they were lawyers who could practise law while also serving the community.[468] His ideal was based on early US lawyers, including Thomas Jefferson and Alexander Hamilton.[469] His ideal emphasised the importance of subserving one's private interests for those of the state. Kronman's lawyer–statesmen were idealised and romanticised. To be a lawyer–statesman was to be a 'devoted citizen'.[470] This signified a lawyer who 'cares about the public good and is prepared to sacrifice his own well-being'—including, if necessary, his private interests.[471] It also signified a 'leader in the realm of public life' who could practise 'prudence and practical wisdom'.[472] That is, it signified someone

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[462] Massimilo Tani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19(1) *Legal Education Review* 24–5; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing Our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Curriculum' (2011) 21(1/2) *Legal Education Review* 149; Judy Allen and Paula Baron, 'Buttercup Goes to Law School: Student Wellbeing in Stressed Law Schools' (2004) 29(6) *Alternative Law Journal* 286–8.

[463] Tani and Vines (n 462); O'Brien, Tang and Hall (n 462); Allen and Baron (n 462).

[464] Tani and Vines (n 462); O'Brien, Tang and Hall (n 462); Allen and Baron (n 462).

[465] Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1993) 1.

[466] Ibid 1–2.

[467] Ibid 11.

[468] Ibid.

[469] Ibid.

[470] Ibid 14.

[471] Ibid.

[472] Ibid 15–16, 154.

who was not cold or hard but who practised a form of ‘compassion’ when making ‘judgments about the public good’ or when choosing between two alternatives.[473]

Compassion was defined narrowly by Kronman as the ability to ‘sympathize with the values represented by a particular choice’ so that an informed decision could be made.[474] Lawyer–statesmen are intended to make all choices in this ‘sympathetic’ light so that they can reach a rational, if ‘intuitive’, decision regarding the right outcome of a legal problem.[475]

Admission requirements made it difficult for lawyer–statesmen to emerge, as they were sidelined in a curriculum that produced employees rather than leaders. Voices like Kronman’s were increasingly silenced in the decades after the 1990s. Reform in curriculum design and teaching methods was once common in the ‘molten’ years of legal education (1910s–1930s), but by the 1990s, legal education had formalised, solidified and focused on the compulsory black-letter subjects. For example, minimal flexibility remained for testing whether law students could be taught public service or ‘compassion’ as defined by Kronman. Law schools could not demonstrate the same innovation, ingenuity and creativity they had in their earlier years, as they were increasingly pressured into a firmly vocational mindset.

Conclusion

The history of legal education in the selected common-law countries reveals a slow but deliberate shift from innovation and experimentation in a liberal arts education towards a narrow and vocational teaching of law. Commencing at Oxford in England (as well as in some specific early examples of law schools in the US, Canada and Australia), some early law professors have clearly attempted to teach law as a liberal art. From the 1850s to the 1920s, some of these professors attempted to base the law curriculum on the social, political, economic and philosophical contexts of law. The ensuing ideas ranged from linking the study of law to politics (via legislative

[473] Ibid 65–70.

[474] Ibid 71.

[475] Ibid 65–70.

assemblies) to linking law to social problems (via the notion of law students as law reformers). In each case, these select few professors believed that law was a wider field of study—that it was a broad humanities discipline related to the wider world beyond the courtroom. The role of the law student was more expansive under this paradigm, with students seen by some of these professors as possessing, at times, a civic duty to promote law reform and the law's social progress.

The shift towards a vocational legal education in the selected common-law countries was slow but persistent. It began with the creation of the case method and Socratic method at Harvard in the late 1800s. Langdell's methods separated law from its natural partners of politics, philosophy and history, and created a science of law unto itself. Law was to be taught via cases. Students would uncover legal principles in those cases to be applied to new factual circumstances.[476] Adopted by various law schools worldwide (including the first law schools in Australia), Langdell's case method (and specifically the use of casebooks and case problems), ultimately came to dominate all others; it became the primary method for teaching law in common-law countries by the 1920s.[477]

Despite this, small groups of resistance remained, in which certain law professors maintained the ideal of teaching law as a liberal art. At Yale in the 1920s and 1930s, Pound and Newcomb fought for a different style of legal education—one that was centred on the social cost of law and the legal realist notion that the law was living and changeable.[478] In Canada, WPM Kennedy had similar notions at the University of Toronto; he attempted to teach students how law affected society, and how law was the ultimate social science.[479] Innovations and experimental teaching methods and assessments were evident in these early permutations of legal education (some of which will be discussed in further detail below).

The latter half of the twentieth century observed several movements that challenged the idea of a vocational education in US law schools. These movements began what evolved into a more critical understanding of the law's role in society. In the 1940s

[476] Schofield (n 190).
[477] Ibid 277.
[478] Hull (n 202).
[479] Kennedy (n 231) 100.

and 50s, members of the legal process movement argued that the law was 'purposive,' derived from 'human needs' and was made to serve social aims.[480] Legal education was to go beyond a mere learning of the rules and towards a questioning of the process that brought those rules into existence. Fuller wrote of the need to bring non-legal subjects and non-legal instructors into the legal classroom in order to get students to interrogate the 'unstated premises' of legal reasoning.[481] Legal process academics were, however, critiqued for a focus on process over outcome, especially in light of the social movements that arose in the 1960s and 70s.[482]

The law and society movement and the CLS movement of the 1960s and 70s, respectively, aimed, in different ways, to shift the conversation away from legal process and towards legal outcomes. Law and society scholars used the tools of empirical researchers (traditionally found in the social sciences) for this purpose.[483] They aimed to unite 'theory and data,' in order to discover the true impact of the law on society, revealing the social context of law in action.[484] CLS scholars, on the other hand, aimed to unpack the ways in which the law advantaged or disadvantaged particular segments of society, by revealing hidden biases in what was otherwise presented as an objective law school curriculum.[485] This culminated in a struggle for the hearts and minds of students. Duncan Kennedy went so far as to suggest that law lecturers should radicalize the students in their classes by both undermining conservative student arguments and supporting liberal student arguments and sowing disagreement.[486] CLS scholars like Kennedy wanted to unveil the hidden, political nature of legal education, revealing an implicit status quo bias hidden behind the typically vocational style of teaching.[487] Law students were not to just learn the law, they were to learn its effects and impact on different parts of society.

For a myriad of reasons, the aforementioned movements went into various states of decline in their respective decades of prominence, with a few notable exceptions. As the course of the twentieth century progressed, legal education in certain cases

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[480] 'Henry M. Hart Jr and Albert M. Sacks' (n 297).
[481] Fuller (n 308) 201; Fuller (n 313) 495, 504-5.
[482] William W Fisher III (n 299) 12-13, 34-72.
[483] Silbey (n 329) 860.
[484] Ibid.
[485] Kennedy (n 353).
[486] Kennedy (n 364).
[487] Kennedy (n 353); Klare (n 358)

became increasingly vocational under the pressures of neoliberalism, formalised professional credentials, examinations, assessments, the case method and compulsory subjects. The history discussed above reveals that it was not one but all these forces that led to the embedding of vocational education into the curriculum's core. In Australia, the LACC created 11 compulsory subjects for admission in 1992, giving law schools very little flexibility for curriculum reform.[488] The core subjects were black-letter law or doctrinal in nature, with the exception of legal ethics. In the ensuing decades, funding cuts to public universities by various federal governments led to a greater sense of competition between universities and a greater focus on skills, graduate attributes and employment outcomes.[489]

1) Lessons Learned from History

The history presented in Part 1 is relevant to the rest of this thesis for several reasons. First, it provides context for a liberal arts education in law, and where it has existed in a few diffuse examples in common-law countries. The limitation to common-law countries allows for a closer study of the development of the case method as it came to prominence. Second, the history sets out examples of the conflict between a liberal arts and vocational view of law. It reveals rival schools of thought, sometimes within the same faculty building, at times, aiming to convert the student body to one or another perspective. Third, the history provides context for the early development of legal education in Australia. This latter history will be developed further in Part 2 below.

Finally, for the purposes of this thesis, the above history provides a source inspiration for what a modern liberal arts law school might look like. Looking to history reveals examples of various teaching methods, assessments and subjects that adhere to the liberal arts tradition. These methods may need to be adapted to modern educational standards. This may include removing exclusionary educational philosophies, such as the idea of a 'gentleman's' education. However, at the same time, it is important that successful teaching techniques are not lost to history altogether. A fresh look at historical teaching methods may provide insight into how these methods can be used

[488] French (n 18) 5.
[489] Thornton (n 2); Brown (n 2).

in today's classrooms, when paired with contemporary pedagogical theory and adapted to modern standards of diversity and inclusion. These teaching methods include the teaching of law in relation to interdisciplinarity, politics, society, social critique, law reform and process, along with the ideas of small class sizes, class discussions, reflective tasks, roleplays and critical essay tasks.

Beginning with the early law professors cited above - Blackstone at Oxford, Wythe at Virginia, Kennedy at Toronto, and Hargrave at Sydney – some early law professors aimed to, to varying degrees, relate the study of law to a broader interdisciplinary study of other, related humanities or social science fields.[490] This broad approach empowered students to ask the 'big questions' about the law's origin and purpose, by contextualizing the study of law in history, philosophy, anthropology and politics. This combination of law with other topics created the conditions for novel teaching methods, such as Wythe's legislative assembly, where students roleplayed as legislators, gaining an understanding of the way law relates to political forces.[491] Interdisciplinarity is here revealed as both a teaching method in itself, and a means by which to reach other, innovative teaching methods and assessments.

In the case of WPM Kennedy, Toronto Law School showed one way law could be taught with a view to its social function, and how students could be trained to be social reformers of the law, rather than just practitioners.[492] In class, via assessments and class discussions, students were asked to consider 'the social worth of legal doctrines'.[493] They were to do so via their interdisciplinary training on the public perception of social issues, embodying the role of democratic representatives of a kind.[494] In this way, the theoretical aspects of their interdisciplinary training merged with the practical outcome of law reform tasks. Other innovations by Kennedy, including smaller class sizes and diverging away from case-based teaching, allowed for more wide-ranging lecturing and teacher autonomy.[495] The law school that Kennedy established, in part because of its novelty, will be considered in greater detail in Part 3 of this thesis. This will include an in-depth discussion of Kennedy's

[490] Blackstone (n 57); Douglas (n 42); Kavanagh (n 138) 16; Kennedy (n 231) 100.
[491] Hemphill (n 99) 53.
[492] Kennedy (231) 100.
[493] Ibid, 26-7.
[494] Risk (n 243) 366.
[495] Kennedy (n 246).

curriculum, teaching methods and assessments, and how some of them may be adapted to fit into a broader modern curriculum.

In 1947, Lon Fuller, while on Harvard's curriculum committee, planned a different kind of interdisciplinary legal education.[496] In Fuller's case, this was to be achieved by inviting non-legal educators into the classroom, including faculty members from other university departments, such as economics and psychology.[497] He enacted this method in his own classes and found that it was successful when the non-legal topics were given legal relevance.[498] The presence of non-legal instructors may encourage divergent thinking, where law and other topics are juxtaposed against one another, to find implicit connections, such as between law and ethics.[499]

In the 1960s and 70s, some professors expanded on the idea of interdisciplinary education by combining it with critical assessments and critical, interrogative student discussions. Law and society scholars, for instance, tried to motivate a 'critical judgment' of how the law actually worked in society, through the evaluation of empirical data.[500] CLS scholars went further by encouraging students to debate the political aspects of law in class, uncovering hidden biases and inequality, along with unclear, divisive, legal outcomes.[501] The aim of these teaching techniques was to move students beyond a mere understanding of legal principles and black-letter law, and towards an understanding of who benefited from the law, and who lost out.[502] Critically engaged discussions and assessments were introduced to teach the whole student; treating their moral, political and ethical reactions to cases and legislation as inseparable from their learning experience.

The lessons learned from this history will be expanded upon in greater detail in Part 3 of this thesis. In particular, Part 3 discusses how some of these techniques can be adopted, expanded or refined in a modern curriculum, in combination with new pedagogical techniques. Building a modern liberal arts law school curriculum can therefore begin by drawing on methods that have worked in the past, and discarding

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[496] Summers (n 301).
[497] Fuller (n 308).
[498] Ibid.
[499] Fuller (n 313) 505.
[500] Selznick (n 332).
[501] Kennedy (n 353); Klare (n 358).
[502] Kennedy (n 353); Klare (n 358).

or refining those that are not suited to present circumstances. These methods can also be tested against the literature on educational theory, which provides various benchmarks for measuring success, not the least of which including student satisfaction.

The next part of this thesis will investigate modern legal education in Australia. Specifically, it will explore the influence of neoliberalism in shaping the curriculum's current content, structure, assessments and teaching style. The ideas that will be explored include the dominance of numerical styles of evaluation, graduate attributes, vocational assessments and the conversion of students' mindsets in their studies and lives to a vocational outlook (as well as the circular effect that this has on the curriculum). The next part of this thesis will specifically function as a deeper delving into the recent history of law education in the early 2000s and onwards, in which vocationalism has been firmly entrenched in law schools, and there is little room for new methods, teaching styles or assessments.

Part 2: Modern Legal Education in Australia

Section 1: Neoliberal and Instrumental Legal Education

With the previous section having examined the general history of legal education in common-law countries, this section will specifically focus on analysing the recent neoliberal turn in modern Australian law schools. It will examine the narrow and prescriptive conception of legal education as a path to a vocation rather than as an academic pursuit in the model of the previously mentioned early law schools, as well as the liberal arts approach, the CLS movement and other critical approaches to teaching law. In doing so, this section will take an evaluative stance and critique the content, style and delivery of the current Australian law school curriculum.

Understanding the neoliberal turn requires a definition of 'neoliberalism', both as a matter of political philosophy and as it applies to higher education. The following background definitions and contextual paragraphs can be considered a starting point for discussing the rise of neoliberalism in higher education and its correlation to law schools transitioning towards a greater focus on vocational education. This thesis does not contend that neoliberalism is the only force influencing modern law schools. In contrast, it contends that it is merely one way of explaining how certain Australian law schools have changed to prioritise (or resisted attempts to de-prioritise) vocational education. The neoliberal framing is evident in the assessment structure, student culture and influence of the employer's voice in curriculum design—which all combine to form a curriculum that tends to prioritise market imperatives (e.g., the voice of key stakeholders) over intrinsic educational aims (e.g., learning for the sake of learning).

1) Neoliberalism

Australian law schools have not become vocational by accident; rather, they have become so due to a designed feature of the emerging political philosophy of neoliberalism.[1] For the purpose of this thesis, neoliberalism, as a political philosophy, refers to the deregulation, privatisation and use of 'monetarism and market-based

[1] Margaret Thornton, *Privatizing the Public University* (Taylor and Francis, 2011) 1–10; Margaret Thornton, 'The New Knowledge Economy and the Transformation of the Law Discipline' (2012) 19(2–3) *International Journal of the Legal Profession*; Mary Heath and Peter D Burdon, 'Academic Resistance to the Neoliberal University' (2013) 23 *Legal Education Review* 380–1; Nick James, 'More Than Merely Work-Ready: Vocationalism Versus Professionalism in Legal Education' (2017) 40(1) *UNSW Law Journal* 186.

reform' mechanisms in public policy.[2] This neoliberalism is typified by the notion of turning every aspect of life into a market—and it is readily identified with the market-centric policies of Margaret Thatcher and Ronald Reagan in the 1980s, along with the push towards laissez-faire economic policies.[3] In practice, neoliberal policies refer to leaving markets to their own devices without government interference.[4] Neoliberalism trusts the market to reach the correct policy outcome on its own accord through competition between private firms, even at the risk of producing market failures.[5] This description does not exclude some limited role for the government in national defence and defending basic private property rights. However, it is contended that even these defences should be decided through market mechanisms.[6]

The concept of neoliberalism first emerged in academic circles in 1947 when, inspired by the leadership of Austrian philosopher Frederick von Hayek, a small group of 'academic economists, historians and philosophers' formed the Mont Pelerin Society at a Swiss spa.[7] The group consisted of Hayek, Ludvig von Mises, the economist Milton Friedman and 'for a time, the noted philosopher, Karl Popper'.[8] For its founding document, the group outlined its concerns with the global world order in the period following World War II.[9] Principally, the members of this group were concerned about the individual's diminishing power in the West due to the increasingly arbitrary power of the state.[10] They argued that this development had occurred due to 'a decline of belief in private property and the competitive market'.[11] Without these two bedrock institutions, it was difficult 'to imagine a society in which

[2] Daniel Stedman Jones, *Masters of the Universe: Hayek, Friedman and the Birth of Neoliberal Politics* (Princeton University Press, 2014).

[3] Ibid 7.

[4] Ibid 20.

[5] Ibid 20.

[6] Wendy Brown, as seen in New Economic Thinking, 'How Neoliberalism Threatens Democracy' (YouTube, 26 May 2016) 00:00:00–00:19:41 <https://www.youtube.com/watch?v=ZMMJ9HqzRcE>.

[7] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 20.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ibid.

freedom may be effectively preserved'.[12] Hayek summarised the group's view regarding individual liberty in the competitive market as follows:

> Our freedom of choice in a competitive society rests on the fact that, if one person refuses to satisfy our wishes, we can turn to another. But if we face a monopolist we are at his absolute mercy. And an authority directing the whole economic system of the country would be the most powerful monopolist conceivable … it would have complete power to decide what we are to be given and on what terms. It would not only decide what commodities and services were to be available and in what quantities; it would be able to direct their distributions between persons to any degree it liked.[13]

The solution to this threat was to mandate the introduction of the free market into all aspects of public life so that state monopolies of public services can be prevented.[14] The term 'neoliberal' was derived from two core ideas. The designation 'neo' originated from the group's 'adherence to those free market principles of neo-classical economics'.[15] The designation 'liberal' originated from the group's 'fundamental commitment to ideals of personal freedom'.[16] The free market and personal liberty were essentially combined with Adam Smith's notion of the invisible hand as 'the best device for mobilising even the basest of human instincts, such as gluttony, greed, and the desire for wealth and power'.[17] Neoliberal thinkers have argued that this is why so much of society had to be turned into a market—it had to liberate the individual and mobilise market forces towards optimal outcomes for individual happiness.[18] This thought process is outlined in Hayek's quotation above, in which the market, through competition, is observed as providing variation to satisfy any individual's needs through competition among suppliers.[19] It was argued that the natural result of this was the belief that markets should be instilled in various aspects

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[12] Ibid.

[13] Frederick August Hayek, *The Road to Serfdom* (Psychology Press, 2001) 96.

[14] Harvey (n 7) 20–1; Sally Weller and Phillip O'Neill, 'An Argument with Neoliberalism: Australia's Place in a Global Imaginary' (2014) 4(2) *Dialogues in Human Geography* 110.

[15] Harvey (n 7) 20–2.

[16] Ibid.

[17] Ibid 20; Simon Glendinning, 'Varieties of Neoliberalism' (LEQS Paper No 89, 2015) 10–11.

[18] Harvey (n 7); Glendinning (n 17).

[19] Hayek (n 13).

of people's personal and public lives.[20] Anything that is not a market should be transformed into a market, including assets typically held by the state for public benefit under a monopoly of state control (e.g., education or health care).[21]

Neoliberal thinkers such as Hayek were critical of the state's role in providing public services to society; it was argued that the state could never work as efficiently as market forces.[22] The information to which the state had access was said not to be capable of matching the efficiency of a market economy's price signals.[23] Therefore, it was argued that state-run services should be dismantled and privatised into a market alternative.[24] State institutions were also regarded with scepticism because they were tainted by political bias, as compared to the non-biased logic of the market.[25] Michel Foucault highlighted that neoliberal thinkers believe that the 'government must not form a counterpoint or a screen, as it were, between society and economic processes'.[26] Instead, economic processes should be left to play out on their own.

Despite critiquing the state, the Mont Pelerin Society did believe that the state played a limited role in society. Under a neoliberal framework, the state acts as an enforcer of market principles, including 'private property rights, the rule of law, and [other] institutions of freely functioning markets', such as deregulation and low corporate tax rates.[27] The policy proscriptions are varied. First, a neoliberal state would have to create strong legal frameworks to allow 'freely negotiated contractual obligations' in the market.[28] Second, laws would have to be passed (or repealed through deregulation) to allow businesses to trade freely—both domestically through private property and intellectual property laws and internationally through free trade agreements.[29]

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[20] Weller and O'Neill (n 14).

[21] Ibid.

[22] Harvey (n 7) 21.

[23] Ibid.

[24] Ibid 21–2.

[25] Ibid.

[26] Michel Foucault, *The Birth of Biopolitics* (Palgrave Macmillan, 1978–1979) 145.

[27] Harvey (n 7) 64; Sam Bowman, 'In Defence of Neoliberalism' (2017) 33(3) *POLICY* 38.

[28] Harvey (n 7) 64.

[29] Ibid.

The protection of intellectual property, specifically, would ensure that 'technological changes' could proliferate throughout society, which would lead to a sustained period of innovation.[30] It was argued that this innovation would lead to increased productivity, which would, in turn, deliver 'higher living standards to everyone'.[31] In simple terms, this is known as trickle-down economics or it can be expressed by the phrase 'a rising tide lifts all boats'.[32] Through deregulation, tax cuts and laissez-faire economics, a neoliberal state would deliver economic gains to the poor through money 'trickling down' from the winners of the market competition down to their employees. However, in practice, neoliberal policies tend to give more power to companies and 'global corporations' through a transfer of power upwards.[33] Aside from a few notable exceptions (e.g., several South-East Asian countries and France), neoliberalism as a political philosophy has led to increased income inequality in various countries, in which it has delivered more power to so-called 'economic elites' at the expense of the poor.[34]

In their aversion to government-led services, neoliberal thinkers also dimly regarded democracy and democratic institutions.[35] Under a neoliberal framework, the notion of democracy was 'viewed as a luxury, only possible under conditions of relative affluence coupled with a strong middle-class presence to guarantee political stability'.[36] Instead of democracy, the preference was for a market-led alternative, in which power was attributed to consumers so that they could make decisions for themselves.[37] Democratic institutions could be replaced by non-democratic market alternatives that operated under broad policy mandates (e.g., the World Bank,

[30] Ibid.

[31] Ibid.

[32] Ibid.

[33] Bronwyn Davies and Peter Bansel, 'Neoliberalism and Education' (2007) 20(3) *International Journal of Qualitative Studies in Education*.

[34] Harvey (n 7) 19.

[35] Ibid 66; Cf Bowman (n 27).

[36] Harvey (n 7) 66.

[37] 'How Neoliberals Reinvented Democracy: An Interview with Niklas Olsen', *Jacobin* (Web Page, 4 June 2019) <https://www.jacobinmag.com/2019/04/neoliberalism-democracy-consumer-sovereignty>.

International Monetary Fund and World Trade Organization).[38] These institutions could be run by experts who knew the relevant topics.

Neoliberal thinkers tend to prefer this form of technocracy or the leadership of society by 'experts and elites'.[39] Expert leaders have triumphed in the meritocracy of the market and are thus deemed worthy of leadership. Critics of neoliberalism highlight the growth of income and wealth inequality as a sign that 'experts and elites', when placed in positions of power, take too much away and offer too little in return in wealth redistribution. A market economy might lead to a trickle-down effect, but it might also lead to a 'winner takes all' outcome, in which the best competitor takes the greatest amount, and the disadvantaged are left with little.[40] However, it must be noted that neoliberalism in itself does not necessarily prevent the redistribution of wealth, especially if private actors choose to give their wealth away or the government intervenes to do so.[41]

Neoliberalism rose to prominence in the political realm (as opposed to the academic realm) in the 1970s and 1980s. After its initial founding, the Mont Pelerin Society made a concerted effort to garner 'financial and political support' in the US from 'a powerful group of wealthy individuals and corporate leaders' who were invested in the success of neoliberal philosophy.[42] The movement gained significant traction in the 1970s due to several notable events. First, two leaders of neoliberal theory, Frederick Hayek and Milton Friedman, won the Nobel prize in economics in 1974 and 1975, respectively.[43] Second, the theory gained a foothold in politics when Margaret Thatcher was elected as prime minister in England in 1979 and Ronald Raegan as president in the US in 1980.[44] Thatcher was elected 'with a strong mandate to reform the economy' under neoliberal principles.[45] Under the influence of 'Keith Joseph, a very active … neoliberal [from] the Institute of Economic Affairs', she

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[38] Jason Hickel, 'Neoliberalism and the End of Democracy' (2016) *London School of Economics Papers* 142.

[39] Ibid 66; Cf Bowman (n 27).

[40] Anand Giridharadas, *Winner Takes All: The Elite Charade of Changing the World* (Knopf, 2018) 5–7.

[41] Bowman (n 27).

[42] Harvey (n 7) 21–2.

[43] Ibid 22–3.

[44] Ibid 22–5.

[45] Ibid 22–34.

began to confront trade unions, attack 'social solidarity' and privatise public assets.[46] Ronald Reagan's victory in the US was equally decisive in 1980. The Reagan government devoted itself to 'deregulation, tax cuts, budget cuts and attacks on trade union and professional power', which mirrored the neoliberal developments in England.[47] On both sides of the Atlantic, 'Reagenomics' and 'Thatcherism' pushed for the core ideals of neoliberal philosophy: deregulation, a withdrawal of the state from public service and a fight against collective (as opposed to individual) bargaining power.[48] Margaret Thatcher summarised the transition with her famous statement that 'there is no such thing as society'; there are only individuals.[49]

Many critiques can be made about neoliberalism as a political philosophy. In this thesis, four related problems will be mentioned—which are considered separate from the problems in education that will be covered in a following section. These related problems include contradictions in neoliberalism's stated objectives, monopolies, market failures and economic inequality. First, the core of neoliberalism has two central contradictions: a distrust of the state and yet the need for a strong state to enforce individual liberties, as well as the science of neoclassical economics that is contrasted against the ideology of political individualism.[50] In brief, neoliberal philosophy calls for both a weak and strong state, as well as both a scientific and ideological approach.[51] However, these contradictions can be resolved simply by diminishing the ideological purity of devotion to one side of the scale. For example, a weak state could still provide basic levels of regulation while remaining relatively weak. A second problem of neoliberal philosophy is that its devotion to markets can lead to monopolies, in which a single company wins in the competition of the market.[52] This can also be resolved; according to neoliberal philosophy, monopolies are not necessarily a problem if no barriers are blocking the entry of new

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[46] Ibid.

[47] Ibid 24–5.

[48] Ibid 22–5.

[49] Margaret Thatcher stated this in an interview in 1987; 'Interview for Woman's Own ("No Such Thing as Society")', *Margaret Thatcher Foundation* (Web Page) <https://www.margaretthatcher.org/document/106689>.

[50] Harvey (n 7) 21; Foucault (n 26) 133.

[51] Harvey (n 7) 21; Foucault (n 26) 133.

[52] Harvey (n 7) 67.

competitors.[53] The state needs only deregulate and remove any barriers. Third, neoliberal philosophy might inadvertently cause market failures—such as pollution, in which companies avoid paying the full costs of a process by 'shedding their liabilities outside the market' (i.e., dumping in public land).[54] Neoliberals contend to solve this through even more market mechanisms, such as environmental tax incentives.[55] Finally, neoliberal philosophy can lead to the concentration of power and wealth in the hands of the elite (the 'winners' of the market competition), and it can widen the gap between the rich and poor.[56] As a solution to this problem, the redistribution of wealth seems to contradict both the neoliberal principle of individual liberty (control of one's own resources) and the devotion to market mechanisms (whereby a winner has rightfully been chosen).[57]

Both the definition and analysis of neoliberalism above—which describe it as a force of diminishing state power, privatisation and market competition—are not immune to counterarguments from neoliberal apologists. These arguments can generally be categorised into three camps. First is the belief that neoliberalism is too difficult to define (or that any definition is too vague); in this sense, the term itself might be useless, and any criticism is thus unworkable.[58] Second, the term 'neoliberalism' has also been described as an encompassing term that left-wing academics who pursue a political agenda use to attack the ills of society.[59] Third is the belief that neoliberalism can be defined clearly and that it is ultimately a positive factor for society—in which case, it should be supported or improved rather than criticised or dismantled.[60]

The term 'neoliberalism' has been described as 'slippery' and 'vague', with the allegation that it can act as a convenient (and in bad faith) super-term to 'unify

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[53] Ibid.

[54] Ibid.

[55] Ibid.

[56] Ibid 26.

[57] Ibid.

[58] Dag Einer Thorson and Amund Lie, 'What is Neoliberalism?' (Research Paper, Department of Political Science, University of Oslo, 2007) 1–3; Weller and O'Neill (n 14) 123; Sean Phelan, 'Critiquing "Neoliberalism": Three Interrogations and a Defense' in Leah A Lievrouw (ed), *Challenging Communication Research* (Peter Lang, 2014) vol 1, 2–3; Davies and Bansel (n 33) 1; Terence Casey, 'In Defense of Neoliberalism' (Conference Paper, Political Studies Association Annual Conference, 21–23 March 2016) 3.

[59] Phelan (n 58) 3.

[60] Casey (n 58) 1; Bowman (n 27) 37.

disparate positions' under one heading.[61] Great scepticism is expressed towards the term 'neoliberalism'.[62] Authors have even admitted their own difficulty in defining the term for their works.[63] For example, Casey suggested that the term is conveniently vague, in that it is used 'to explain just about any and all social ills'.[64] Glendinning proposed a definition so wide-reaching that it could apply to various processes that were unrelated to economics altogether: 'I define neoliberalism … as the outlook of a community of ideas that seeks the limitless extension of the norms of conduct of one domain of life to the whole'.[65] He then proposed that a variety of neoliberalisms existed, such as religious neoliberalism ('the limitless extension of religious reason to every sphere of life'), political neoliberalism ('the limitless extension of political reason to every sphere of life') or economic neoliberalism ('the limitless extension of economic reason to every sphere of life').[66] However, this definition might be too broad to be workable. Further, even if this definition was accepted, this thesis will only consider economic neoliberalism. It can be stated that the definition provided in this thesis will be used for present purposes, and that these wider discussions of other vaguer definitions will not be overviewed.

It is also alleged that neoliberalism is an all-encompassing phrase for left-wing academics and their political agendas.[67] On this claim, Clive Barnett contended that neoliberalism might be a 'banal' and 'predictable' term that facilitates 'the ritual enactment of a rote critical identity'.[68] This crucial identity is that of a left-wing academic who aims to create a dichotomy between market and progress, with 'romantic antagonism' between the two.[69] The word 'neoliberalism' also tends to be used by critics instead of the theory's proponents.[70] As a label denoting the critics' dislike, there is a risk that neoliberalism might be considered a 'strawman' philosophy

[61] Weller and O'Neill (n 14) 106, 123; Cf similar ideas in Thorson and Lie (n 58) 1–3.

[62] Phelan (n 58) 2–3.

[63] Davies and Bansel (n 33) 1.

[64] Casey (n 58) 3.

[65] Glendinning (n 17) 9.

[66] Ibid.

[67] Clive Barnett, as cited in Phelan (n 58) 3.

[68] Ibid.

[69] Ibid 8, 10.

[70] Thorson and Lie (n 58) 1–3.

without any inherent substance. Here, it is worth mentioning that there are those on the right side who embrace and defend the term.[71] In this thesis, the various discussions (e.g., comparing a 'liberal arts v vocational' approach to education) also predate the term 'neoliberalism' and the suggested left–right dichotomy. Instead, neoliberalism is considered a useful shorthand for the privatisation of public assets, as well as a set of policy proscriptions that prioritise market mechanisms in all areas of life. This definition in itself is neither political nor vague—rather, it is targetable at certain processes within society.

Finally, it can be argued that neoliberalism is exactly what this thesis has defined: a positive factor.[72] Apologists of the theory have highlighted that neoliberal political parties have created 'positive economic outcomes' that outweigh any detriments of the boom/bust market cycle.[73] Bowman noted that under neoliberal regimes worldwide since the 1980s, 'Extreme poverty has fallen from 44% [in 1981] to 9.6% [in 2017]'.[74] He specifically referenced the drastic reduction in extreme poverty in China, which shifted from its traditional communist roots to a more market-based economy.[75] In embracing the free market and global trade, neoliberal thinkers might also present themselves as more centrist and moderate than the populist insurgencies of the left or right—whether in the form of the protectionism of either Bernie Sanders or Donald Trump.[76] Instead, neoliberal thinkers venerate the opinions of experts to lead people through struggles and ignore populist mandates, which leads to a potentially more stable global order with less-extreme swings in politics.[77] These arguments might be true, but they do not inhibit this thesis using the term in a negative light. An educational experience might be profitable and stable, but it might also be inadequate for students and society. There is no inherent contradiction in this argument, which signifies that the discussion of education below still stands.

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[71] Casey (n 58) 1; Bowman (n 27) 37.

[72] Bowman (n 27) 37; Casey (n 58) 1.

[73] Casey (n 58) 1.

[74] Bowman (n 27) 37.

[75] Ibid.

[76] Ibid 39.

[77] Ibid.

2) How Did the Neoliberal University Arise?

The neoliberal shift in legal education can only be understood by more generally contextualising it in the broader neoliberal shift of Australian universities.

Neoliberal philosophy enters the education space through the privatisation of educational institutions, the creation of educational markets and the introduction of 'performance goals' that track the competitive advantages and disadvantages of one institution against another.[78] These changes begin with the privatisation of public assets or the transformation of public goods into a competitive private 'market'.[79] In the context of universities, 'privatisation' refers to the transformation of universities from publicly funded institutions that aim for the common good (or learning for the sake of learning) to privately funded institutions in a market that aim for profit maximisation (or securing greater funding through numerical outcome competition).[80]

In Australia, neoliberal education emerged from a series of government funding cuts to the university sector, which began in 1975 and extended throughout the following three decades.[81] Australia's investment in higher education is now 'low compared to other industrialized countries'.[82] However, to truly understand this context, it is important to consider the period preceding these events—in the early 1970s, when universities were considered a public good and were generally free for students.

In 1972, Prime Minister Gough Whitlam was elected, along with the policy of making tertiary education free for all Australian citizens.[83] With the new Tertiary Education Assistance Scheme, full-time university places became means tested, which granted

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[78] Davies and Bansel (n 33) 11.

[79] Thornton (n 1) 1–4; Glenn C Savage, 'Neoliberalism, Education and Curriculum' in Brad Gobby and Rebecca Walker (eds), *Powers of Curriculum: Sociological Perspectives on Education* (Oxford University Press, 2017) 143.

[80] Savage (n 79); Dave Hill and Ravi Kumar, 'Neoliberalism and Its Impacts' in Dave Hill and Ravi Kumar (eds), *Global Neoliberalism and Education and Its Consequences* (Routledge, 2009) 20–1; David R Shumway, 'The University, Neoliberalism, and the Humanities: A History' (2017) 6(4) *Humanities* 83.

[81] Rebecca Barrigos, 'The Neoliberal Transformation of Higher Education' [2013] (6) *Marxist Left Review* 3.

[82] Jeannie Rea, 'Critiquing Neoliberalism in Australian Universities' (2016) 58(2) *Australian Universities Review* 9.

[83] Matthew Knot, 'Gough Whitlam's Free University Education Reforms Led to Legacy of No Upfront Fees', *Sydney Morning Herald* (online at 21 October 2014) <https://www.smh.com.au/politics/federal/gough-whitlams-free-university-education-reforms-led-to-legacy-of-no-upfront-fees-20141021-119bws.html>.

greater access to lower socio-economic students.[84] It was stated that 'hundreds of thousands of students studied without incurring debt, two-thirds also receiving income support'.[85] Free tertiary education was marketed as a method for increasing access and diversity, as well as one for training a new generation of professional services workers for the growing services economy.[86] In principle, free education made university a public good and removed it from the private market and competition.[87] Universities could rely almost exclusively on the government for their income rather than private investors or private student loans.[88]

However, the experiment of free education was almost immediately placed in jeopardy. Gough Whitlam was dismissed in 1975 by the governor-general, and he was succeeded by a conservative Liberal government under Malcolm Fraser.[89] Facing the prospect of a continued economic recession (which began in 1973–19974), the new Fraser government began implementing a series of aggressive neoliberal policies.[90] These included funding cuts to public services, but they fell short of a full-scale deregulation of private industry.[91] According to most accounts, Fraser was a relatively light-handed neoliberal prime minister compared to his successors.[92] For example, despite its economic difficulties, the government did not reintroduce student fees for universities.[93] Instead, it commissioned the Williams Report, chaired by a former University of Sydney vice-chancellor, to examine university-sector reforms.[94] The Williams Report focused less on the notion of education as an individual's right and more on the matching of education with economic goals and numerical outcomes.[95]

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[84] Alan Barcan, *A History of Australian Education* (Oxford University Press, 1980) 392–3.

[85] Hannah Forsyth, *A History of the Modern Australian University* (NewSouth, 2014) 88.

[86] Barrigos (n 81) 3.

[87] Knot (n 83).

[88] Barcan (n 84) 392.

[89] Barrigos (n 81) 3.

[90] Jennifer Mays, *Basic Income, Disability Pensions and the Australian Political Economy* (Macmillan, 2020) 181.

[91] Barrigos (n 81) 4; Jonathan Swarts, *Constructing Neoliberalism: Economic Transformation in Anglo-American Democracies* (University of Toronto Press 2013) 200.

[92] Barrigos (n 81) 4; Swarts (n 91) 200.

[93] Bruce Chapman, *Austudy: Towards a More Flexible Approach* (Australian Government Publishing Service, 1992) 46, as cited in Hastings, 'Commonwealth Student Financial Programs' 9.

[94] Forsyth (n 85) 96.

[95] Ibid 97.

This included the neoliberal priorities of the market and the numerical measurements of outcomes in educational institutions.[96] Based on the report's findings, the government radically cut back on existing university grants and loan schemes, including income support for students.[97] Consequently, 'The proportion of students receiving some form of government assistance fell sharply, from 70 percent in 1976 to 40 percent in 1982'.[98] This marked the start of the federal government's withdrawal from the university sector, and it foreshadowed other neoliberal policies in the decades to come.

The subsequent Labor government under Hawke–Keating drove the neoliberal agenda to its natural conclusion: a semi-privatised university system.[99] In 1983, the new Labor Party came to power during 'the worst economic crisis since the Great Depression'.[100] The party immediately implemented an 'Accord' that was signed with the Australian Council of Trade Unions (ACTU).[101] In exchange for guaranteed political support, the ACTU would agree to halt the 'wage growth by indexing it to inflation'—and the government promised to offset this with increased spending, progressive taxes and social benefits.[102] Realistically, the government reneged on its side of the bargain. By 1984, the Hawke–Keating government had adopted a series of neoliberal economic policies, including a commitment 'not to increase taxation, government expenditure, or the size of the budget deficit'.[103] Other neoliberal policies followed, including 'industry deregulation, privatization of public assets, corporatisation of government departments' and 'free trade' deals.[104]

In 1987, John Dawkins became the Labor government's Minister for Employment, Education and Training, in which he instigated significant reforms to tertiary

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[96] Brown (n 6).

[97] Chapman (n 93) 9; Forsyth (n 85) 98.

[98] Chapman (n 93) 9.

[99] Elizabeth Humphrys and Damien Cahill, 'How Labour Made Neoliberalism' (2016) 43(4–5) *Critical Sociology* 2–3.

[100] Ibid 10.

[101] Ibid.

[102] Ibid 10–11.

[103] Ibid 13.

[104] Ibid 13.

education.[105] The Dawkins reforms, as they came to be known, solidified much of the neoliberal agenda.[106] The reforms made three main changes to the tertiary education system: they linked public funding of universities to 'national objectives', merged Australian colleges and universities and abolished free tertiary education.[107] Of the three, the funding changes were not purely neoliberal, as the 'national objectives' included 'economics, society and culture' (as opposed to market-based economics alone).[108] However, the merging of colleges and universities had a more profound effect. Student numbers at universities steeply increased from '393,000 in 1987 to 650,000 in 1997'.[109] Despite the recommendations of the 1987 Pearce Report, law schools also increased in number by 16 from 1989 to 1997, with 10 more opening in the following two decades.[110] The final change of the neoliberal reforms was the abolition of free tertiary education.[111] In 1989, the Labor government reintroduced university fees under the HECS model, effectively abolishing the Whitlam 'free education' reforms of the 1970s and turning universities into a semi-privatised market.[112]

The points listed above do not intend to argue that neoliberalism was the only factor that higher education institutions faced in the 1980s. Forsyth suggested that elements of 'esteem' were also involved and that universities were increasingly pressured by both the newly dominant global university ranking systems and the general public to perform well.[113] MacIntyre highlighted that Australian policy was merely following global trends in higher education and that the push to link research to commercial goals originated from a concern with the country's economic circumstances at the

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[105] David Barker, *A History of Australian Legal Education* (The Federation Press, 2017) 100.

[106] Peter Burdon, 'Neoliberalism in Legal Education Research' in Ben Golder et al (eds), *Imperatives for Legal Education Research: Then, Now and Tomorrow* (Routledge, 2019).

[107] Ibid; Barker (n 105) 100; Humphrys and Cahill (n 99) 10.

[108] Burdon (n 106) supra note 12.

[109] Barker (n 105) 100.

[110] Ibid 99.

[111] Humphrys and Cahill (n 99) 10.

[112] 'Making Students Pay—30 Years Since the End of Free Education', *Solidarity* (Web Page, 19 February 2019) <https://www.solidarity.net.au/highlights/making-students-pay-30-years-since-the-end-of-free-education/> ('Making Students Pay').

[113] Forsyth (n 85) 144–5.

time.[114] Exploring these lines of thought are currently beyond the scope of this thesis, but it is worth mentioning that other factors besides privatisation might have been present.

The further privatisation of Australia's public universities has been gradual but persistent since the 1980s. After the Hawke–Keating government, successive governments further cut university funding on both sides of politics.[115] In the Howard government, universities received significant funding cuts, including the single largest cut in Howard's 1996 budget.[116] The Abbott government tried a further round of cuts in the 2014 budget, but it buckled due to backlash from the Australian public.[117] However, the latest proposals to deregulate the sector occurred with a sense of inevitability, given the history of prior government proposals turning in that direction.[118]

The trend of all federal governments since Whitlam has been to shift towards decreasing public funding for universities, within the philosophical framework of neoliberalism. As a political philosophy, neoliberalism emerged in the 1980s and 1990s as an ideology that promoted the 'deregulation, privatization and the withdrawal of the state from many areas of social provision'.[119] At the heart of neoliberalism was the belief that the free market should determine the course of human society. If a service or institution is not a market, then it should become one.[120] Under this model, universities are increasingly expected to compete and gain a market share of prospective students.[121] Funding cuts are intended to ensure the efficiency of university services. Due to the pressure of increased competition, universities are

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[114] Stuart McIntyre, *The Poor Relation—A History of Social Sciences in Australia* (Melbourne University Press, 2010) 328–9.

[115] 'Making Students Pay' (n 112).

[116] Perla Astudillo, 'More Plans to Deregulate and Privatize Tertiary Education in Australia', *World Socialist Web Site* (Web Page, 13 November 1999) <https://www.wsws.org/en/articles/1999/11/edu-n13.html>.

[117] Knot (n 83).

[118] Richard Hil, *Selling Students Short: Why You Won't Get the University Education You Deserve* (Allen & Unwin, 2015) 1.

[119] Lawrence Busch, *Knowledge for Sale: The Neoliberal Takeover of Higher Education* (MIT Press, 2017) 13.

[120] Meg Luxton and Susan Braedley, *Neoliberalism and Everyday Life* (McGill-Queen's Press, 2010) 10.

[121] Forsyth (n 85) 110.

expected to produce more research and create more market-oriented student graduates.

According to Thornton, the shift towards neoliberalism harkened a new age of university policies—ones that were driven by market forces rather than other potential goals (e.g., social justice or a liberal arts education).[122] Forced to 'compete' in the open market for a share of prospective students with less government funding, the universities had little option but to raise the cost of tuition.[123] Students were forced to acquire larger student debts.[124] This increasing student debt compelled students to regard their education as a product and themselves as consumers.[125] Students could no longer learn for the sake of learning; learning had been 'replaced with a "consumer" mindset where students focused on "getting what you pay for"'.[126] Universities, in turn, had to sell their services to students. They did so by prioritising certain numerical outcomes that student 'customers' value, including employability outcomes, graduate attributes, global university rankings and lists of famous alumni.[127]

In addition to funding cuts was an increasing number of universities worldwide, which significantly increased competition for what little public funding remained. As more 'research' universities were created (some with '20,000 or more' students), it has been argued that the 'gulf between academic staff and students' increased even further.[128] However, the expansion of universities did allow students from lower socio-economic backgrounds to access institutions that were once reserved for the elite (or the gentlemanly), as described in the previous history section.[129] Nevertheless, the neoliberal shift might have prompted professors to prioritise

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[122] Thornton (n 1) 3–4; Cf Busch (n 119) 13.

[123] Forsyth (n 85) 110.

[124] Ibid; Thornton (n 1) 4.

[125] Busch (n 119) 12–14.

[126] Ibid.

[127] Nave Wald and Tony Harland, 'Graduate Attributes Frameworks or Powerful Knowledge' (2019) 41(4) *Journal of Higher Education Policy and Management* 2; Kathleen Lynch, 'New Managerialism, Neoliberalism and Ranking' (2013) 13 *Ethics in Science and Environmental Politics* 2–4.

[128] William Twining, *Blackstone's Tower: The English Law School* (Stevens and Sons, 1994) 49.

[129] Stuart Macintyre, Andre Brett and Gwilym Croucher, *No End of a Lesson: Australia's Unified National System of Higher Education* (Melbourne University Press, 2017) 11.

research over the needs of students—and students similarly felt that they should prioritise their careers over their education.[130] As more professors were hired, they increasingly 'closed their doors' to students and became isolated and detached from the teaching experience.[131] The focus of universities turned towards yearly audits and research numbers that differentiated one institution from the next.[132] Institutions aimed to raise themselves higher in the global university rankings.[133]

It is possible that Thornton, James and the other critics of neoliberalism argued too far by implying that neoliberalism was the sole driver of the changes to education. Some observations can be made as a counterargument: the changes to education were less neoliberal than they might have first appeared. First, the merging of universities and colleges in the 1980s during the Dawkins reforms (which were often framed as neoliberal in nature) contradicted the neoliberal notion of increasing competition in the market.[134] Concurrently, deregulation, a central pillar of neoliberalism, never occurred in the Australian university sector.[135] Finally, the government did not withdraw completely from the university sector in the 1980s and 1990s. Indeed, the Dawkins reforms linked the government funding of universities to 'national objectives' that pertained to economics, society and culture.[136] A truly neoliberal agenda would place fewer government imperatives on universities rather than more. It is possible that other forces contributed to the vocational shift of universities beyond a strictly neoliberal agenda.

Further, Thornton, James and the other critics might have overplayed the negative aspects of neoliberal policies while ignoring the potential advantages. As discussed in the previous definition section, neoliberal policies have been responsible for numerous positive effects on society—such as reducing global poverty, continuing

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[130] Ibid 50; as mentioned by Brian Tamanaha, in Massachusetts School of Law at Andover, 'Failing Law Schools—A Moral Disaster: An Interview with Brian Tamanaha' (YouTube, 2 August 2012) 00:00:00–01:00:00 <https://www.youtube.com/watch?v=2oyEQOcTgow>.

[131] Tamanaha (n 130).

[132] Busch (n 119) 1.

[133] Ibid.

[134] Burdon (n 106) 4.

[135] Jeffrey Goldsworthy, 'The Law and the Profits' (2013) 55(1) *Australian Universities Review* 92–3, as cited in Burdon (n 106) 4.

[136] The Dawkins Reforms were less neoliberal than they first appear; Burdon (n 106) 2 supra note 12.

more moderate (and less politically extreme) policymaking and offering the freedom of choice to students who study under a neoliberal education model. Bowman highlighted that under neoliberal policy regimes since the 1980s, 'Extreme poverty has fallen from 44% [in 1981] to 9.6% [in 2017]'.[137]

In an educational context, a similar argument is often made about the democratisation of education for the poor. The proliferation of Australian universities in the 1970s and 1980s led to an increased number of students attending university generally, including an increased number of lower socio-economic students.[138] The participation of this student cohort increased from 15.69 per cent in 2006 to 17.01 per cent in 2011 and continued to increase in 2013.[139]

Even if the quality or content of education had somehow been altered, it could be argued that the benefits of neoliberalism outweighed the costs—at least to women in the law school context and the disadvantaged in the university context.[140] Further, if students from a lower socio-economic background could access higher education more generally, then their needs would be different from those of traditional upper-class university students (e.g., requiring a more vocational approach); this signifies that a change of focus in education is less about neoliberalism itself and more about class needs. Nevertheless, as the civil rights activist WEB du Bois argued, just because someone comes from a disadvantaged background does not mean that he or she should be deprived of a broader liberal arts education.[141] Du Bois suggested that 'future leaders in the African-American community deserved a college level liberal education—that is, the best kind of higher education, not just narrow occupational training'.[142] It might be that lower socio-economic students deserve this same opportunity and that the neoliberal turn is detrimental to their interests.

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[137] Bowman (n 27) 37.

[138] For the increasing number of students, see Nick Parr, 'Who Goes to University? The Changing Profile of Our Students', *The Conversation* (online at 25 May 2015) <https://theconversation.com/who-goes-to-university-the-changing-profile-of-our-students-40373>.

[139] Ibid; Trevor Gale and Stephen Parker, *Widening Participation in Australian Higher Education* (CFE, 2013) 15.

[140] Casey (n 58) 1.

[141] Carol G Schneider, 'Practicing Liberal Education: Formative Themes in the Reinvention of Liberal Learning' (2004) 90(2) *Liberal Education* 6.

[142] Ibid.

Students were said to benefit from the neoliberal shift in universities because they had more 'choice'.[143] Students had more choices after the expanding number of universities and, for relevant purposes, the number of law schools (an additional 26 between 1987 and 2015).[144] Additionally, greater competition between universities was said to provide more choices to the student 'consumers' regarding which university they should attend according to the best value for money. Students were said to be free from the 'bureaucratic restraint' of governments that interfered in their daily lives, and they were thus free to pursue 'whatever work [or course, they wanted to pursue], and to sell [their] labour … for a wage that reflects' the value of that work.[145] However, this freedom tended to result in students becoming more driven by financial incentives than an urge to learn.[146]

However, neoliberal policies have also had unintended side effects on student culture, such as increased competition between students and choice paralysis. Forced with new public or private debt, students began to devalue education as an end in itself because they could not afford it.[147] Instead, they increasingly wanted a return on their investment—job skills and a graduate job linked to their degree—so that they could ensure they profited from their degree.[148] Of course, these vocational conceptions of education have always existed, but neoliberal policies (privatisation and the consequent competition between universities) have made them the dominant conceptions of higher education in the minds of students.[149] As degrees have increased in cost, students have correspondingly increased their focus on vocation. Modern students are considered 'consumers' of education, and they are 'individualised' into becoming 'entrepreneurs of the self' who aim to obtain their money's worth.[150] Students perceive the core ideal of neoliberalism (individual

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[143] Brian Howe, *Weighing Up Australian Values: Balancing Transitions and Risks to Work and Family in Modern Australia* (UNSW Press, 2007) 60.

[144] Barker (n 105) 99.

[145] Ibid; Luxton and Braedley (n 120) 10; Helga Leitner, Jamie Peck and Eric S Sheppard (eds), *Contesting Neoliberalism: Urban Frontiers* (The Guilford Press, 2007) 4.

[146] Luxton and Braedley (n 120) 9.

[147] Hill and Kumar (n 80); Thornton (n 1) 8.

[148] Hill and Kumar (n 80); Thornton (n 1) 8.

[149] Hill and Kumar (n 80); Thornton (n 1) 8; Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, 2015) 2–5.

[150] Davies and Bansel (n 33) 7–8.

freedom) as universities competing through differentiation for their money. However, the result of these freedoms is just as often 'ambivalence, confusion, doubt, failure and anxiety', as the choices seem overwhelming and the push to 'maximize individual potential' draining.[151] The ultimate effect of neoliberalism was this realignment of student culture, in which students became more motivated about attaining lifelong employment in an upward trajectory towards the richest positions in society.[152]

In addition to a shift in student culture was a shift in academic culture. Neoliberalism pushed academics beyond the 'publish or perish' mantra and, since at least 2016, towards a model that focused on collaboration with industry.[153] Teaching began to reflect the desires of the market, the employer and the newly commercialised student. Under a numeric and outcomes-focused approach, staff began to prioritise their research so that they could boost global university rankings.[154] University global rankings rely on consistently cited publications, which pressures academics to prioritise their research over their teaching and their research papers over their students.[155] Academics are ranked according to 'both the productivity and citation impact' of all published work.[156] In this way, professors have been pushed into a neoliberal imperative to quantify everything by numbers.[157]

A focus on numerical outcomes changes the nature of university education—in that every class, subject and teacher is forced to focus on outcomes rather than processes, on employability rather than knowledge and résumé points rather than a student's

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[151] Granted, this is not the guaranteed outcome, as some students would enjoy this freedom; however, it is an unintended side effect of policies that are aimed at individual liberty. For more, see Davies and Bansel (n 33) 13.

[152] Ibid 2–4.

[153] Paul Kniest, 'Universities Expected to Drag Business out of the Dark Ages' (2016) 23(1) *Advocate: Journal of the National Tertiary Education Union*; Doug Hodgson, 'Higher Legal Education in Australia: Historical Perspectives' (2016) 43(10) *Brief.*

[154] Zeena Feldman and Marisol Sandoval, 'Metric Power and the Academic Self: Neoliberalism, Knowledge and Resistance in the British University' (2018) 16(1) *TripleC* 221; Justin Micah Pack, 'Academics No Longer Think: How the Neoliberalization of Academia Leads to Thoughtlessness' (PhD Thesis, University of Oregon, 2015) 1–2; Brown (n 149) 196.

[155] Feldman and Sandoval (n 154); Pack (n 154); Margaret Thornton, 'Legal Education in the Corporate University' (2014) 10(1) *Annual Review of Law and Social Sciences* 19.

[156] Izet Masic, 'H-Index and How to Improve It?' (2016) 10(1) *Journal of Ultrasound in Obstetrics and Gynecology* 83–4.

[157] Paula Baron, 'A Dangerous Cult: Response to "the Effect of the Market on Legal Education"' (2013) 23(2) *Legal Education Review* 283.

intrinsic worth as a well-rounded human being.[158] Staff and students can easily misconstrue anything that does not contribute to a university's outcomes or rankings as superfluous, and it can consequently be cut from the curriculum.[159] The effect of performance-based outcomes is thus profound:

> Academics deliver products to consumers and those products can be assessed in the same way we assess any product or commodity: in terms of satisfying consumer preferences. Moreover, the university as a part of wider society should also be judged in terms of its service to national (or more generally commercial) economic goals and interests.[160]

It should be noted here that the critiques of US authors should be interpreted within their proper context. The works of universities, and specifically law schools, differ from jurisdiction to jurisdiction, as do the perceived influences of neoliberalism.[161] Concurrently, parallels can be drawn between the kinds of critiques that were made and the kinds of effects that neoliberal educational policy had on students, even if these effects occurred in different educational contexts. This thesis does not aim to definitively claim that neoliberalism has affected all universities (or law schools) in the same way; it merely intends to highlight examples in different countries of a possible neoliberal shift in focus.

3) The Neoliberal Shift in Australian Universities: A Feature Not a Bug

Since the early 2000s, warning signs have been noted regarding the health of our democracies; it has been threatened by universities being abandoned as communities of intellectuals in favour of a new model that is driven by a 'market forces' and a 'user pays' mentality.[162] Prolonged funding cuts in the 1980s and 1990s, as well as the dominance of neoliberal policies at the time, changed the old university system

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[158] Ibid; Hill and Kumar (n 80); Thornton (n 1) 8.

[159] Hill and Kumar (n 80); Thornton (n 1) 8.

[160] Although this thesis focuses on vocational outcomes, Glendinning clarifies that 'national' goals can also be important: Glendinning (n 17) 10–11.

[161] Fiona Cownie and Anthony Bradney, 'Gothic Horror? A Response to Margaret Thornton' (2005) 14(2) *Social and Legal Studies* 277.

[162] John Smyth and Robert Hattam, 'Intellectual as Hustler: Researching Against the Grain of the Market' (2000) 26(2) *British Educational Research Journal* 157–8.

and replaced it with a newly commercialised university 'industry'.[163] Forced to compete in the open market, universities shifted their internal practices away from knowledge accumulation and towards profit. Students were no longer regarded as students but as customers; tutors were no longer regarded as tutors but as employees; research was no longer regarded as an end in itself but as a means to an end (the increase of global university rankings).[164] This had correspondingly influenced internal decisions regarding the content of the internal curriculum.[165] The curriculum in several major universities began to reflect the desires of employers rather than those of students. Consequently, students began to learn that the market was the key determinant of their future success, and that their entire lives were a function of their employability.

Law schools were not immune to these changes. In Australia, the 1987 Pearce Report found that 'all law school[s] surveyed' were following the broader 'increased focus on skills acquisition across universities [generally]'.[166] Law schools were increasingly pressured into providing practical and international courses and legal clinics to help students compete in the 'global marketplace'.[167] Student 'customers' began demanding more corporate law electives over time, in the hope that these electives would boost their chances of employment at graduation.[168] Throughout the 2000s, law students were especially regarded as having become focused on corporate interests rather than public interests under a privatised university system.[169] Students prioritised high-paying jobs and feared 'that a public interest career' would 'not

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[163] Colin Symes et al, 'Working Knowledge: Australian Universities and "Real World" Education' (2000) 46(6) *International Review of Education* 566; Terry Hyland, 'Vocationalism, Work and the Future of Higher Education' (2001) 53(4) *Journal of Vocational Education and Training* 677.

[164] Chris Duke, 'Is There an Australian Idea of a University' (2004) 26(3) *Journal of Higher Education Policy and Management* 307–8.

[165] Hyland (n 163) 677.

[166] Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (AGPS, 1987), as quoted in Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Developments in Law' (Report, Australian Universities Teaching Committee, 2003) 15.

[167] Duncan Bentley and Joan Squelch, 'Employer Perspectives on Essential Knowledge, Skills and Attributes for Law Graduates to Work in a Global Context' (2014) 24(1) *Legal Education Review* 96; Charles JG Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (The Federation Press, 1999) 132, 146.

[168] Stephen C Halpern, 'On the Politics and Pathology of Legal Education (or Whatever Happened to the Blind-Folded Lady with the Scales?)' (1982) 32(3) *Journal of Legal Education* 383, 385, as cited in Tamara Walsh, 'Putting Justice Back into Legal Education' (2008) 17(1) *Legal Education Review* 126.

[169] Thornton (n 1) 48.

generate sufficient income to repay a substantial higher education debt'.[170] Although law schools had historically been predisposed to vocational education (as evidenced in Part 1 of this thesis), neoliberalism had offered a new edge and strictness to the curriculum; it made alternative education models increasingly difficult to implement.

Divided into two parts, this section will consider the challenges that the increasing vocational focus of law schools poses to students, the curriculum and society. First, it will conduct a broad overview of how neoliberalism has influenced the curriculum over time. This includes examining the evidence of vocationalism in Australia's major law schools and how it affected the curriculum. Second, this section will track the effects of neoliberal education policies on students and society. Specifically, it will discuss how law students have missed the opportunity for an education that includes moral critiques, creative thinking and critical insight. Law schools had once produced lawyers who were trained in public service, but today's law schools produce students who might consider law as morally or politically neutral, who cannot critique the law's faults and virtues and who accept the law's authority at face value. However, this style of education is not apolitical; it only masks the true political objective of implementing and protecting neoliberal market forces.[171]

4) Neoliberalism in Australian Law Schools

The neoliberal shift in Australian higher education, marked by decreased public funding for universities, has strongly affected law schools. After the federal government cut public funding for universities from the 1970s to 1990s, universities were forced to create new faculties to secure more lucrative student loans.[172] Law schools were considered a great return on investment, as they cost little to establish but could attract large numbers of fee-paying students.[173] New and old universities, as well as those that lacked the faculty, established law schools. This significantly increased the numbers of law schools across Australia and, consequently, the number

[170] Ibid 47.

[171] Thornton (n 1); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (Afar, 1983) 54.

[172] Thornton (n 1) 20.

[173] Ibid.

of law graduates nationwide.[174] The new faculties encountered 'a virtually unstoppable demand for law places' due to the social prestige of law, which meant that the universities could charge high prices for the degree and thus increase their income to offset reduced state funding.[175] Law, with its history in vocational education, could also be sold as a vocational degree with more job prospects. This vocational focus (again, caused by a neoliberal withdrawal of state funding) was embodied in the content, teaching style and assessment structure of the legal education curriculum; it highlighted a focus on corporate values, employability outcomes and jobs skills above other perspectives on education.[176]

Within a neoliberal framework (in which universities competed with each other for prospective students), the core purpose of a law school became to prepare students for their future jobs in the employment market.[177] Consequently, job-related skills were considered more important than other educational experiences, and students were regarded as customers and tutors as freelance employees.[178] Law schools were treated as trade schools rather than a critical institution, and they aimed to teach law students to 'think like a lawyer' rather than for themselves.[179] The increased number of law students and law schools also posed the risk of isolating students from their professors and creating a detached educational experience.[180] This correlates with a finding in the *Breaking the Frozen Sea* report, which was written by ANU Law students.[181] Interviewed law students stated:

> *I felt like most of the lecturers I've had were too busy to meet up with students.*
>
> *I guess I hoped for encouragement, inspiration, mentorship, confidence-building … I've definitely not received those things.*

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[174] Ibid.

[175] Ibid xii.

[176] Ibid 5–8.

[177] Hill and Kumar (n 80); Thornton (n 1) 8.

[178] Hill and Kumar (n 80); Thornton (n 1) 8.

[179] Hill and Kumar (n 80); Thornton (n 1) 8.

[180] Tamanaha (n 130).

[181] Anna Boag et al, *Breaking the Frozen Sea: The Case for Reforming Legal Education at the Australian National University* (Law School Reform Committee, 2010) 22–4.

The lecturers can be a little impersonal, aloof and in some cases harsh.

[There is] no room for friendly interaction with lecturers.

Vocational education predates the rise of neoliberalism, and students were indeed taught common law with a vocational focus since the 1200s at the Inns of Court in London.[182] However, the philosophy of neoliberalism has come to influence and correlate with the rise of a vocational focus as one of the core focuses of legal education in Australia. In addition to some other factors, it has led to a curriculum that can sometimes exclude other areas of knowledge that were historically valued,[183] such as legal history, legal philosophy, political philosophy, civics and ethical, moral and religious views of the law.[184]

Vocational education is generally framed in the language of 'skills', 'outcomes' or quantitative outcomes—which signifies that learning is guided towards attaining specific and measurable goals (as opposed to attaining intangible self-realisation).[185] The shift towards a neoliberal education framework in Australian law schools is evident in the prioritisation of these outcomes and job-related skills in the law school curriculum and in its core subjects, assessments and graduate attribute listings.[186]

In 2011, Margaret Thornton conducted the largest study of Australian law schools.[187] The assessment structure of law schools was revealed to enshrine vocational education above all other forms of learning, including learning for the sake of learning, the humanities and critical introspection.[188] Thornton found that law professors prioritised non-critical assessment tasks (e.g., case problem questions) over

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[182] Encyclopædia Britannica, Inc., *Encyclopaedia Brittanica* (online at 18 June 2021), 'Inns of Court: British Legal Association' <https://www.britannica.com/topic/Inns-of-Court>; TW Tempany, 'The Legal Profession in England—Its History, Its Members, and Their Status' (1885) 19 *American Law Review* 677–8.

[183] There are other factors that have influenced Australia's legal education beyond neoliberalism. However, investigating these other factors is beyond the scope of the present thesis; Encyclopædia Britannica, Inc. (n 182); Tempany (n 182); David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar: 1680–1730* (Clarendon Press, 1990); T Raleigh, 'Legal Education in England' (1898) 10(1) *Juridical Review* 1–5.

[184] Encyclopædia Britannica, Inc. (n 182); Tempany (n 182); Lemmings (n 183); Raleigh (n 183).

[185] Encyclopædia Britannica, Inc. (n 182); Tempany (n 182); Lemmings (n 183); Raleigh (n 183).

[186] Encyclopædia Britannica, Inc. (n 182); Tempany (n 182); Lemmings (n 183); Raleigh (n 183).

[187] Thornton (n 1).

[188] Ibid; Busch (n 119) 13.

critical or reflective tasks (e.g., essays).[189] She found that essays were 'no longer regarded as an essential element of law school culture'.[190] In contrast, teaching 'known knowledge' and 'right answers' were considered essential.[191]

At least one critic has described Thornton's work as 'exaggerated', further suggesting that many of the problems linked to neoliberalism predate modern neoliberal philosophy.[192] Thornton also risks generalising her findings of neoliberal education too broadly—she could be portraying an overly dark image of law schools, as well as misrepresenting the actual changes that occur in education in Australia and the many (not singular) causes of these changes.[193] At the core of her book, *Privatizing the Public University*, Thornton suggested that a process of 'marketization' has occurred in law schools, which was caused by universities shifting from public to semi-private institutions.[194] This has led to an increased focus on work skills and the rise of casualised staff and performance metrics.[195] Consequently, there have been changes to the Australian law school curriculum that have made it more vocational, with students focussing on personal career goals.[196] Critics of Thornton suggested that her image is too bleak.[197] Goldsworthy argued that 'law schools have long been deferential to the legal profession, wanting to be noticed and appreciated, especially by the judiciary', and so this perspective is not new.[198] This critique is well placed, but it does not necessarily prove that neoliberalism has not enhanced or extended negative trends linked to vocational education in law schools (which will be argued in greater detail below).

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[189] Thornton (n 1); Busch (n 119) 13.

[190] Ibid.

[191] Ibid.

[192] Goldsworthy (n 135) 93–4.

[193] Ibid.

[194] Burdon (n 106).

[195] Ibid.

[196] Ibid.

[197] Goldsworthy (n 135).

[198] Ibid, as cited in Burdon (n 106).

A second critique of Thornton's work relates to the notion of regarding neoliberalism, and the massification of education, as a net positive.[199] More students studying law might be a positive outcome if the potential democratising effects of increased student enrolments were considered.[200] If more students are attending law school from more diverse backgrounds, then the increased number of law students can be framed as a net positive.[201] However, the reality of the situation is more nuanced than this. As the number of law schools increased in the 1970s and 1980s and overtook most other routes into the legal profession (e.g., apprenticeships), they increasingly sidelined low socio-economic students who had previously taken such alternative routes.[202] As Weisbrot observed, 'University law students typically come from homes which are significantly more affluent than the norm; most attended selective or elite, private secondary schools; their parents mainly have professional or management backgrounds', which contrasted the students from low socio-economic families.[203] What has changed is the number of women who are entering law school. Over the same period, women comprised '11.4 per cent of Australian university law students in 1960, 12.4 per cent in 1968, 22.1 per cent in 1974, 29.1 per cent in 1977, 33.3 per cent in 1980, and 41 per cent in 1984'.[204] The issue is that these women often arrived from the same upper–middle class background as the men, which signified that law schools have not opened to the poor despite increased student numbers.[205]

To offer a more nuanced perspective on Thornton's work, it might be more accurate to describe Australian law schools as a 'hybrid' system rather than a purely neoliberal system (although they retain a neoliberal push towards vocation).[206] Evidence of this can be observed when the government's involvement in the university sector is considered. Under a truly neoliberal system, the government would completely

[199] Burdon (n 106) 4; for more, see Parr (n 138).

[200] Burdon (n 106) 4; for more, see Parr (n 138).

[201] Parr (n 138).

[202] David Weisbrot, 'Recent Statistical Trends in Australian Legal Education' (1991) 2(1) *Legal Education Review* 11.

[203] Ibid.

[204] Ibid.

[205] Ibid.

[206] For the idea of a 'hybrid' system, see Burdon (n 106).

deregulate universities and turn them into a fully private market.[207] Instead, the Australian Government has remained involved in funding universities and, through them, law schools—which signifies that the established system is, to some degree, a hybrid of neoliberal (privatisation) and traditional state-funded education.[208] However, even the absence of a purely neoliberal approach does not signify that neoliberal philosophy has had no effect or has not somehow correlated with the rise of a vocational educational approach. Even if Thornton did not completely substantiate this view, other evidence at play can be observed.

In the same survey of 29 law schools mentioned earlier, every law school in Australia stated that, 'to varying degrees', they considered the 'views of the profession' when they designed their internal curriculum.[209] At least one law school dean met with major corporate law firms every two years to craft a curriculum that best suited the needs of the employer.[210] This notion of the 'employers' voice' has become an essential influence on legal education in Australia; it has shaped curriculum design, assessments and graduate attributes.[211] For example, Bentley and Squelch in 2014 examined the kinds of skills that employers desired from law graduates 'to work in a global context'.[212] Typically, employers preferred students to learn skills and assessments, as well as focus on 'reading and analyzing case law, applying and distinguishing cases [and gaining a] familiarity with legal principles'.[213] Uncoincidentally, these are the types of skills that are taught in law schools today.

The vocational outlook has also been enshrined in the core curriculum's subjects. As mentioned earlier, the Priestley Eleven are 11 compulsory subjects that all law schools in Australia must teach.[214] Introduced in 1992, the subjects coincided with the

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[207] Ibid.

[208] Ibid.

[209] Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Developments in Law' (Report, Australian Universities Teaching Committee, 2003) 227.

[210] Ibid 231.

[211] Elisabeth Peden and Joellen Riley, 'Law Graduates' Skills—A Pilot Study into Employers' Perspectives' (2005) 15(1/2) *Legal Education Review* 94.

[212] Bentley and Squelch (n 167) 96.

[213] Peden and Riley (n 211) 94.

[214] *Uniform Admission Arrangements* (2008) 5 <lawcouncil.asn.au/LACC/images/pdfs/212390818_1_LACCUniformAdmissionRules2008.pdf>; *Legal Profession Admission Rules 2005* (NSW) r 95(1)(b) ('*Legal Profession Admission Rules*').

Hawke–Keating governments' introduction of neoliberal philosophy in Australia.[215] The Hawke–Keating government instigated several reforms to privatise state assets, deregulate industry and encourage services to become markets.[216] The timing might be coincidental, but neoliberalism as a philosophy certainly helped entrench the vocational nature of the subjects over time.[217] The Priestley Eleven were narrowly focused on 'substantive' and doctrinal law rather than on extrinsic lessons in ethics, morality or politics (aside from a legal ethics subject itself).[218]

At their core, the Priestley Eleven represent a vocational and black-letter law—they focus on teaching students technical legal skills in case analysis, as well as knowledge about legal doctrine and legal principles.[219] They include core, black-letter law units such as torts, equity, contracts, administrative law, evidence, corporations law, property, constitutional law and civil and criminal procedure. Black-letter law subjects tend to focus on what the law is rather than on what it should be, and it tends to normalise the conception of law as an objective, neutral and passive force in society.[220] These subjects tend to be 'saturated with scenario-based learning through problem solving' questions instead of learning through essays or other critical engagement tools.[221]

The Priestley Eleven, having been written by the law admission authorities of each state, aim to prepare law students for graduate employment in the legal profession.[222] It is worth considering that there are 11 compulsory subjects—almost all vocational—

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[215] Paul Dibley-Maher, 'Friend or Foe? The Impact of the Hawke–Keating Neoliberal Reforms on Australian Workers in the Australian Public Sector (Master's Thesis, Queensland University of Technology, 2012) 6–10; Jean Parker, 'Labor's Accord: How Hawke and Keating Began a Neo-Liberal Revolution' (12 October 2012) *Solidarity* <https://www.solidarity.net.au/mag/back/2012/50/labors-accord-how-hawke-and-keating-began-a-neo-liberal-revolution/>.

[216] Dibley-Maher (n 215); Parker (n 215); Keshia Jacotine, 'Was Embracing the Market a Necessary Evil for Labour and Labor?', *The Conversation* (online at 25 August 2017) <https://theconversation.com/was-embracing-the-market-a-necessary-evil-for-labour-and-labor-81612>.

[217] Thornton (n 1).

[218] *Uniform Admission Arrangements* (2008) 5 <lawcouncil.asn.au/LACC/images/pdfs/212390818_1_LACCUniformAdmissionRules2008.pdf>; *Legal Profession Admission Rules* (n 214).

[219] Ibid; *Legal Profession Admission Rules* (n 214).

[220] Michael Robertson et al (eds), *The Ethics Project in Legal Education* (Routledge, 2011) [8.3.3].

[221] Ibid.

[222] LACC, 'Background Paper on Admission Requirements' (Background Paper, LACC, 1992) 1–2 <http://www.lpab.justice.nsw.gov.au/Documents/background_paper_on_admission_requirements_211010.pdf>.

that all law students must complete. This is far more than the compulsory admission requirements for students at universities in Canada (seven subjects), the UK (five subjects) and US (no subjects).[223] The status quo in Canada, the UK and US is that law schools should be free to set their own curriculum, with less direct control from the profession or industry bodies. This offers law schools in these jurisdictions the opportunity to prioritise subjects that are non-vocational in nature.[224] No such opportunity exists in Australia.

The narrow focus of the Priestley Eleven subjects has received sustained criticism in recent years. The subjects have been described as not being vocational enough. Nick James, dean of Bond Law School, has described the Priestley Eleven as outdated and incapable of meeting the demands of new subjects (e.g., in technology, block chain).[225] According to James, the Priestly Eleven are 'not keeping up with reality'.[226] Kate Galloway has argued that, even in practical terms, the Priestley Eleven do not meet the needs of modern lawyers, 'as the profession transforms'.[227] Neil Rees has similarly suggested that the Priestley Eleven aim 'to provide law students with the essential content for something which really no longer exists—a career as a solicitor in general practice'.[228]

As far back as 1999, Chief Justice French described the Priestley Eleven as being a 'dead hand' on curriculum reform—one that prevents innovation in what law schools could offer their students.[229] It has also been critiqued that so few Priestley Eleven subjects (only three, in one case) focus on how law affects marginal groups or even

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[223] Taskforce on the Canadian Common Law Degree, *Consultation Paper* (Federation of Law Societies of Canada, 2008) 10–11; American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools (2015–2016)* (American Bar Association, 2015) Standard 302(a).

[224] Taskforce on the Canadian Common Law Degree (n 223); American Bar Association (n 223).

[225] Nick James, as quoted in Grace Ormsby, 'Priestley 11 "Not Keeping Up' with Reality', *Lawyers Weekly* (online at 26 May 2019) <https://www.lawyersweekly.com.au/biglaw/25707-priestley-11-not-keeping-up-with-reality>.

[226] Ibid.

[227] Kate Galloway, 'The Legal Profession's "Black Swan" Problem', *Katgallow* (Blog Post, 17 June 2017) <https://kategalloway.net/2017/06/17/the-legal-professions-black-swan-problem/>.

[228] Neil Rees, 'I Look Ahead' (Speech, Sir Ninian Stephen Lecture, University of Newcastle, 10 September 2015) 22.

[229] Sampford, Blencowe and Condlin (n 167) 132, 146.

how law affects society.[230] There is a consensus among the authors mentioned above that a broader curriculum (in the liberal arts, technology or social justice) is not possible if the Priestley Eleven remain established.[231]

Despite sustained pressure to abolish or change the Priestley Eleven, the LACC's recent reviews have cemented the committee's role and made the subjects even more vocational. From 2015 to 2016, the LACC reviewed the Priestley Eleven requirements.[232] Somewhat ironically, the review began by immediately limiting its scope, rejecting various proposals for changes and reinforcing existing arguments.[233] Key to this was rejecting the Productivity Commission's recommendation to abolish the compulsory subjects, which the LACC stated 'lacked accuracy and rigour'.[234] The LACC proceeded to defend compulsory subjects in general, repeatedly referring to the need for 'threshold competence', 'threshold academic knowledge' and 'threshold knowledge [and] skills'.[235] It concluded with only minor changes to the descriptions of two core subjects.[236]

In 2019, the LACC again reviewed the Priestley Eleven subject requirements.[237] However, this time, the committee sought to revise the description of every subject, to support 'a more general move to express academic requirements in terms of 'outcomes,' as well as support the threshold learning outcomes for law courses.[238] This outcome-oriented approach is an acknowledgement of the neoliberal framework of modern law schools. The latest report repeatedly emphasised the importance of skills and vocational knowledge as being the core knowledge necessary in law

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[230] Justin Pen, 'Consider the Law School', *Honi Soit* (Web Page, 13 March 2014) <http://honisoit.com/2014/03/consider-the-law-school/>.

[231] James (n 225); Galloway (n 227); Rees (n 228); Pen (n 230).

[232] LACC, 'Review of Academic Requirements' (2015–16) <https://www.lawcouncil.asn.au/resources/law-admissions-consultative-committee/review-of-academic-requirements>.

[233] Ibid.

[234] Ibid 3.

[235] Ibid 3–6.

[236] Letter from the Family Law Section of the Law Council of Australia (n 232).

[237] Law Admissions Consultive Committee, 'Redrafting the Academic Requirements for Admission' (Web Document, 2019) <https://www.legalservicescouncil.org.au/Documents/redrafting-the-academic-requirements-for-admission.pdf>.

[238] Ibid.

schools.[239] Nick James has noted that this latest review did not reach far enough and that it focused on simply 'rewording the Priestley 11, not changing the Priestley 11'.[240] The report itself acknowledged that 'the present 11 prescribed areas have proved to be extremely difficult to change'.[241] Given that the LACC is the only body that can change the Priestley Eleven, this makes any future change to the subject list unlikely. Instead, the vocational outlook is firmly established for the foreseeable future.

The neoliberal framework of Australian law schools is not only evident in the core subjects but also in the proscribed graduate attributes. As early as 1994, Australian law schools were already following a broader 'increased focus on skills acquisition across universities'.[242] This was established in the mid-2000s with the introduction of graduate attributes.[243] Graduate attributes helped shape the focus of education by guiding professors into teaching to numeric or qualitative 'employability' metrics.[244] Today, all teaching at a law school, to one degree or another, must meet a graduate attribute—that is, all teaching must contribute to the student's employability.[245] This is reinforced by Australia's QS Graduate Employability Ranking,[246] a yearly ranking system that aims to level each university according to the employability of its students.[247] These metrics guide teaching and content, and they pressure law schools to focus on employability above other areas.[248] They are an essential part of neoliberal doctrine, in which everything must be measured (including students).

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[239] Ibid.

[240] James (n 225).

[241] Law Admissions Consultive Committee (n 237).

[242] Johnstone and Vignaendra (n 209) 15.

[243] Bentley and Squelch (n 167) 96.

[244] Ibid.

[245] Ibid.

[246] Quacquarelli Symonds Limited, 'QS Graduate Employability Ranking', *QS Top Universities* (Web Page, 2017) <https://www.topuniversities.com/university-rankings/employability-rankings/2017>; 'Macquarie University Graduate Destination Survey' (MQGDS April 2016 Final Report, Macquarie University, 4 July 2016) <https://www.mq.edu.au/__data/assets/pdf_file/0013/193000/MQGDS-April-2016_Report_15-July-2016_for-web-Publication.pdf>.

[247] Ibid.

[248] Ibid.

The influence of the employers' voice in law schools extends beyond the curriculum and into student services, events and functions. Recently, law schools have allowed law firms to sponsor student events, networking functions, clerkship presentations, career fairs, libraries, drink occasions, boat trips and other activities.[249] The dominance of corporate law firms in students' social lives has prompted at least one dean to question whether this dominance unduly influences students' decision-making.[250] Attracted by the message and glossy brochures, students come to crave 'the office with a spectacular view, original artworks, lavish entertainment and high salaries', and this image 'overshadows alternative careers'.[251] It is notable to consider how vocational education extends into students' private lives, and how it pressures them to join law-related societies, events and networking events so that the students' lives can be aligned with a corporate, market agenda.[252]

a) Students and Neoliberal Values

There is much to criticise about neoliberalism as an ideology, but in the context of this subsection, the notion that neoliberalism leads to 'freedom of choice' is especially contentious. With regard to Australian law schools, this subsection will demonstrate that a focus on financial incentives drives students to become narrow-minded, insular and risk-averse over time, rather than 'freethinking' or 'free to do what they want' with their lives, as proponents of neoliberalism would claim.

The culture of neoliberalism regards the workplace as the heart of all authentic knowledge, so anything that cannot be turned into a job-related skill or job-related knowledge is deemed suspect.[253] The humanities in particular are described as functionally useless, and students who study law consider irrelevant and impractical subjects boring.[254] Law students are quoted as asking 'what's the relevance of this?'

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[249] David Dixon, as quoted in Nicola Berkovic, 'Uni Helps Pupils Think Outside Box', *The Australian* (online at 31 January 2014) <http://www.theaustralian.com.au/business/legal-affairs/uni-helps-pupils-think-outside-box/story-e6frg97x-1226814211915>.

[250] Ibid.

[251] Ibid.

[252] Joshua Krook, 'The Role of the Corporate Mega-Firm: Law Firm Influence on Law Students' (2016) 4(2) *Griffith Law Review* 66.

[253] Lyn Yates, 'My School, My University, My Country, My World, My Google, Myself … What Is Education for Now?' (2012) 39 *Australian Education Research* 265.

[254] Thornton (n 1) 64.

when studying morality and legal ethics, as if this kind of holistic knowledge about morality, philosophy and ethics is simply irrelevant to their future working lives.[255]

This reflects a disconnection between how law is represented in popular media (revolving around justice, fairness and equality) and how law students have come to internalise the opposing culture of neoliberal education—in which they consider law school a matter of practicality and wealth accumulation, are bored by the 'irrelevant' topics of morality and justice, and are unaware of how fairness 'fits in' with coldly applying law to a set of facts.

In a more meaningful sense, students are no longer connected to the larger purpose that universities were intended for.[256] Ivy League educator William Deresiwicz suggested that 'specialization is the only part of the curriculum that makes sense to students anymore'.[257] Students have lost the belief that universities can offer them something other than a certification or degree in law; that is, they have forgotten that universities can offer something else—an opportunity before work and other commitments to develop a fuller understanding of themselves, to develop a 'soul' or, crucially absent of parental oversight, to develop independence.[258] Raewyn Connell wrote that 'a good university will be a place rich in coffee shops, with the coffee shops rich in passionate argument, intense thought and exotic projects'.[259] It is not numerical marks or research that define a university, but what occurs in the free time and space in which people are not ticking boxes.[260] Without this broader goal, the average law student will invariably start demanding as many specialised, vocational courses as possible. Students are grasping at whatever they have been taught to grasp, and they are reaching for what they know how to reach: another box to tick. They come to regard the study of law as a practical matter, and themselves as more of 'an

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[255] Yates (n 253).

[256] William Deresiwicz, *Excellent Sheep: The Miseducation of the American Elite and the Way to a Meaningful Life* (Simon & Schuster, 2014) 62–4.

[257] Ibid 62.

[258] Ibid.

[259] Raewyn Connell, 'What Are Good Universities?' (2016) 58(2) *Australian Universities Review* 70 ('What Are Good Universities?'); Cf Raewyn Connell, *The Good University: What Universities Actually Do and Why It's Time for Radical Change* (Zed Books, 2019) 5–9 ('*The Good University*').

[260] Connell, 'What Are Good Universities?' (n 259); Connell, *The Good University* (n 259).

auto mechanic [than] an intellectual'.[261] Law is considered a technical skills training course, and, therefore, acquiring as many technical skills in as many technical subjects as possible is a sensible approach.

The more esoteric and intellectual subjects do not interest most students, and the average law student avoids ethics, morality and social justice. Instead, students focus on the external, functional and practical aspects of life: work, careers and the potential for future success.[262] Core internal processes of self-reflection, growth and dynamism (the ability to move beyond the strict confines of a single subject area) are sacrificed in favour of practicality. Students become narrowly focused on career:[263]

> Mainstream students … are preoccupied with their careers, with getting a job, making money, getting married, deciding where to live—getting through law school as trade school, with no intellectual, political, cultural agenda of any kind … on the way to life in the mainstream.[264]

In some cases, students feel the change occurring within themselves and sense that something is wrong with their education.[265] Over time, they become convinced that vocation is the only valuable factor, but they also retain other, intrinsic motivations from when they first started university.[266] Richard Hil interviewed several such students at Macquarie University, with one example below:

> **Student:** I came to do a degree but I wanted more—I really wanted to get to know other students. But as time wore on I felt increasingly isolated from uni and the students in it. I felt something was missing. It was all so, well, bland.
>
> **Hil:** So if it isn't about connecting with others, what does the uni experience mean to you? Is it just about the formal learning?
>
> **Student:** It's really just preparation for a career, I suppose, it's all designed to get you into the workforce. It's a case of do the course work, get the

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[261] Ralph Shain, 'Legal Education and Hierarchy: A Reply to Duncan Kennedy' (2012) 23(1) *Quarterly Journal of Ideology* 14.

[262] Robin West, *Teaching Law: Justice, Politics, and the Demands of Professionalism* (Kindle eBook, Cambridge University Press, 2014) 1212.

[263] Jeremy Cooper and Louise G Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Dartmouth, 1997) 29.

[264] Kennedy (n 171) 5.

[265] Hil (n 118) x.

[266] Ibid.

> necessary qualification, then go out and find a job—hardly what I'd call a great experience.[267]

Today, students are much more efficient proponents of market and neoliberal values than those described by Duncan Kennedy in the 1980s.[268] In that period, he argued that students 'believed what they [were] told' about corporate values and that they acted 'affirmatively within the channels cut for them' by the law school.[269] However, there were still those who resisted—both faculty and students—by providing a liberal arts lens to studying law.[270] In contrast, the 'debt-burdened' students of today's neoliberal order have a strong imperative to ignore critical perspectives of their education and, instead, adopt the ideology they are being taught.[271] There is less of a need for a cultural education in the liberal arts than there was in the past, even among the elite classes of society.[272] Consequently, students themselves will begin to voice neoliberal values and call for neoliberal subjects—all while suppressing any unease for doing so due to market imperatives.[273]

The changes to the student body have been prompted by changes to the law schools themselves. Law schools have increasingly come to serve external market interests over the interests of the student body. Students are indoctrinated from the beginning of their studies into believing that law is a passive, neutral force in society. At worst, this produces a neutral effect, and at best, a singularly positive one. This indoctrination of students into acquiring an unquestioning attitude is best evidenced in the internal assessment structure, in which problem questions intrinsically reject critical and ethical thinking in favour of the predominance of legal positivism. Although this attitude has existed since the inception of modern law schools, it has been further solidified by neoliberal values in recent times.

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[267] Ibid.

[268] Kennedy (n 171) 5.

[269] Ibid 54–5.

[270] Ibid 56.

[271] Brown (n 149) 180.

[272] Ibid.

[273] Ibid 180–1.

5) Commercial Values

Law schools have propagated neoliberal values in three distinct ways in their internal curriculum. First, they have adopted an assessment structure that intrinsically celebrates corporate values by framing law as being passive, neutral and objective rather than active, ideological and subjective.[274] Second, law schools have succumbed to the influence of the 'employers' voice' in curriculum reform, which allows employers complete access to influence both the internal graduate attributes and the direction of law schools.[275] Third, law schools have offered major corporate employers the opportunity to dominate career fairs; these corporate employers would directly advertise and market towards students at a time when the legal profession is experiencing a decline in the number of graduate jobs.[276]

Law schools justify this shift towards commercialisation by using the clichés of being situated in a 'technological age' that has greater 'globalisation' and more 'global' challenges than ever before.[277] It is unclear why this justification is being used when the real justification appears to be a shift towards corporate values.[278]

a) Law as 'Passive': Assessing Structure

An essential part of the legal education process involves converting students from actively engaged citizens into passively observant judges who accept the authority of law at face value.

Another essential part of this process involves students adopting the philosophy of legal positivism. As mentioned previously, Austrian philosopher Hans Kelsen described legal positivism as the belief that law should discard the 'baggage' of the social sciences, morality and other considerations and instead pursue the study of law

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[274] Thornton (n 1).

[275] West (n 262).

[276] Ibid.

[277] Muna Ndulo, 'Legal Education in an Era of Globalisation and the Challenge of Development' (Research Paper 987, Cornell Law Faculty Publications, 2014); Terry Hutchsion, 'Educating the Transnational Lawyer: Globalisation and the Effects on Legal Research Skills Training' in *Legal Knowledge: Learning, Communicating and Doing—Australasian Law Teachers Association Annual Conference Published Conference Papers* (ALTA Secretariat, 2006) 5.

[278] Thornton (n 1).

as 'pure law'.[279] By 'pure law', Kelsen references the study of law alone, based only on its own authority. Kelsen has suggested that law derives its authority from prior law alone (and no other force), and that the prior law itself derives its authority from a further prior law before it—and this linear basis continues as far back as it can.[280] When no previous authority can be found, the final piece of law can 'presuppose its own validity' (e.g., in the case of constitutions).[281]

In general society, legal positivism is commonly understood by the phrase 'the law is the law'. This phrase reinforces what the law 'is' without questioning what the law 'ought' to be.[282] Continually used by politicians to justify controversial (often immoral or morally questionable) judicial decisions, this banal phrase summarises the non-critical conception of law being a final or ultimate conclusion to a problem, as opposed to the start of a continued debate on possible solutions.[283] Instead of questioning whether an outcome is just or fair, it is considered 'just' simply 'because it derives from a legal authority'.[284] The law is considered just simply because it 'is' law—because law is law. In this way, an 'ought' (justice) is derived from an 'is' (the law). Deriving an 'ought' from an 'is' is a logical fallacy. David Hume originally elucidated as much in his. *Treatise on Human Nature*, in which he stated, 'A reason should be given … how this new relation [the ought] can be a deduction from the [is]'. The laws of slavery in the US, of the apartheid in South Africa, of discriminatory voting rights in the Western states prior to the 1980s and other cases were all principally unjust; they are widely still regarded as such today, but they were

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[279] Hans Kelsen, *Pure Theory of Law* (University of California Press, 2007); Stanford Center for the Study of Language and Information, *Stanford Encyclopedia of Philosophy* (2016) 1 The Pure Theory of Law [xx] <http://plato.stanford.edu/entries/lawphil-theory/> ('The Pure Theory of Law'); Joshua Krook, 'What Law Students Need to Know About Legal Ethics Won't Be Taught to Them in Law School', *New Intrigue* (Web Page, 15 August 2014) <http://newintrigue.com/2014/08/15/what-law-students-need-to-know-about-legal-ethics-wont-be-taught-to-them-in-law-school/>.

[280] The Pure Theory of Law (n 279); Kelsen (n 279).

[281] The Pure Theory of Law (n 279); Kelsen (n 279).

[282] Robert John Araujo and John Courtney Murray, 'The Law as a Moral Enterprise' (Speech, Fifth Annual Courtney Murray Lecture, Loyola University Chicago, 14 November 2013) 5. <https://walshslaw.files.wordpress.com/2014/07/araujo-fifth-annual-john-courtney-murray-lecture-2013.pdf>; Richard John Neuhaus, 'Law and the Rightness of Things' (1979) 14(1) *Valparaiso University Law Review* 8.

[283] Letitia Summerford, 'Residents Think "The Law Is the Law" When It Comes to Bali 9', *Daily Mercury* (online at 24 February 2015) <http://www.dailymercury.com.au/news/residents-think-law-law-when-it-comes-bali-9/2554362/>; Anapat Deeechuay and Kasamakorn Chanwanpen, 'The Law Is the Law: PM' (Web Page, 1 July 2015) <http://www.nationmultimedia.com/politics/The-law-is-the-law-PM-30263485.html>.

[284] Roberto Gargarella, 'Human Rights, International Courts and Deliberative Democracy' (Working Paper, The University of Texas at Austin, 3 December 2008) 2 <http://lanic.utexas.edu/project/etext/llilas/vrp/gargarella.pdf>.

nevertheless 'law' at the time. If 'the law is the law' is an ethical justification for just laws, then the laws of slavery in the US were just. This is clearly an untrue statement, which highlights how 'the law is the law' as an ethical justification for law itself is an untrue statement and, further, a logical fallacy.

It is thus problematic to observe a potential over-reliance on past precedent over other forms of knowledge in some Australian law schools. If students rely on cases as the main source of legal information in class, then some students might ultimately derive their conception of justice by referencing past legal authority rather than wider discussions of political science and political philosophy. The most common assessment task is the problem question, which involves students applying legal precedent to a new set of facts.[285] Students are given new facts and are expected to act like appellate court judges in applying previously found legal principles to those facts, without any regard to extrinsic justificatory materials.[286] This analysis is circular, in that the students' conclusions are justified by past legal precedents alone, which are themselves, as case laws, justified by further past legal precedents. The 'end point' or the original conception of law is never questioned in terms of its derivation from certain areas such as politics, society, morality, moral philosophy, sociology and anthropology.[287] In this sense, law is justified in law schools simply by reference to it being the law. This mirrors the broader societal belief that 'the law is the law', and that any ethical justification of law is self-evident by its own authority. Again, according to Hume, this is a logical fallacy—and, again, no external justification is provided, even though one is needed.

With the appearance of being morally neutral, but intrinsically just, the case law method equips students with the tools to 'draw boundaries between the spheres of legal, moral and political consideration'.[288] This allows them to normalise law as being objective, neutral and passive while ignoring contrary evidence. Morality,

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[285] Walsh (n 168) 127–8; Robertson et al (n 220).

[286] Edward J Phelps, 'Methods of Legal Education' in Steve Sheppard (ed), *The History of Legal Education in the United States: Commentaries* (Salem Press, 1888) 532.

[287] John D Whyte, 'Finding Reality in Legal Education' (2013) 76 *Saskatchewan Law Review* 99.

[288] Vanessa E Munro, 'Legal Education at the Intersection of the Judicial and the Disciplinary' (2003) 2(1) *Journal of Commonwealth Law & Legal Education* 39; Gonzalo Villalta Puig, 'Legal Ethics in Australian Law Schools' (2008) 42(1) *The Law Teacher* 34.

politics and justice are considered subjective irrelevancies outside the curriculum's scope.[289] To be a law student is to have an 'encyclopedic grasp of law's terms, precepts, rules and decisions'.[290] In this sense, law students become walking encyclopedias, though law schools pretend that law is not a game of 'memorisation'.[291] Students who enter law school are transformed from laypersons and interested citizens into apolitical social constructs. Reflecting on the US experience, Kennedy highlighted that students with fast-reasoning intellects will likely have to 'deconstruct law starting from scratch' after they complete their law courses, or otherwise be entrenched in a hegemonic culture in which law is self-justifying, self-verifying and self-perpetuating under the 'law is law' mindset.[292] Neuhaus even suggested that lawyers who follow 'mechanical precedent' alone lose their sense of morality, in that they are artificially ignoring the 'moral meaning' behind each case decision.[293] By following precedent rulings blindly, students are implicitly rejecting the moral basis on which the law was made; they are turning away from the law's original public conception (that it is a derivation from society, morality or God). This would not be a concern if some other justification for law were offered in the internal curriculum; however, it is concerning because no such justification is offered.

At various points throughout history, legal educators have attempted to either justify or question the morally neutral teaching of the law. The CLS school of thought (as discussed in Part 1) sought to critique the current form of law and consider hidden biases, hierarchies and discrimination behind the façade of 'pure law' teaching.[294] By extension, the prominent school of legal realism in the 1930s–1940s refuted the belief that law was somehow 'static' or immovable and contrasted it with the opposing belief that law was the 'living law'—that it was ever changing with the social context

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[289] Munro (n 288); Puig (n 288).

[290] Munro (n 288); Puig (n 288).

[291] Munro (n 288); Puig (n 288).

[292] Whether this is reflective of the Australian experience will be discussed in more detail in the rest of this section. Kennedy (n 171) 3.

[293] Neuhaus (n 282) 8, 10.

[294] Guyora Binder, 'Critical Legal Studies' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 267; Abram Chayes et al, 'Critical Legal Studies Movement', *The Bridge* (Web Page) <https://cyber.harvard.edu/bridge/CriticalTheory/critical2.htm>.

of the times.[295] Law was not to be judged by its own internal 'logic' but through 'experience' as it changed over time.[296] However, despite the small but lingering movements in academia, they have had little tangible effect on the law school curriculum of today.

In fact, a large-scale study of 29 Australian law schools in 2003 found that the most common mode of assessment at the time remained in the black-letter forms of 'examinations, written reports and problem-based' questions.[297] It is difficult to ascertain whether this is still the case without a new empirical study of the same magnitude. Although such a study is beyond the scope of this thesis, some circumstantial evidence indicates that at least casebooks and problem questions remain prominent in law schools (according to certain critiques on modern legal education that this section references). More recent statements from professors, faculty members or students at numerous law schools throughout Australia also indicate the continued use of the case method, cases and problem questions.

For example, in 2011, Molly O'Brien at ANU Law School described appellate court judgements as 'the meat and potatoes of [Australian] legal education', further suggesting that 'the predominant mode of teaching law—especially in introductory classes—is still case analysis'.[298] In the same year, Patrick Keyser at La Trobe Law School argued for a 'deepening' of the case method, so that other theoretical factors could be considered.[299] In 2015, Cameron Royse, a tutor at Monash Law School, suggested that 'most [law] exams follow the formula of two "problem" questions'—in which one is an essay or policy question, and the other a case problem.[300] A year later, Kelley Burton at the University of the Sunshine Coast Law School outlined the use of

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[295] Grant Gilmore, 'Legal Realism: Its Cause and Cure' (1961) 70(7) *Yale Law Journal* 1038–9.

[296] Ibid 1038.

[297] Johnstone and Vignaendra (n 209) 16.

[298] Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37(1) *Monash University Law Review* 47; Cf Boag et al (n 181) 2, 60 (the ANU Law Students in 2016).

[299] Patrick Keyzer, 'Using "Deeper" Case Method to Introduce Legal Theory and Context' in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis, 2011) 295–309.

[300] Cameron Royse, 'Tips for Law Assessments and Exams' in *Monash Law Guide 2015* (Monash University, 2015) 20 <https://studylib.net/doc/8161615/law-guide---monash-law-students--society>.

the IRAC method and other acronym-based tools of case analysis.[301] In 2017, Sydney Law School and the Sydney University Law Society both released guides that detailed case problem analysis and independently explained why cases are considered an important aspect of a law school curriculum.[302] A year later, two academics from Curtin University and the University of Western Australia proclaimed that 'undisputedly, the teaching of black letter law forms a substantial basis of most undergraduate Bachelor of Laws curricula' in Australia.[303] According to these firsthand accounts, it is evident that black-letter law and case-based teaching continues in many law schools throughout Australia.

Similar statements from students further confirm the use of case-based teaching at various Australian law schools. As mentioned previously, Sydney University Law Society published a guide in 2017 for law students, which addressed case problems, case notes and essays.[304] Many statements regarding the use of cases can be found in law society guides for first year students. In 2016, Curtin Student Law Society published a first year guide that included a section titled 'Day in the Life', in which a fourth-year law student explained how they liked to 'brainstorm the relevant points of law, cases and other useful material' before a tutorial.[305] In 2019, Adelaide University Law Student's Society also released a first year guide, and it included study tips for only one kind of assessment task: case problems.[306] In 2020, Deakin Law Student's Society released their first year guide; it included a section titled 'How to Do a Law Assignment' that focused on only one type of assessment task: case problems.[307] In

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[301] Kelley Burton, 'Teaching and Assessing Problem Solving: An Example of an Incremental Approach to Using IRAC in Legal Education' (2016) 13(5) *Journal of University Teaching and Learning Practice* 1–2.

[302] Sydney Law School in 2017—'Why Are Problem Questions Given as Assessment Tasks?' Sydney Law School Learning and Teaching (2017) <http://sydney.edu.au/law/learning_teaching/legal_writing/problem_question_task.shtml>; Sydney University Law Society, *SULS Education Guide* (SULS, 2017) <https://issuu.com/sydneyuniversitylawsociety/docs/edguide>.

[303] These academics also mentioned short-answer analytical questions (mini-essays of a sort). The use of essays will be discussed later in this section. For more, see Christina Do and Nicole Wilson-Rogers, '"Business Law and Regulation": A Model for Developing "Critical Thinking" in Future Law Graduates' in Michael Coper, Kevin Lindgren and Francois Kunc (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2018) 1, 12–14.

[304] The use of essays will be discussed later in this section; Sydney University Law Society (n 302).

[305] Case problems were the only assignments mentioned; Mila Banovic, 'A Day in the Life of a Curtin Student' in Zemyna Kuliukas et al (eds), *First Year Guide* (Curtin Student Law Society, 2016) 28 <https://issuu.com/curtinstudentlawsociety/docs/fyg>.

[306] Adelaide University Law Students' Society, *Lipman Karas First Year Guide* (AULSS, 2019) 34 <https://www.aulss.org/wp-content/uploads/2019/03/FYG-2019-FOR-AULSS-PAGE.pdf>.

[307] Deakin Law Students' Society, *First Year Guide 2020* (DLSS, 2020) 17 <https://www.deakinlss.org/first-yearguide>.

the same year, a first year juris doctor student at Melbourne Law School offered tips for students to 'think like your examiner', in which the student discussed only case problems as a type of assessment task.[308]

The ubiquity of cases is also evident in online, anonymised forums, in which current law students summarise what studying law is like for aspiring high school applicants. These quotations are relevant enough to reproduce below. It should be noted how each student ultimately presents casebook readings and/or problem questions as the norm. Although online forums are typically considered unreliable, the nature of anonymity, in contrast, allows law students to be blunter and more honest with how they assess their legal education:

> [To get good marks in law school,] read summaries/principles of the cases and law, and work from there. Ideally, do that first, then walk into class and note down what your lecturer mentions on top of that. (4th year student, UNSW Law School)[309]

> I usually did the required readings (most subjects don't set whole cases—just extracts), create 'reading notes' (from the cases), lecture notes and then I combined them to form a summary. Depending on the subject, some very case based ones, I would end up having a summary of cases at the end of my notes—key facts, issue and decision (usually only 1–2 lines for each element). (Alumni, ANU Law School)[310]

Students also differentiated legal education (and problem questions, specifically) from traditional liberal arts–style examinations in the humanities:

> Law exams are not anything like high school English essays. They are hectic and intense problem questions, with a dense hypothetical that you must resolve in 40 mins–1 hr, by identifying the legal issues and resolving them in a concise, legal argument. (2nd year student, Sydney Law School)[311]

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[308] Jonathan Chee, 'THINK Like Your Examiner: Demonstrate the SKILLS Lecturers Look For to Succeed in Law Exams', *Success at MLS* (Web Page, 4 June 2020) <https://successatmls.com/2020/06/04/think-like-your-examiner-demonstrate-the-skills-lecturers-look-for-to-succeed-in-law-exams/>.

[309] Auri (User #553253), 'More Effective Way to Study Law?' (Whirlpool Forum, 6 July 2014) <https://forums.whirlpool.net.au/archive/2240864>.

[310] Doormouse1 (User #443828), 'More Effective Way to Study Law?' (Whirlpool Forum, 6 July 2014) <https://forums.whirlpool.net.au/archive/2240864>.

[311] Alstah (User #445836), 'What Is Law?' (Whirlpool Forum, 26 May 2013) <https://forums.whirlpool.net.au/archive/2104857>.

> The writing expected of law students is very different to what students in liberal arts degrees do ... The words that you choose to describe a principle of law will be subject to great scrutiny. On the other hand, the more important aspect of studying law is problem solving. (5th year student, University of Canberra Law School)[312]

Unsurprisingly, a focus on black-letter assessments through case analysis reflects the kind of assessment tasks that best serve the market, as well as the kind of skills that employers desire the most. In a small-scale pilot survey of 16 employer organisations, the traditional skills of 'reading and analyzing case law, applying and distinguishing cases [and] familiarity with legal principles—scored most highly'.[313] Employers are not invested in law students solely gaining a moral or justice-oriented education. They are invested in students becoming highly capable in their jobs. Problem questions are routinely defended as reflecting 'real world' knowledge or 'so called "authentic" situations' in legal jobs.[314] Law firms are typically pressed for time and need law graduates who can quickly apply legal principles to a new set of facts. Universities create a 'value proposition' by selling this kind of skill and assessing students' abilities to successfully learn this skill 'that individuals, employers and ultimately society pay for'.[315] Bentley and Squelch cited that law students required the graduate skill of 'thinking' for work; however, the scholars only cited 'problem solving' as an example of a thinking skill.[316] In brief, problem-solving is the only necessary kind of thought. Although this reflects the expediencies of the market, it does not represent the growth of the individual student.

Although the analysis above offers a robust market defence of case analysis, it does not justify the lack of consideration regarding morality, policy or extrinsic materials in the current curriculum. Instead of justifying how case law derives an 'ought' from an 'is' (and thereby creates a self-perpetuating logical fallacy), the market 'justification' simply considers case law a convenient skill for law students to possess. As Margaret Thornton stated, any other assessments like 'research essays, with their

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[312] byebye (User #640826), 'First Year Law: What Do I Do?' (Whirlpool Forum, 20 October 2015) <https://forums.whirlpool.net.au/archive/2461828>.

[313] Peden and Riley (n 211) 94.

[314] Yates (n 253) 265.

[315] Simon Roodhouse, 'Revisiting "Technical" Education' (2008) 50(1) *Education + Training* 56.

[316] Bentley and Squelch (n 167) 101.

creative and critical edginess do not comport with market orthodoxy'.[317] Other types of assessments are simply too difficult to mark, write or structure,[318] and they tend to challenge the status quo. Even worse, creative or intellectual thinking is considered less beneficial to employers, as it is believed that this thinking does not offer students enough marketable or transferable skills. In this point, the convenience of the market, major firms and law schools supersedes the morality, critical engagement or intellectual insight of the student body.

In the US context, Duncan Kennedy suggested that 'the actual intellectual content of the law seems to consist of learning the rules, what they are and why they have to be the way they are, while rooting for the occasional judge who seems willing to make them marginally more humane'.[319] This is especially true in Australia, considering the almost celebrity-like status of former High Court Justice Michael Kirby, who is celebrated by law students as a great dissenter on issues of human rights, justice and morality.[320] Justice Kirby's popularity extends to an appreciation group on Facebook, in which Australian law students make comments such as 'Kirby for PM' or 'Kirby for Governor-General' (in which they are presumably serious in such hopes). However, celebrating human rights should not be limited by (or construed through the lens of) a judge's dissenting opinions or by any 'authority' figure in case law; rather, conceiving human rights should be based on students' own sense of morality and their independent moral judgment or 'dissent' against the norm.[321] Support for human rights often requires rejecting the dominant stream of public thought at a specific point in time, along with students' own acclimatised culture (in this case, the business-like culture of law school) in favour of pursuing a moral objective to its rightful end.

Justice Kirby himself fought against the dominant culture of homophobia in the 1980s, and his dissenting approach in legal cases often valorised human rights and

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[317] Margaret Thornton, 'The Market Comes to Law School', *The Australian* (online at 13 September 2011) <http://www.theaustralian.com.au/higher-education/opinion/the-market-comes-to-law-school/story-e6frgcko-1226134877209>.

[318] Ibid.

[319] Kennedy (n 171) 22.

[320] 'Now History Will Be the Judge', *Sydney Morning Herald* (online at 31 January 2009) <http://www.smh.com.au/articles/2009/01/30/1232818725589.html?page=fullpage>.

[321] Ibid.

morality at a time when such principles were unpopular. It is difficult to reconcile how law students celebrate this 'great dissenter' with the assessment structure of law schools' mainstream corporate law culture. Students celebrate a rebel while they themselves might be trained to become conformists. The application of judicial rulings by rote, problem-based questions and other similar methods does not allow for a 'dissenting' voice to arise in the legal classroom. Instead, law students become intellectuals by proxy—through their hero, Michael Kirby—while they hide behind their doctrines, rules and black-letter law.

The fictional lawyer Alan Shore expresses this succinctly when he stated, 'Every first year law student is taught don't ever, ever equate legal ethic with morality. They're almost always mutually exclusive!'[322] William Sullivan et al mimicked the statement by expressing that 'in their all-consuming first year, students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analysis.'[323]

The case method teaches students to become post-emotional and disregard their reactions. Essentially, the case method teaches students to become automatons: they apply legal principles that they never morally justify or rationally criticise beyond the limited criticisms available within case law itself (specifically by reference to the past 'dissenting judgments' of the aforementioned Justices).[324] Students often begin their first year with a strong sense of morality and justice, which slowly diminishes by the time they graduate three years later.[325] This is reflected in certain US studies on student opinions and perspectives over time.[326] It was found that students changed their perceptions of law simply because they were told that this was how the law

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[322] As quoted in 'The Case against Alan Shore', *The Practice* (David E. Kelley Productions, 28 March 2004); the quotation can be found on page 8 of the script at <http://www.boston-legal.org/script/tp08x18.pdf>.

[323] William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey–Bass, 2007) 5–6, as quoted in Jennifer S Taub, 'Unpopular Contracts and Why They Matter: Burying Langdell and Enlivening Students' (2013) 88 *Washington Law Review* 1451.

[324] Puig (n 288) 34.

[325] West (n 262) 1185.

[326] Sandra Janoff, 'The Influence of Legal Education on Moral Reasoning' (1991) 76 *Minnesota Law Review* 193.

school functioned.[327] They were taught that this was how the world worked. Or, more bluntly, they were taught that 'the law is the law':

> Law students come to law school with a sense of moral right and wrong, a well-tuned ethical compass, and even a rough feel for justice … Three years later, those same students leave law schools as graduates ready to sell their services as a hired gun to the highest bidder, skeptical of either the existence or the objectivity of right and wrong or good and bad.[328]

Defenders of the case method highlight its original conception under Christopher Langdell at Harvard. Under the reforms that commenced in 1896, Langdell taught students at Harvard for the first time using the Socratic method.[329] By 1914, the Socratic method and the accompanying format for case law problem questions came to dominate law schools worldwide.[330] The case method 'was copied in Australia as the new law schools were established, first at Melbourne and then at Sydney in the last years of the nineteenth century'.[331] Problem questions were considered an escape from the dry, rote memorisation of legal principles.[332] Instead of being lectured to, students received judicial opinions on related cases and were asked to 'replicate or improve on the judge's reasoning and the arguments of the lawyers on each side'.[333]

This contrasted the older model, in which students read and listened to textbooks and were expected to explicitly memorise case principles. Students in this prior period were given the 'right' answers. However, under Langdell, they were told that there were no 'right' answers, only competing opinions.[334] To this day, some scholars and academics yet believe that Langdell's case method is the best method for allowing students to observe 'how open is the future of the law'.[335] By considering the different perspectives of appellate court judges, the law is supposedly unearthed as fluid and

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[327] Ibid.

[328] West (n 262) 1185.

[329] Peggy Cooper Davis, 'Desegregating Legal Education' 26 *Georgia State University Law Review* 1275.

[330] Ibid; Bruce A Kimball, 'The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic "Abomination," 1890–1915' (2006) 46(2) *History of Education Quarterly*.

[331] Michael Kirby, 'Right Now' (Speech, Melbourne Law School, January 2007).

[332] Davis (n 329).

[333] Ibid.

[334] Ibid.

[335] John R Morss, 'Part of the Problem or Part of the Solution? Legal Positivism and Legal Education' (2008) 18(1–2) *Legal Education Review* 3.

dynamic, as well as open to change or reform at the whim of a new judge. However, critics of Langdell, both in his time and presently, suggested that a focus on case law actually narrows the scope of a student's thoughts, as it ignores how law relates to everyday life.[336] A true consideration of 'how open is the future of the law' would consider substantive issues that actually reveal the true scope of law, such as politics, sociology and anthropology.[337] Politics and activism should at least become a central part of the curriculum since appellate court judges rarely change the law in their own right.[338] Instead, changes in the law tended to originate from persistent debate, activism and the work of politicians drafting new statutes.

Even more fundamentally, a true consideration of 'how open is the future of the law' would more greatly emphasise statute law itself. Critics often highlighted that Langdell's method prioritised case law over statute law in an age when statute law had come to dominant law reform.[339] Ironically, since 2006, Harvard Law School itself had shifted its focus towards statute law, after a century of Langdell's method.[340] First year Harvard students now consider statute law analysis, international law and a broader understanding of law as general proponents of a field 'rather than … focusing entirely on interpreting legal doctrines'.[341] New Harvard tutors who teach a newly formed elective, Systematic Justice, stated that the case method simply 'puts too much emphasis on what the law already is, rather than [on] what it should be'.[342] Tutor Jacob Lipton claimed that it 'tends to assume that decisions of the past are fair and appropriate', whereas legal education should begin by considering 'what the problems are in the world' and how they should be effectively addressed.[343] Justice Kirby highlighted an obvious discrepancy when he stated that it was 'astonishing that,

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[336] Davis (n 329) 1286; Edward Rubin, 'What's Wrong with Langdell's Method' (2007) 60(2) *Vanderbilt Law Review* 610; Sheppard (n 286) 618.

[337] Davis (n 329) 1286; Rubin (n 336); Sheppard (n 286) 618.

[338] Davis (n 329) 1286; Rubin (n 336); Sheppard (n 286) 618.

[339] Davis (n 329) 1286; Rubin (n 336); Sheppard (n 286) 618.

[340] Kirby (n 331).

[341] Ibid; Elia Powers, 'Harvard Law Alters First-Year Program', *Inside Higher Ed* (Web Page, 9 October 2006) <https://www.insidehighered.com/news/2006/10/09/harvard-law-alters-first-year-program>.

[342] Jon Hanson and Jacob Lipton, as quoted in Courtney Humphreys, 'New Harvard Law School Program Aims for "Systematic Justice"', *The Boston Globe* (online at 6 February 2015) <https://www.bostonglobe.com/ideas/2015/02/06/new-harvard-law-school-program-aims-for-systemic-justice/PeGBqIenWhqqCuJ37Y20kJ/story.html>.

[343] Ibid.

in Australia (with a few notable exceptions) law courses continue to persist with the illusion that the common law is the centerpiece of our legal system'.[344] People might thus wonder why Australian law schools have been so slow to shift their focus when they had once been quick to follow the dictates of Harvard.

A rare exception is the University of Wollongong Law School, which posits in its first year law student manual that:

> We do not spoon-feed students at the Faculty of Law. We discourage passive listening. We do not simply pass on an acceptance of the way the Law has always been. If we were to teach Law in that way you would be most unlikely to gain the independence, judgment and flexibility you expect from a University education.[345]

In addition to this guideline, the university mandates a legal drafting course and four theoretical courses as part of its core curriculum.[346] Other universities, including UNSW, have responded to the rising prominence of statute law by introducing a new elective course in statutory interpretation.[347] However, this decision is not as proactive as those of Harvard.[348] Indeed, Australian law schools have remained slow to adapt to the new realities of law, as they continue focusing on the old and narrow case–law method. Eugene Clark's criticism of Australian law schools that was made a decade ago still applies: 'Few law schools, if any have had the time or resources to be proactive, to plan for change in an orderly, coherent and strategic way'.[349] This trend among modern law schools can be compared unfavourably to the early and more innovative law schools of the 1800s, as discussed in the previous section.

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[344] Kirby (n 331).

[345] University of Wollongong, *Studying Law* (University of Wollongong, 2007) 6 <https://lha.uow.edu.au/content/groups/public/@web/@law/documents/doc/uow015658.pdf>.

[346] 'Undergraduate Courses: Bachelor of Laws', *University of Wollongong Australia* (Web Page, 2021) <http://www.uow.edu.au/handbook/yr2015/ug/H15000273.html>.

[347] Misa Han, 'University No "Trade School" for Lawyers' (23 October 2014) *Financial Review* <http://www.afr.com/news/policy/education/university-no-trade-school-for-lawyers-20141023-11awap>.

[348] Ibid.

[349] Eugene Clark, 'Australian Legal Education a Decade after the Pearce Report' (1997) 8(2) *Legal Education Review* 213–14.

i) The Priestley Eleven

The national legal admission requirements, known colloquially as the Priestley Eleven, are fundamental to the dominance of the case law method and the 'law is the law' mindset in Australia.

The Priestley Eleven is a set of compulsory subjects that all law students must complete to be admitted to practice law in Australia.[350] These subjects emerged due to the LACC in 1992, who aimed to establish a uniform list of subjects for all admitted lawyers in Australia.[351] Named after the head of that committee, Lancelot John Priestley, the selected subjects portrayed a narrow focus on 'substantive law' rather than on extrinsic lessons in ethics, morality or politics (excluding the 'Legal Ethics' subject).[352] Priestley Eleven subjects include core, black-letter law units such as torts, equity, contracts, administrative law, evidence, corporations law, property, constitutional law and civil and criminal procedure. Black-letter law subjects tend to focus on what the law is rather than on what it should be, and they tend to normalise the notion of law being an objective, neutral and passive force. They also tend to be 'saturated with scenario-based learning through problem solving' questions rather than learning through essays or other critical engagement tools.[353] In this sense, they tend to justify the 'law is the law' mindset by never offering students the chance to criticise what the law is, which thus implicitly endorses its current form.

Most Australian law schools adopt the approach of teaching every Priestley Eleven subject in its own unit, which signifies the predominance of black-letter law throughout the core curriculum.[354] The Australian Law Reform Commission has criticised the Priestley Eleven content as being 'outmoded', as it tends to prioritise 'what lawyers need to know' over what lawyers 'ought to do'.[355] In contrast, law

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[350] *Uniform Admission Arrangements* (2008) 5 <lawcouncil.asn.au/LACC/images/pdfs/212390818_1_LACCUniformAdmissionRules2008.pdf>; *Legal Profession Admission Rules* (n 214).

[351] LACC (n 222) 1–2.

[352] *Uniform Admission Arrangements* (2008) 5 <lawcouncil.asn.au/LACC/images/pdfs/212390818_1_LACCUniformAdmissionRules2008.pdf>; *Legal Profession Admission Rules* (n 214).

[353] Robertson et al (n 220) [8.3.3].

[354] Johnstone and Vignaendra (n 209) 93.

[355] Ibid.

students in the US are expected to study how they can 'improve the profession', gain 'professional self-development' and learn lessons in 'morality' in all core law subjects.[356] In Australia, the focus is narrowly on legal principles. Indeed, the Priestley Eleven tend to focus on teaching law through cases rather than through critical or ethical thinking. Students are commonly told to 'set aside their desire for justice' and not let their 'moral compassion' cloud their judgement in black-letter law subjects.[357] However, it becomes artificial to separate all moral considerations from a student's problem-solving analysis when Priestley Eleven subjects include topics on sexual assault, politics and business transactions. Students come to believe that advising a client involves a robotic function of applying law to the circumstances, drawing lines between precedents and facts, and distinguishing competing cases.[358] Even worse, students gain the false impression that law is neutral, passive or impartial, when, realistically, it greatly affects people's everyday lives.

When students are eventually allowed to consider ethics at the end of their degree (or briefly at the start), they might find it confusing, or they might gain a cynical impression of the dismissive treatment of ethical teaching in the curriculum.[359] Some authors have suggested that it is too late by the time that students are allowed to expand into other electives and subjects such as ethics; by the time they reach the one or two ethics courses in law school, they might have already acclimatised to 'thinking like a lawyer'.[360] If so, they might come to regard ethics as a game to be played.[361] Many academics have suggested integrating ethics 'throughout the curriculum' to prevent this mindset.[362] Others have suggested that a greater focus should be placed on teaching ethics and morality at the start of the degree so that it can act as a backdrop for law students throughout their entire course.

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[356] Australian Law Reform Commission, 'Managing Justice: A Review of the Federal Civil Justice System' (Report No 89, ALRC, 2000) Section 2.20.

[357] Sullivan et al (n 323) 55.

[358] Puig (n 288) 59.

[359] Sullivan et al (n 323); Deborah L Rhode, 'Into the Valley of Ethical Professional Responsibility and Educational Reform' (1995) 58(3) *Law and Contemporary Problems* 140.

[360] Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2008) (17)2 *Legal Education Review* 5–6.

[361] Ibid.

[362] Deborah L Rhode, 'Legal Ethics in Legal Education' (2009) 16(1) *Clinical Law Review* 43.

However, this suggestion misses the larger point of how legal ethics might act as just another vocational sphere of the law for law students to master. Truly broadening the minds of law students would require courses that teach the basics of moral philosophy, sociology and anthropology, as well as courses that permit students to question the cultural, theoretical and moral underpinnings of legal institutions and principles. The Council of Australian Law Deans (CALD) and the Australian Learning and Teaching Council (ALTC) recently stated that law graduates should 'understand the "broader context" [of law] including … the political, social, historical, philosophical and economic context' from which it originates.[363] However, implementing this course model seems impossible with regard to the current Priestley Eleven requirements. Chief Justice French recently panned the Priestley Eleven for this reason, pronouncing that the subjects are a 'dead hand' that constrains legal education reform.[364] The Productivity Commission has similarly stated that the Priestley Eleven provide a 'strong base knowledge of the law [but] limit the flexibility of universities to compete and innovate'.[365] It would appear that universities must move beyond the Priestley Eleven requirements if they wish to sufficiently educate law students about the origins of the law and how to behave ethically.

Therefore, it is unsurprising that a new review of the Priestley Eleven requirements is currently underway. In 2015, the LACC asked whether the subjects of civil procedure, company law, evidence, ethics and professional responsibility should remain a core part of the curriculum or whether they were no longer considered necessary for new lawyers.[366] These specific subjects are considered unnecessary in the current curriculum because they might not be required for '*all* entry-level lawyers', as well as because these subjects are already being taught in PLT courses.[367] The LACC has quoted Chief Justices in its argument for a new focus on statutory interpretation instead. This mirrors this thesis's previous argument regarding the changing focus of law towards statute law and the corresponding shift in the Harvard curriculum to

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[363] Lucy Maxwell, 'How to Develop Law Students' Critical Awareness? Change the Language of Legal Education' (2012) 22(1) *Legal Education Review* 5.

[364] Han (n 347); Cf Sampford, Blencowe and Condlin (n 167) 137–8.

[365] Han (n 347).

[366] Law Admissions Consultative Committee, 'Review of Academic Requirements for Admission to the Legal Profession' (2015) 5.

[367] Ibid.

follow. However, despite this robust argument, CALD has clearly stated that it finds it 'unclear' why 'statutory interpretation … [has been] singled out' in the review process.[368] CALD opposes all changes to the curriculum, but it heavily qualifies that it would be more willing to consider change if it was part of a wider and more all-encompassing review process.[369] It is unclear how this process will unfold over time.

b) 'The Employer's Voice': Shaping Graduate Attributes

In the early 1990s, Australian universities were increasingly pressured by 'the state, industry and other agencies' to produce graduates who possessed specific market-relevant skills.[370] By the mid-2000s, universities had embedded graduate attributes into the core of their teaching objectives.[371] It is now common to observe graduate attributes presented as a dot-pointed list on course outlines, which are handed to students at the start of their degrees. These attributes are often used to justify the entire degree program, as if law would have no purpose without the graduate attributes of the degree. Of course, this is an absurd perspective, but it is nonetheless implicit in the documentation. Certain academics have argued that graduate attributes make university more 'relevant' to society by helping graduates contribute to the larger economic goals (and GDP) of their respective countries.[372] This is partially true, and it will be discussed in greater detail below. However, the primary objection in this subsection is that a focus on graduate attributes diminishes the independence of a law school's internal curriculum. Law schools now listen to the legal profession when they draft changes to the curriculum instead of deriving their own ideas. This greatly bolsters the vocational nature of law schools, in a time when the vocation itself is in a state of flux.

Graduate attributes are key skills or criteria that a student should gain after completing a specific degree program. They are often broad or generic and encompass

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[368] Council of Australian Law Deans, 'Submission: Regarding: Review of Academic Requirements for Admission to the Legal Profession (2015) 4 <http://www1.lawcouncil.asn.au/LACC/images/Review_of_Academic_Requirements_-_Submission_by_CALD.pdf>.

[369] Ibid.

[370] Hyland (n 163) 677–8.

[371] Bentley and Squelch (n 167) 96.

[372] Ibid.

areas such as 'thinking skills … logical and analytical reasoning, problem solving [and] communication, [and] teamwork skills'.[373] In vocational degrees, and increasingly in law, these attributes tend to focus more narrowly on the occupational skills required for gaining entry into the profession. In this way, they are often linked to a student's 'employability'.[374] They are also linked to the belief that universities should produce the kind of graduates that employers desire.[375] At their most intrusive, graduate attributes are used to guide the conceptual understanding and direction of law schools, along with their internal assessment structure and curriculum.[376] According to researchers who promote graduate attributes, the 'best' law schools are those that align their assessments with their graduate attributes to produce the kind of student that narrowly suits the needs of the market.[377] Education, when examined within this framework, becomes outcome oriented rather than intrinsically rewarding.[378] Instead of focusing on developing well-rounded students, universities focus on facilitating market-driven demand.

Owen and Davis illustrated a pyramid that depicts how students should gain market-relevant skills at every stage of their development (see Figure 1).[379] This visual depiction, in which students become 'narrower' over time, is apt (although this was unintentional on the scholars' part). It should be remembered that the more universities focus on vocational graduate attributes, the less their degrees can be considered general or holistic. The losses come in the form of well-rounded students who become narrow-minded over time because they are only taught the technical skills that are required for fulfilling a single role in a single occupation. In this way, universities become specialised knowledge trainers, and each university department is separated from others, which decreases the level of cross-institutional education. Even from a market-centric perspective, this signifies that the students that are produced

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[373] Paul Hager and Susan Holland (eds), *Graduate Attributes, Learning and Employability* (Springer Science & Business, 2007) 2–4.

[374] Ibid 1–2.

[375] Ibid.

[376] Susanne Owen and Gary Davis, 'Law Graduate Attributes in Australia: Leadership and Collaborative Learning within Communities of Practice' (2010) 4(1) *Journal of Learning Design* 18.

[377] Ibid.

[378] Ibid.

[379] Ibid 20.

cannot adequately shift between different market roles or different occupations over time.

Figure 1: Assessment using role

Figure 1:[380] Graduate Attributes Are Continually Linked to the Idea of 'Employability', Offering Employers What They Want or Helping Students Achieve 'work-based learning'.[381] The figure above shows graduate attributes that are actualised in an assessment structure until a student's graduation and afterwards.

In general, universities have started emphasising employer–university relationships more by documenting the relationship with data. Several major Australian universities participate each year in the QS Graduate Employability Ranking.[382] This yearly ranking system aims to level each university according to the employability of its students.[383] The effect of numerical tools such as this cannot be underestimated. Numerical categorisation is a core of neoliberalism; it involves making all aspects of the university process a documented 'science' in which numbers matter more than

[380] Ibid.

[381] Ibid 1–2.

[382] Quacquarelli Symonds Limited (n 246); 'Macquarie University Graduate Destination Survey' (n 246).

[383] Quacquarelli Symonds Limited (n 246).

tangible outcomes.[384] Questions have been asked regarding whether university ranking systems such as these are more 'hype' than 'substance', especially due to the variability of the data that was obtained from 'competing' universities.[385] It is also worth questioning whether universities remain effectively independent—that is, whether they make decisions regarding their curriculum based on external ranking sites.

Law schools have influenced as much as the broader university sector in terms of searching for employers to dictate their next decisions. In a broad 2003 Australian national 'stocktake' of legal education, the opinions of 'employers of law graduates' were considered important to survey, as was employers' ability to 'participate in the project'.[386] It was found that all 29 law schools that were surveyed considered the 'views of the profession' 'to varying degrees' when they designed their internal curriculum.[387] Another study, which was co-authored by a current law dean, qualified that 'law schools should [not] surrender control of the law school curriculum to the legal profession'.[388] However, it then admitted that 'it is important that law teachers are aware of the employers' voice, particularly when contemplating the incorporation of "lawyering" skills into the law school curriculum'.[389] The 'employer's voice' is powerful and persistent, and it tends to shift educational outcomes. Law schools are praised when they use the employer's voice to guide their formulation of new graduate attributes. Queensland University of Technology (QUT) was recently hailed as an 'exemplar' of best practice, partly because it used 'feedback from employers and graduates' to create its new list of graduate attributes.[390] It should be noted that the 'employers voice' that these surveys referenced often emerged narrowly from the

[384] Busch (n 119) 49.

[385] Laurent Evrard, 'On Universities Ranking: Hype or Substance?' (2010) 4(1) *Nawa: Journal of Language and Communication* 83–4.

[386] Johnstone and Vignaendra (n 209) 10, 20.

[387] Ibid 227.

[388] Peden and Riley (n 211) 89.

[389] Ibid.

[390] Sharon Christensen and Sally Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration' (2000) 11 *Legal Education Review* 7.

major and minor law firms; it thus does not reflect the great diversity of graduate routes that law students select after graduation.

On one end of this argument is a law school that admitted that:

> We are in constant and close contact with the profession to ask what they require of our students. As the Head of the School, I, along with the Dean of the Faculty, visit all the large commercial law firms, their HR people and some partners, at least every second year and ask them what they think of our graduates and whether they've got any suggestions. And we also meet with them at lunches.[391]

In a political context, this would resemble lobbying. However, even in this context, it is concerning that the legal profession's influence on legal education is so normalised that law schools can openly admit that such heavy-handed influence occurs. The loss of autonomy, in terms of how law schools no longer feel capable of defining their own internal curriculum without any external influences, is profoundly concerning. It is unclear how a university system—which itself lacks autonomy and merely serves as an extension of the agendas of large, corporate law firms—can expect to produce autonomous, critically aware and open-minded law students.

The reality is that major law firms are currently dictating what occurs in Australian law schools, not only in terms of the curriculum and direction of graduate attributes but also in terms of general student life.

The next subsection discusses how this corporate perspective proliferates into the social and extracurricular lives of law students.

c) Broader Corporate Influence

Most Australian law schools have observed a proliferation of corporate-sponsored career fairs, parties, social and networking events, sports activities, libraries and buildings, speaking events, mooting and other law school skills competitions, as well as clerkship presentations from major firms. One law dean recently admitted that their 'university is dominated by publicity from the big law firms', and that their students

[391] Johnstone and Vignaendra (n 209) 231.

feel like they are failures if they do not obtain a job at one of the firms.[392] Students are confronted with endless advertising from big firms, with some students consequently becoming 'captivated by the glamour of corporate lawyering'.[393] Law is no longer considered a job, profession or calling; it is considered the lifestyle choice of a gatekeeper to weekly office sports, drink events, parties and pork belly canapés. Attracted by the message, students come to crave 'the office with a spectacular view, original artworks, lavish entertainment and high salaries', which 'overshadows [any possible] alternative career [pathways]'.[394] Due to this oversaturation of marketing, corporate law is often considered the only option for law students. In the US, one educator recently discussed the four largest subjects: 'Law, medicine, finance and consulting … dominate careers fairs, not by word of mouth or reputation, but by monetary donation'.[395] Australian major law firms similarly out-pay everyone in terms of sponsorship towards law schools. The more these firms' branding appears in front of students, the more those students will be convinced that corporate law is the only option for their future and for their vision of success.

The current literature has not recognised that major law firms have become invested in capturing the attention of all students to the extent that they wish to acquire the best students after graduation. Given this vested interest and the reality of the economy not possessing enough jobs for all graduates, a clear discrepancy can be noted between the needs of employers and those of graduating students. The damage caused by encouraging all law students to pursue employment at the largest firms—when numerous students will never work at such firms—is profound. Although aspiration itself is not unethical, intentionally misleading most of a population to believe that its aspirations are attainable when it is statistically impossible is unethical.

Many students (most students, according to some estimations) who feel misled by the culture of 'prestige' and inevitability in the practice of law (fostered by the major firms and their PR departments) are ignored. There are extensive online forum threads in Australia, such as 'How to Improve Prospects for Law Grads', in which students

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[392] David Dixon, as quoted in Berkovic (n 249).

[393] Thornton (n 1) 47.

[394] Ibid.

[395] Deresiwicz (n 256) 71.

and former students can complain: **'**The sooner the prestige wears off and the reality of law as compared to other professions sets in, the better'.[396] Many students raise their concerns about the lack of available knowledge regarding alternative career paths in law schools, which themselves are dominated by advertising from the select few firms.[397] Others raise concerns about the lack of demand for law graduates in the major firms, despite the excessive corporate advertising.[398] Nick Abrahams, partner of a Sydney law firm, joked that 'perhaps the answer is that rather than going to law school to become a lawyer, go to law school so you can open a law school'.[399] Venting this frustration, a popular genre of law student confessionals has appeared online, and Australian law students have begun writing online 'ranting' articles, similar to their money-strapped and debt-riddled US counterparts. Marie Iskander, a final year law student, wrote: 'Despite being reluctant about pursuing a clerkship, because I didn't feel drawn towards private law, I was convinced by peers, older lawyer friends and, of course, HR from the big law firms that "this is the right path" and "what do you have to lose?"'[400]

The losses are real and significant. Many law students complain that they start law school with an interest in pursuing a social justice agenda but then feel that they must 'do their time' at the major firms.[401] This finding is evident in several empirical studies that compared the intentions of first year law students (who are initially more publicly motivated by social justice and morality) to their intentions at graduation (in which they are more focused on business and corporate values).[402] Once they

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[396] anti23 (User #582820), 'How to Improve Prospects for Law Grads—Part 3' (Whirlpool Forum, 13 December 2013) <http://forums.whirlpool.net.au/forum-replies.cfm?t=2193169&p=4>.

[397] As can be evidenced by the student discussions on Whirlpool Forums; 'How to Improve Prospects for Law Grads—Part 3' <http://forums.whirlpool.net.au/forum-replies.cfm?t=2193169&p=1>.

[398] Neil McMahon, 'Law of the Jungle: Lawyers Now an Endangered Species', *The Sydney Morning Herald* (online at 11 October 2014) <http://www.smh.com.au/national/newscustom/law-of-the-jungle-lawyers-now-an-endangered-species-20141011-114u91.html>.

[399] Ibid.

[400] Marie Iskander, 'The Ugly Truth about Being a Law Student', *Lawyers Weekly* (online at 3 October 2013) <http://www.lawyersweekly.com.au/opinion/14765-The-ugly-truth-about-being-a-law-student>.

[401] Joshua Krook, 'Clerking Mad', *Honi Soit* (Web Page, 12 May 2014) <http://honisoit.com/2014/05/clerking-mad/>l; Cooper and Trubek (n 263) 29.

[402] Gregory J Rathjen, 'The Impact of Legal Education on the Beliefs, Attitudes and Values of Law Students' (1977) 44 *Tennessee Law Review* 85; Howard S Erlanger and Douglas A Klegon, 'Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns' (1978) 13(1) *Law & Society Review* 11; E Gordon Gee and Donald W Jackson, 'Current Studies of Legal Education: Findings and Recommendations' (1982) 32 *Journal of Legal Education* 4.

graduate, social justice–oriented students are often 'swallowed up [by the big firms] … drawn in by the tempting income',[403] and they feel like they are trapped between the proverbial rock and a hard place.[404] The loss of social–justice oriented students to law firms is often dismissed as having a net-neutral effect on the economy. This demonstrates how all-encompassing the vocational outlook of universities has become. The corporate seduction and media messaging that are used to encourage students to act against their desires to help others, or contribute to charity and society more broadly, do not portray the supposedly 'prestigious' or 'honourable' profession. Indeed, encouraging students to forgo charitable or public-interested pursuits is dishonourable, and it should be called out for what it is. Once-a-week pro bono placements do not supplement becoming a public advocate. Law firms should not be rewarded for discouraging students from pursuing their own interests, pro bono service or social justice.

The university curriculum's loss of autonomy has shifted to an equivalent loss of the student body's autonomy. Many students feel that 'they are living out a script that they didn't choose. They feel that their dreams are being shaped by incentives that are coming to them out of thin air.'[405] The chief executive of the NSW Law Society starkly addressed the need to inform law students about 'the state of the legal market' before they begin a law degree, but it is unclear how this can occur while students are receiving the never-ending onslaught of glossy pamphlets from the major firms;[406] one man cannot stop a tsunami, however much he might shout at it to cease and desist.

That major law firms have other vested interests (e.g., preventing graduates from being interested in other careers outside law) is similarly unrecognised in the literature. Several law firms have recently revealed open fears about the large

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[403] Krook (n 401).

[404] Jeena Cho, 'Quitting Someone Else's Dream', *Above the Law* (Web Page, 13 July 2015) <http://abovethelaw.com/2015/07/quitting-someone-elses-dream/>.

[405] Family Action Network, 'William Deresiwicz, Ph.D. Excellent Sheep: The Miseducation of the American Elite' (YouTube, 18 November 2014) 00:00:00–01:01:22 <https://www.youtube.com/watch?t=595&v=mrOAkfKCSpQ>.

[406] Marianna Papadakis, 'Over 60pc of Law Students Want to Practice Law Despite Grim Market' (27 July 2015) *Australian Financial Review* <http://www.afr.com/business/legal/over-60pc-of-law-students-want-to-practice-law-despite-grim-market-20150727-gil580#>.

accounting firms 'hiring [the] heavy hitters, [the law graduates] with real credibility'.[407] These fears imply a greater fear: losing control over recent graduates. A common phrase among law firms is that Australian law schools are producing 'graduate[s] who are not committed to legal practice and who [will] leave after a few years' (generally, to other industries).[408] Paradoxically, law firms demand 'well-rounded' applicants.[409] Here, it must be asked whether a well-rounded candidate might develop interests outside the law, as aligned with the definition of being well rounded, and whether they might therefore seek to leave legal employment at some point in their lives. Being well rounded demands an intellectual expansion beyond the narrow confines of a single discipline; however, law firms demand a narrow specialisation of graduates into 'legal professionals' alone.

This trend's effect on legal education—a field in which the views of employers still predominate—results in universities becoming vassals for the major firms; universities cannot move beyond the narrow vocational confines, and their students are slaves to 'graduate attributes' that large firms dictate. It is difficult to perceive how well-rounded students can ever emerge from this system unless they fight against their educational institution—and fight for a decent education, one that contradicts what they are expected to receive.[410]

Instead of encouraging law students to broaden their horizons while studying in law school, several Australian law deans have publicly suggested that law students should find diversity 'from their other degree'.[411] That is, they are passing the buck. One dean admitted the problem of diversity in graduating classes, but then immediately stated that students should 'combine their law studies with a range of other degree programs [so that] at the outset they can craft the sort of career options that they have

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[407] Agnes King and Katie Walsh, 'Big Four Accounting Firms Push into Legal Services' (22 July 2015) *Australian Financial Review* <http://www.afr.com/business/accounting/afr8acclawyers-vs-accountants-20150721-ghq715>.

[408] Johnstone and Vignaendra (n 209) 237.

[409] Ibid.

[410] Deresiwicz (n 316).

[411] Sarah Derrington, 'Dean's Welcome', *TC Beirne School of Law* (Web Page, YYYY) <http://www.law.uq.edu.au/deans-welcome>; Neil McMahon, 'Future-Proof Your Law Degree' (3 August 2015) *The Sydney Morning Herald*.

in mind'.[412] Another suggested that 'a law degree … opens up many opportunities'.[413] Another again suggested that law students should 'benefit from the intellectual diversity provided by a wide range of combined degrees which offer an interdisciplinary education to enhance their legal education'.[414] Therefore, instead of making law a generalist degree that many students desire it to be, deans try to make law 'generalist' by association—to the idea of students being involved in other, external degrees. This is a subtle way of not addressing the problem.

Despite how law deans are advising students to be involved in other degrees, most of the alternative advice to young law students regards narrowly gaining legal professional skills alone—to the detriment of gaining any well-roundedness. In their book for prospective law students, Carey and Adams suggested that new law students should become involved in as many law extracurriculars as possible.[415] They should join law reviews, legal centres, law student groups and the local law societies.[416] In brief, they suggested that law students should be 'lawyering' at all times, which denotes a lifestyle that is designed to destroy the 'rhythmic and periodic textures of human life'.[417] The focus on law-only extracurriculars explicitly discourages lateral thinking. However, this demand for constant lawyering has been routinely justified by the lack of new graduate positions at the major firms. Positioned with an absent demand in the economy yet in the heart of a vocationalised system, students are pressured into acquiring as many law-related extracurricular activities as possible. Since law firms can select any preferred graduate, the competition increases exponentially—to the extent that being good at law is no longer good enough. Graduates must be good at law *and* mooters or CLC volunteers; they must be involved in law student bodies or a review, or, even more crucially, they must work in part-time legal practices throughout their studies. In this sense, law dominates the

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[412] McMahon (n 472).

[413] As stated by the Dean of Law at UTS, Lesley Hitchens; quoted in Samantha Woodhill, 'No Need to Limit Law Student Numbers', *Australasian Lawyer* (Web Page, 28 April 2015) <http://www.australasianlawyer.com.au/news/no-need-to-limit-law-student-numbers-says-professor-199690.aspx?keyword=student>.

[414] Derrington (n 411).

[415] Christen Civiletto Carey and Kristen David Adams, *The Practice of Law School: Getting in and Making the Most* (ALM Publishing, 2013) 313–32.

[416] Ibid.

[417] Jonathan Crary, *24/7: Late Capitalism and the Ends of Sleep* (Verso Books, 2013) 9.

public and private lives of average law students, to the extent that they can no longer become well rounded, even if they wanted to.

Little is explained to law students regarding alternative career paths while they are in law school. Lee-May Saw, President of the Women Lawyer's Association of NSW, recently stated that 'many [law students] are choosing not to pursue a career in law but what's concerning is graduates feel there is a lack of information about work opportunities'.[418] In a cynical reading, some have also suggested that universities in the neoliberal age have 'strong incentives *not* to produce too many seekers and thinkers, too many poets, teachers, ministers, [or] public-interested lawyers'.[419] These graduates would decrease the amount of alumni funding available from students after they graduate.[420] There is a clear incentive to funnel law students into the most highly paid professions available (i.e., the major firms), so that alumni contributions can be maximised.[421] At the least, there is a conflict of interest here; at most, this ensures profit seeking on the part of all parties (the student, law firm and university). Profit becomes the metric by which all actions should or can be judged, and all parties turn their minds towards a vocational, market-centric ideology and outlook—one that lacks any meaning other than money as the prime motivator in life.

One suggested solution is to introduce legal clinics or clinical legal education. The following section explores whether legal clinics are a real solution to the current dilemma in social justice careers, or whether they might, counterintuitively, reinforce the neoliberal perceptions of students.

d) Clinical Legal Education as a Silver Bullet

Legal clinics are institutions attached to law schools, or in the community, that place students in real-world settings with clients, which thereby allows them to confront the 'reality' of the law.[422] Students are paired with faculty or volunteer lawyers to fulfil

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[418] Papadakis (n 406).

[419] Deresiwicz (n 316) 71.

[420] Bentley and Squelch (n 167) 96.

[421] Ibid.

[422] Brett WB Smith, 'The Case for Further Integration of Clinical Legal Education in Australian Law Schools' (2007) 2 <http://www.collaw.edu.au/assets/Final-Brett-Smith.pdf>.

basic duties, including client interviews, drafting and research.[423] The clinics are often established as (or linked to) community legal centres, and they provide services to the 'poor and disadvantaged'.[424] In this way, legal clinics frequently begin with an implicit social justice agenda.[425] This agenda would include expanding access to justice by providing services to the poor and helping the vulnerable with legal disputes or others who otherwise could not afford such services.[426] For example, UNSW's Kingsford Legal Centre aims to deliver 'access to justice to the most disadvantaged members of our community'.[427] Clinical legal education can be presented as a solution to a law school curriculum that is considered detached from lawyers' real experiences of working in society.[428] Working with real clients, confronting the reality of the law in practice (e.g., the psychological toll of legal procedures on real people) and possibly assisting those from disadvantaged backgrounds provides students with a broader educational and professional experience of the role of lawyers than they would otherwise receive.[429] Duncan Kennedy's historical complaint that law schools entrench inequality in society can be somewhat addressed by allowing students to work in pro bono legal clinics that target access to justice—an issue that typically entrenches such societal inequalities.[430]

Concurrently, the increasing focus on clinical legal education (as a 'new' movement) can be regarded as correlating with the rise of neoliberal philosophy. Clinical legal education might sometimes inadvertently assist the neoliberal turn in legal education by reinforcing a focus on job skills, graduate attributes and numerical, outcome-based education. In clinics, students 'learn about law and lawyering by performing

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[423] Anna Cody, 'Developing Students' Sense of Autonomy, Competence and Purpose through a Clinical Component in Ethics Teaching' (2019) 29(1) *Legal Education Review* 3.

[424] Adrian Evans et al, *Australian Clinical Legal Education: Designing and Operating a Best Practice Clinical Program in an Australian Law School* (ANU Press, 2017) 101–2, 116.

[425] Ibid 100–1.

[426] Ibid.

[427] 'Kingsford Legal Centre', *UNSW Sydney* (Web Page) <https://www.klc.unsw.edu.au>.

[428] Evans et al (n 424).

[429] Ibid; For more on the professional role aspect, see Jackie Weinberg, 'The Common Missions of ADR and Clinical Legal Education Provide a Solid Foundation for Teaching ADR in Clinic', *The Australian Dispute Resolution Research Network* (Blog Post, 21 January 2019) <https://adrresearch.net/2019/01/21/the-common-missions-of-adr-and-clinical-legal-education-provide-a-solid-foundation-for-teaching-adr-in-clinic/>.

[430] For example, Kennedy suggested that students are trained to cement inequality in society due to their role in cementing hierarchies (e.g., by entering prestigious jobs): Kennedy (n 171) 66.

lawyering tasks'.[431] These tasks endow them with specific skills that are valuable in the job market.[432] However, at other times, clinical legal education might also work against the neoliberal turn by allowing students to critique the law in practice, reflect on a client's lived experience of the law and gain tangible new traits such as empathy and compassion, which are not necessarily part of a neoliberal or vocational curriculum.[433] Regardless of whether students' experience in a legal clinic is broad or not, perceiving the law in society critically or being narrowly focused on job skills alone is decided by the individual clinic, which varies according to each case. It is equally plausible for clinics to be a hybrid of social justice and neoliberal (or at least vocational) educational paradigms; this would provide students job skills while simultaneously allowing them time outside class to consider social justice and reflect on how the law works in society.

Examining the arguments that have been advanced to establish legal clinics offers a better understanding of the veracity of the claims of a vocational or social justice purpose to clinical education. This section does not aim to offer a comprehensive history of these clinics, but rather some select examples that demonstrate how different arguments have been made for legal clinics to become part of a law school curriculum in the US and Australia over time. These historical arguments have sometimes matched a neoliberal paradigm by focusing on numerical outcomes, job skills and market-based competition with other law schools; however, legal clinics have also been advanced as a social justice salve to legal positivism or as a method for students to gain exposure to the real world of law in society. Further, sometimes both directions have been advanced.[434]

Some of the earliest of these examples from a common-law jurisdiction are from the US, where legal clinics were initially, though not exclusively, established to replace

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[431] Ralph S Tyler and Robert S Catz, 'The Contradictions of Clinical Education' (1980) 29 *Cleveland State Law Review* 694.

[432] 'Best Practices for Experiential Courses' in Roy Stuckey et al (eds), *Best Practices for Legal Education* (CLEA, 2007) 170.

[433] For a longer discussion of empathy in clinics, see Andrés Gascón-Cuenca et al, 'Acknowledging the Relevance of Empathy in Clinical Legal Education' (2018) 25(2) *International Journal of Clinical Legal Education* 218.

[434] For a discussion on job skills, see 'Best Practices for Experiential Courses' (n 432). For a nuanced discussion on social justice claims, that encompasses job skills too, see Ibijoke Patricia Byron, 'The Relationship between Social Justice and Clinical Legal Education: A Case Study of the Women's Law Clinic' (2014) 20(2) *International Journal of Clinical Legal Education* 564–7.

apprenticeships as a method for teaching vocational skills to law students.[435] By the late 1800s, law students were still mandated to complete apprenticeships 'in private law offices', even if they had attended a US law school.[436] An informal agreement existed 'between the legal bar and law schools', in which the theoretical component of legal education would be left to law schools and the practical component to the legal bar.[437] Law students were required to undergo apprenticeships even if they had attended a law school; this signifies that US law schools lacked a requisite incentive to provide their own practical legal training.[438] However, as 'the apprenticeship model dissipated' and law schools arose as the primary avenue through which to enter the legal profession, a question was asked regarding 'who would train law students' in the more practical aspects of legal practice.[439] One answer was law schools themselves, in which students would spend time in legal clinics that were run by, or associated with, the faculty or student body.[440]

Early legal clinics began as legal 'dispensaries' that were modelled from the concept of medical dispensaries providing free services to the poor.[441] To varying degrees, these early legal clinics linked either to a university or student group, and they were often informal compared to modern legal clinics.[442] That they provided services to the poor implicitly signifies that these dispensaries had a practical vocational and social justice aspect from the beginning. The first dispensary in the US was established in 1893 by a 'law club at the University of Pennsylvania'.[443] The Pennsylvania dispensary was established by a voluntary student organisation that had no affiliation with the university.[444] It aimed to provide 'free legal services to the poor, much like

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[435] Julie D Lawton, 'Teaching Social Justice in Law Schools: Whose Morality Is It?' (2017) 50 *Indiana Law Review* 821.

[436] Ibid.

[437] Ibid.

[438] JP Sandy Ogilvy, 'Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools' (2009) 16(1) *Clinical Law Review* 4.

[439] Lawton (n 435) 821; Jerome Frank, 'Why Not a Clinical Lawyer-School?' (1933) 81(8) *University of Pennsylvania Law Review* 907, 909.

[440] Lawton (n 435) 821; Frank (n 439) 907, 909.

[441] Richard J Wilson, *The Global Evolution of Clinical Legal Education: More Than a Method* (Cambridge University Press, 2017) 89.

[442] Ibid.

[443] Ogilvy (n 438) 4.

[444] Wilson (n 441) 89.

medical dispensaries of the time'. As such, it initially possessed a clear social justice agenda.[445] However, according to contemporary documents, this agenda was secondary to a professional agenda; students would work as lawyers until they could represent clients in court, which indicates a significant practical-skills component of helping students hone 'the tools of [the] profession'.[446]

Other universities followed suit. In 1904, the University of Denver established a dispensary, while in 1913, Harvard 'established the Harvard Legal Aid Bureau and [in the same year] the University of Minnesota required obligatory service by all students in the office of the Legal Aid Society'.[447] In the case of Harvard, social justice was the core mission statement of the student-run clinic; it focused on 'rendering legal aid and assistance, gratuitously, to all persons or associations who by reason of financial embarrassment or social position, or for any other reason, appear worthy thereof'.[448] In the case of the University of Minnesota, the university advertised the clinic as a 'service to poor clients', but the faculty's main internal motivation was to prepare students for legal practice.[449] These early clinics each had an implicit (and often advertised) social justice focus in addition to an often more explicit, internal and vocational focus.

Two interesting statements were made by US advocates of legal clinics in the ensuing decade, which reflected the dual social–vocational purpose of legal clinics at the time. In 1917, William Rowe wrote a law review article that advocated for every law school to have a clinical program.[450] He argued in favour of legal clinics for three key reasons: vocational training, professional responsibility and social justice.[451] He believed that clinics 'should be made a part of the regular curriculum' because

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[445] Ibid.

[446] Ibid.

[447] Ogilvy (n 438) 4; Cf Wilson (n 441) 88.

[448] Colleen Walsh, 'The Harvard Legal Aid Bureau at 100: A Lifeline to the Poor: For a Century, Harvard Law Students Have Toiled to Ensure Legal Rights for All', *Harvard Law Today* (Web Page, 21 November 2013) <https://today.law.harvard.edu/feature/the-harvard-legal-aid-bureau-at-100/>.

[449] Wilson (n 441) 97.

[450] Roberta M Gubbins, 'A Bit of History on Law Clinics and Law Schools', *Detroit Legal News* (online at 5 July 2011) <http://legalnews.com/detroit/1001293>; Cf William Rowe, 'Legal Clinics and Better Trained Lawyers—A Necessity' (1916–1917) 11 *Illinois Law Review* 591, 606–7.

[451] Gubbins (n 450); Rowe (n 450).

'nothing else' would 'arouse an abiding interest in the law, as a vital thing' for students.[452] According to Rowe, common-law countries had failed to provide adequate vocational training in the wake of the apprenticeship model; he argued that this could now be accomplished via law schools.[453] Further, not only could law schools train students in practical matters, but they could also teach students about the 'professional spirit' of 'good citizenship' and a lawyer's duty to society.[454] Finally, students could learn from clinics about duty 'to the poor', to 'charity and [to] social service'.[455]

In 1921, the Carnegie Foundation for the Advancement of Teaching funded a report on legal education.[456] Written by Alfred Reed, the report advocated for a 'practical skills' course in all law schools that would advance both 'social service' and 'practical skills'.[457] The purpose of legal education was similarly identified by Reed as being three-fold: 'general education, theoretical knowledge … and practical skills training'.[458] Reed suggested that lawyers were political actors of the 'governing mechanism of the state' and that they acted as a check and balance on injustices against individuals.[459] Expectedly, Reed's proposals were met with controversy; for example, Albert M Kales of the Chicago Bar vigorously critiqued that the recommendations of Reed's report were impractical—a criticism against which Reed felt compelled to defend himself.[460] Nevertheless, his recommendations imparted the same wider perspective of what legal clinics could do in a law school.

In 1928, the University of Southern California established the first experimental six-week in-house program for clinical legal education,[461] which was created by John

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[452] Rowe (n 450) 606–7.

[453] Ibid 591, 594.

[454] Ibid 11.

[455] Ibid 11.

[456] Gubbins (n 450).

[457] Ibid.

[458] Ibid.

[459] Alfred Zantzinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States, with Some Account of Conditions in England and Canada* (Carnegie Foundation for the Advancement of Teaching, 1921) 3.

[460] Alfred Zantzinger Reed, 'Scholarship or Opinion?' (1921–1922) 35(3) *Harvard Law Review* 355.

[461] Ogilvy (n 438) 4.

Bradway.[462] Bradway would later establish a legal aid clinic at Duke University, one that would be considered 'the first full-fledged in-house clinical program' in a US law school.[463] In his 28 years of running the clinic, Bradway contended that it possessed multiple objectives.[464] It would help train 'new lawyers' with 'flesh and blood clients' in preparation for the bar, it would help Duke 'build relationships in the community', and it would finally demonstrate the legal profession's 'humane side' by representing clients who could not pay.[465] This trifecta of vocational training, outreach and community service aligns with the focus of the earlier legal dispensaries. It was a new experience for Duke University, in that this trifecta occurred within the law school itself rather than at an external venue.[466] Despite the success at Duke University, it would take another two decades before another law school (the University of Tennessee) opened an 'on-going, in-house clinical program'.[467]

In 1933, Jerome Frank, one of the major writers of the Legal Realist movement, argued that most law schools were too theoretical and had to become 'lawyer-schools'.[468] His conception of lawyer schools contradicted that of 'law[yer] teacher' schools that tended to create more academics rather than practical lawyers.[469] Frank argued that lawyer schools could be accomplished through legal clinics.[470] However, even though he advocated for clinics from a strong vocational premise, Frank also acknowledged that legal clinics should have a larger role in the community through fostering legal aid work among students.[471] Therefore, even when framed from a vocational standpoint, social justice concerns inevitably rose to the surface.

However, the true rise of legal clinics as a source of social justice initiatives as the primary goal in the US, began in the 1970s and 1980s, when funding was often tied to

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[462] Ibid.

[463] Ibid.

[464] 'Clinics: Clinical Program', *Duke Law* (Web Page, 2020) <https://law.duke.edu/clinics/clinical/>.

[465] Ibid.

[466] Ibid.

[467] Ogilvy (n 438) 4; Lawton (n 435) 825.

[468] Frank (n 439) 916–17.

[469] Ibid.

[470] Ibid.

[471] Ibid.

specific social justice objectives.[472] This diverged from the more implicit notion of social justice to a more explicit motivating factor.[473] Grants were offered to law schools from 'the Department of Education and the Legal Services Corporation, [and] the Ford Foundation' to significantly expand clinical programs.[474] This funding was linked to explicit 'social justice' missions of 'providing legal assistance to the poor', which diverged from the explicitly vocational focus of earlier clinics.[475] By 1972, several law schools (including Stanford, Michigan, Yale, Pennsylvania, UC Hastings and Georgetown) began operating under this more explicit social justice agenda.[476] There is a correlation that can be made here regarding the rise of the CLS movement in the same period, in which various CLS scholars had equally argued for legal clinics to be used to teach students about 'privilege', oppression and the reality of the legal system as a non-neutral entity.[477] These objectives were broader than a strictly vocational approach would allow. The increasing number of legal clinics in other countries worldwide (e.g., Canada, Australia and the UK) can also be traced back to the 1970s.[478] The specific context of Australia's history of legal clinics will now be discussed in greater detail.

The origin of clinical legal education in Australia began in the 1970s with various legal referral services. These services involved students participating in external placements outside law schools without any course credit or university supervision.[479] Examples include informal referral services that were associated with Melbourne University, Monash University and ANU.[480] The first of these referral services was created in 1971 by Melbourne University law students who operated a 'free legal

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[472] Lawton (n 435) 826.

[473] Ibid.

[474] Ibid.

[475] Ibid.

[476] Ibid.

[477] Hilary Charlesworth, 'Critical Legal Education' (1988) 5 *Australian Journal of Law and Society* 33; Mark Tushnet, 'Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Legal Education' (1984) 52(2) *George Washington Law Review* 273–5.

[478] Maria Concetta Romano, 'The History of Legal Clinics in the US, Europe and around the World' (2016) 16 *Diritto & Questioni Pubbliche* 27.

[479] Jeff Giddings, 'Clinical Legal Education in Australia: A Historical Perspective' (2003) 3 *International Journal of Clinical Legal Education* 8–10.

[480] Ibid 8; John Chesterman, *Poverty Law and Social Change: The Story of the Fitzroy Legal Service* (Melbourne University Press, 1996) 4, 26.

referral service' in Carlton at the Church of All Nations.[481] In 1971, a group of law student volunteers from Monash University (supported by members of the law faculty) began a referral service that was hosted at the Melbourne Citizens Advice Bureau.[482] Finally, in 1972, the ANU Law Society established a referral service in lieu of 'official' legal aid offices, which opened the following year.[483] As voluntary organisations, these early services possessed an implicit social justice agenda, which involved providing free referrals and an initial point of contact for disadvantaged clients.[484] However, they were not hosted in-house at law schools.

The first Australian in-house legal aid clinic was established in 1975 by Monash University Law School, and it was created as part of a dual focus on community service and student learning.[485] By 1979, the Monash program was run as part of a law school elective called 'Professional Practice', in which it accepted 15 students at a time.[486] The program allowed for one placement at the internal clinic and at three external clinics, but the core focus was less on education and more on legal aid itself.[487] This sometimes involved helping those with a foreign language barrier (e.g., those who lacked proficiency in English) with their legal problems.[488] The clinic had the dual role of serving the public through this outreach to immigrants and the poor, as well as the implicit role of serving students through course credit.[489]

The Monash program was followed in 1974 by a legal clinical program at La Trobe University. It was created by staff in the Legal Studies Department who targeted the representation of students in legal disputes.[490] Students were originally not involved

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[481] Chesterman (n 480) 4, 26.

[482] Giddings (n 479).

[483] Ibid 8–9.

[484] Ibid 8–10; Chesterman (n 480) 4, 26.

[485] Giddings (n 479) 9–10.

[486] Ibid.

[487] Ibid.

[488] Ibid.

[489] Ibid. For more, see 'Monash Law Clinics', *Monash University* (Web Page) <https://www.monash.edu/law/home/cle/mlcc#:~:text=History%20and%20background,School%20building%20in%20the%201970s.&text=The%20present%20building%20was%20opened,the%20Victorian%20Chief%20Justice%20Phillips>.

[490] Giddings (n 479) 11; Adrian Evans, 'Para-Legal Training at La Trobe University' (1978) 3(2) *Legal Service Bulletin* 65.

in this program, which signified that it was for their benefit (and a public benefit, as a subsidised service) rather than vocational training.[491] By 1977, partly due to student demand, it was realised that the clinic could be used to train students in paralegal work to prepare for practice.[492] Adrian Evans, a faculty member who was part of the clinic, established a clinical elective for students called 'clinical legal education'.[493] Originally, 12 students were placed on the service, in which they participated 'in seminars on interviewing skills and various substantive legal areas'.[494] In 1978, La Trobe hired a legal aid lecturer, who established a secondary clinic at West Heidelberg Community Centre that functioned as a secondary placement venue for students on the elective unit.[495] Another elective ('law and social justice') was developed from the same work, but with a more explicit social justice focus; it pushed for students to regard themselves as changemakers in society.[496] Students were taught electives that would allow them to play a key role in 'improving the workings of the legal system' rather than to merely work within that system.[497]

A final historical legal clinic worth mentioning is the one established at UNSW in 1981, titled the Kingsford Legal Centre.[498] The clinic had an evident social justice agenda and political mission from the start, as it accepted various anti-discrimination cases; however, it was also established to differentiate UNSW Law School from the existing Sydney University Law School.[499] This market differentiation strategy is notable because it is unique according to the explicit reasons cited by the legal clinics discussed thus far. In terms of timing, a focus on the market competition correlates to the rise of neoliberal political philosophy at the time (though it was not necessarily caused by the philosophy). Kingsford Legal Centre nevertheless possessed a significant community service focus while it simultaneously allowed students to have

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[491] Ibid.

[492] Giddings (n 479) 11.

[493] Ibid.

[494] Ibid.

[495] Ibid; David Neal, 'The New Lawyer Bloke' (1978) 3(4) *Legal Service Bulletin* 148.

[496] Giddings (n 479) 11.

[497] Ibid.

[498] Ibid 13.

[499] Ibid.

practical training in a 'whole range' of roles that were necessary for litigation.[500] It could thus be said the centre was established for market, social justice and vocational reasons.

The number of legal clinics and community legal centre placements for students in Australia has increased significantly from the 1990s.[501] There were '13 CLE programs listed' in the 1998 *Kingsford Legal Centre Guide to Clinical Legal Education* in Australian universities.[502] By 2019, the same guide listed clinics that were linked to 26 of the 39 law schools in Australia, with some law schools running multiple different clinics or placing students at multiple community legal centres through different clinical law elective units.[503] Part of this shift can be explained by CALD's push for clinical legal education to be standardised.[504] In its 2007 submission to the 'Review of the Impact of the Higher Education Support Act 2003: Funding Cluster Mechanism', CALD stated that:

> It is now widely accepted that legal education should have a clinical or industry placement component, with students having hands-on experience with real clients: yet clinical programs are so expensive that only a handful of law schools have been able to fund them adequately, usually with substantial support, to which many law schools do not have easy access.[505]

One way to understand the modern focus of legal clinics in Australia is to consider their mission statements or to examine how they are described on law school websites. At face value, these statements evidence both a vocational and social justice focus (to varying degrees), and almost always simultaneously. The Kingsford Legal Centre stated that it is 'committed to social justice and to promoting access to and reform of the legal system'.[506] It also promised students 'professional skills', but only

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[500] Ibid.

[501] Jackson Walkden-Brown and Lindsey Stevenson-Graf, 'Preparing for Practice: Clinical Legal Education through the Lens of Legal Education Discourse' (2018) 3(1) *Australian Journal of Clinical Legal Education* 7.

[502] UNSW, *Kingsford Legal Centre Clinical Legal Education Guide* (1998).

[503] Kingsford Legal Centre, *Clinical Legal Education Guide (2019/20)* (UNSW, 2019) <https://www.klc.unsw.edu.au/sites/default/files/documents/2924%20CLE%20guide-WEB.pdf>.

[504] Council of Australian Law Deans, 'Submission to the Review of the Impact of Higher Education Support Act 2003: Funding Cluster Mechanism' (2007) 2.

[505] Ibid.

[506] 'Kingsford Legal Centre: UNSW Law', *UNSW Sydney* (Web Page, 2020) <https://www.klc.unsw.edu.au/>; 'Kingsford Legal Centre: UNSW Law: Study', *UNSW Sydney* (Web Page, 2020) <https://www.klc.unsw.edu.au/study>.

those placed within a 'critical analysis of the legal system'.[507] Caxton Legal Centre (Griffith University) also promised students the chance to conduct real legal work, along with 'pro bono law reform' and 'public interest research projects'.[508] Redfern Legal Centre (Sydney University placement) similarly indicated the dual role of 'developing your skills' through client interviews, along with learning the 'constraints of the law' as it applies to the disadvantaged.[509] Other clinics linked to Macquarie University, Newcastle University, the University of South Australia, University of Adelaide, Murdoch University, ANU, Bond University and Curtin University all indicate a similar vocational–social dual purpose.[510] In contrast, the University of Tasmania's clinical placement program focuses solely on an explicitly vocational focus—namely, that students will gain 'practical legal skills' in a 'practice-centric teaching' curriculum.[511] In these cases, social justice can only be evidenced implicitly in the clients that students take in their external placement organisations (e.g., in the Launceston Community Legal Centre and Tasmanian Aboriginal Community Legal Service).[512]

Another way to comprehend the focus of legal clinics in Australia is to consider the experiences of students who undergo placements. Several surveys and statements of students reveal that they gain intangible perspectives about law, society and social justice, as well as tangible job skills from their time in these programs. In 2017, 14 student volunteers and eight supervisors were surveyed at Macarthur Legal Centre in

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[507] 'Kingsford Legal Centre: UNSW Law' (n 506); 'Kingsford Legal Centre: UNSW Law: Study' (n 506).

[508] 'Student Legal Clinics', *Caxton Legal Centre* (Web Page) <https://caxton.org.au/connect/student-legal-clinics/>.

[509] 'University of Sydney Law School—Social Justice', *Redfern Legal Centre* (Web Page, 2020) <https://rlc.org.au/social-justice>.

[510] 'Clinical Legal Education Program', *The University of Adelaide* (Web Page, 2020) <https://law.adelaide.edu.au/free-legal-clinics/clinical-legal-education-program>; 'Legal Advice Clinic' (Factsheet, University of South Australia, 2018) <https://www.unisa.edu.au/contentassets/b21d424485734132bb9a8b81af5b8891/legal-advice-clinic-factsheet_sep2018.pdf>; 'The University of Newcastle Legal Centre', *The University of Newcastle Australia* (Web Page, 2021) <https://www.newcastle.edu.au/school/newcastle-law-school/legal-centre>; 'LAWS5078—Macquarie University Social Justice Clinic', *Macquarie University* (Web Page) <https://coursehandbook.mq.edu.au/2020/units/LAWS5078>; Kingsford Legal Centre (n 503) 5; 'John Curtin Law Clinic', *Curtin Law School* (Web Page) <https://businesslaw.curtin.edu.au/law/john-curtin-law-clinic/>; 'ANU Clinical Legal Education', *Canberra Community Law* (Web Page, 2017) <https://www.canberracommunitylaw.org.au/anu-clinical-legal-education.html>.

[511] 'Practice-Centric Legal Teaching: Clinical Legal Education', *University of Tasmania Australia* (Web Page, 2020) <https://www.utas.edu.au/law/study/practice-centric-legal-teaching>.

[512] Ibid.

South West Sydney.[513] The survey aimed to 'test whether students volunteering in a community legal centre made a significant difference to their learning of the law'.[514] The survey revealed that almost all students gained a greater understanding of their professional responsibility as lawyers and that 100 per cent of students cited a greater understanding of conflict of interest.[515] All students similarly expressed a greater interest in pro bono work due to the placement.[516] They remarked that it was 'rewarding to help those in need', with one student even citing a new-found desire to pursue a wholly 'not for profit legal career'.[517]

Similar comments have been made by students from other placement programs. A student at the UQ Pro Bono Centre cited the 'building [of] confidence in our legal skills' and the ability to more 'valuably' understand the 'significant socio-legal issues affecting indigenous Australians'.[518] A student at Redfern Legal Centre stated that 'it will make you realise that the law is not just fancy and glamorous, but that it affects real people with real problems'.[519] This notion of confronting the reality of law was common. Students at ANU Canberra Community Law variously said that although the clinic helped them 'learn from experienced lawyers' and gain 'client communication skills', they also observed the consequence of the law on real people—specifically those from a lower socio-economic background.[520] Heather, an ANU student, stated that the clinical experience had helped her think about 'careers outside of corporate law'.[521] Therefore, legal clinics not only offer students exposure

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[513] Svetlana German and Robert Pelletier, 'Clinical Legal Experience: The Benefits of Practical Training in Teaching—Student Perspectives' (Conference Paper, The Future of Australian Legal Education Conference, 13 August 2017) <https://academyoflaw.org.au/resources/Legal%20Education%20Conference%202017%20Final%20Papers/German,%20Pelletier%20-%20Clinical%20Legal%20Experience.pdf>.

[514] Ibid 1.

[515] Ibid 21–2.

[516] Ibid 25.

[517] Ibid.

[518] 'Legal Clinics Get a Boost from UQ Law Students', *The University of Queensland Australia* (Web Page, 2021) <https://www.uq.edu.au/news/article/2020/05/legal-clinics-get-boost-uq-law-students>.

[519] 'University of Sydney Law School—Social Justice' (n 509).

[520] 'ANU Clinical Legal Education' (n 510).

[521] Ibid.

to the reality of the law in practice, but they also help students understand the role they can play in affecting that reality.

It could be argued that regardless of effect, the rise of legal clinics in Australia might have been caused by neoliberal policy movements—such as the defunding of legal aid services more broadly and the outsourcing of legal aid responsibilities to clinics as semi-privatised institutions in the market (which relied on free student labour to subsidise the work of paid professionals).[522] Campbell and Ray made this argument without naming it 'neoliberal'.[523] The start of the shift was observed in 1996 when the federal government 'announced a program of reduction in legal aid funding'.[524] In the ensuing years, the government pursued alternatives—such as clinical legal education with its 'use of students as "free labour" and its connection with Universities, which might be expected to contribute to the costs of programs'.[525] This reduction in public funding and reliance on universities (which themselves were becoming increasingly privatised) might indicate a neoliberal policy shift—one in which neoliberal philosophy involves privatising public services into a more competitive market. Due to these shifts, in 1998, clinical legal education became a part of government expenditure on legal aid services, as the government began working in 'cooperation with universities'.[526] The situation became somewhat more complicated after this point. Since 2000, the overall commonwealth funding that was bestowed to the states for legal aid has gradually increased (and this figure now includes clinical legal education).[527] In Victoria, when isolating legal aid services, the share of federal government funding for state-run legal aid has been cut from almost 50 per cent in 1999–2000 to almost 30 per cent in 2013–2014.[528]

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[522] Susan Campbell and Alan Ray, 'Specialist Clinical Legal Education: An Australian Model' [2003] (June) *Journal of Clinical Legal Education* 68.

[523] Ibid.

[524] Ibid.

[525] Ibid.

[526] Ibid.

[527] This is based on parliamentary library estimates; Jaan Murphy and Michelle Brennan, 'Legal Aid and Legal Assistance Services' (Budget Review Research Paper Series No 2016–17, Parliamentary Library, 19 May 2017).

[528] Department of Premier and Cabinet, 'Submission to the Public Accounts and Estimates Committee's Inquiry into the Impact on Victorian Government Service Delivery of Changes to National Partnership Agreements' (21 August 2015) 31, as cited in Victoria State Government, *Access to Justice Review* (Finsbury Green, 2016) vol 2, 339.

It should be asked whether the rise in funding for clinical legal education over time (rather than for state-run legal aid services) is a neoliberal shift. There is a further question of whether this shift is partly taking advantage of free student labour as part of a broader neoliberal shift towards the casualisation and added precarity of the workforce.[529] Free labour is often at the heart of neoliberal policy initiatives.[530] Although paid professionals also work in clinics, and some students are paid, paid workers are to some extent implicitly subsidised by the work of student volunteers. However, some doubt has been expressed regarding this claim, as some clinic supervisors believe that students might require so much training that they actually do not help the clinics operate at a higher capacity at all (and they even hinder clinic services).[531] Further, working for free in this context (pro bono work) encourages students to commit to future pro bono work and charity, in a manner that does not necessarily reflect broader free labour in society (e.g., as part of a profit motive).[532] An increased amount of funding for community legal centres might also reflect the positive role that these centres play in their communities, instead of reflecting a negative turn in government policy. It is worth questioning whether a shift from state-run legal aid services to community legal centres (and clinical legal education) might correlate with a broader neoliberal shift in government policy.

The push for more 'clinical legal education' (which has occurred since the late 1800s) might also be considered a reinforcement of the vocational trend that is already occurring in law schools.[533] Clinical legal education is often framed as being a more 'practical' method for learning the law.[534] In clinics, students 'learn about law and lawyering by performing lawyering tasks'.[535] These tasks endow them with specific

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[529] For more on the reliance on free labour, see Campbell and Ray (n 522).

[530] Scott Burrows, 'Precarious Work, Neoliberalism and Young People's Experiences of Employment in the Illawarra Region' (2013) 24(3) *The Economic and Labour Relations Review* 380–2; Ann Duffy and Norene Pupo, 'Unpaid Work, Coercion and the Fear Economy' (2018) 29(1) *Alternate Routes: A Journal of Critical Social Research* 14–16.

[531] German and Pelletier (n 513) 28.

[532] For more on the nature of clinics as an avenue for generating pro bono work practices for students, see Adrian Evans et al (n 424) 28–9.

[533] Rhode (n 423) 43; Malcolm M Combe, 'Selling Intra-Curricular Clinical Legal Education' (2014) 48(3) *The Law Teacher* 281–3; Rebecca Sandefur and Jeffrey Selbin, 'The Clinic Effect' (2009) 16 *Clinical Law Review* 57; Sheppard (n 286) 540.

[534] Rhode (n 423); Combe (n 533); Sandefur and Selbin (n 533); Sheppard (n 286) 540.

[535] Tyler and Catz (n 431).

skills that are valuable in the job market.[536] Legal clinics that are more job focused (and less focused on social justice) might be less critical in their approaches, and they might even accept and rely 'on the established relations of law and power in society'.[537] Tutors can instil their own neoliberal biases into the clinical environment, as they can be considered a product of the education that they themselves have received.[538] This makes it difficult to ascertain how clinics can 'avoid graduating instrumentalists' who regard clients not as human beings but as targets for their own persuasion skills, achievement and performance.[539] Even the concept of obtaining 'job skills' from clinical legal education seemingly undermines the belief that students exist to serve the public selflessly.[540] This is most evident in discussions of clinical placement outcomes, in which it has been stated that 'law students entering the competitive work environment can benefit significantly from practical work experience during the course of their law degree'.[541] Although these placements are either completely pro bono or taken for credit, a potential underlying tension exists between students' current charity focus in placements and their future-market orientation, in which they would use the experience for their résumé. The more vocational lens here centralises numbers and graduate attributes at the core of charity and public service rather than the traditional values of a person's selflessness or self-sacrifice.[542]

Clinical legal education can also be framed as an attractive investment for law schools in terms of capturing a greater market share of students.[543] This fits the neoliberal imperative to compete for income in the market and win by attracting more student 'customers', with education considered a product. Appealing to student 'customer' demand is an important part of the concept so that law schools can be differentiated

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[536] 'Best Practices for Experiential Courses' (n 432).

[537] Evans et al (n 424) 110.

[538] Robert Condlin, *The Moral Failure of Clinical Legal Education* (Centre for Philosophy and Public Policy, 1981) 336.

[539] Ibid 337.

[540] Brown (n 149).

[541] For example, see the tension in the language between graduate attributes and pro bono work in certain articles, such as in Francina Cantatore, 'Boosting Law Graduate Employability: Using a Pro Bono Teaching Clinic to Facilitate Experiential Learning in Commercial Law Subjects' (2015) 25(1) *Legal Education Review* 147–9.

[542] Brown (n 149).

[543] Walkden-Brown and Stevenson-Graf (n 501) 11.

from their competitors. The student demand for critical legal education programs is high, even at 'conservative law schools'; this reflects that such programs must somehow be beneficial for businesses and reflect corporate values.[544]

However, a market framing of clinical legal education is likely too cynical to be evidentiarily accurate. If clinical legal education programs have some aspect of a market imperative, then they are also steeped in a focus on social justice and the liberal notion of professional responsibility. Legal clinics are often sold as a silver-bullet solution to positivist legal education.[545] The central idea is that by working with the disadvantaged under close supervision, students will obtain an ethical understanding of the law that they could not have otherwise gained in their normal degree.[546] This includes the 'ability to think critically about the law, justice and the legal system, particularly from the perspective of disadvantaged clients'.[547] Instead of leaving law school with the belief that laws are neutral and apolitical, students gain an understanding of 'the maldistribution of wealth, power and rights in society', as well as an understanding of their ethical obligation in addressing those inequalities by observing them firsthand.[548] Legal clinics thereby subvert the traditional hierarchical structure of law school. For example, the survey of students at Macarthur Legal Centre in Sydney (as cited in an earlier section) found that 'almost all respondent students gained a greater understanding of their ethical obligations' from their time volunteering.[549] Students had a similar experience at the Kingsford Legal Centre.[550] This type of 'reflective' practice (and reflective assessment) is covered in more detail in Part 3.

Despite these benefits, legal clinics also have significant limitations. The chief limitation pertains to numbers. Only a small number of law students can work at a legal clinic at a time, which signifies that most students lose the opportunity to gain

[544] Ibid.

[545] Ibid.

[546] Ibid.

[547] Ibid.

[548] Ibid.

[549] German and Pelletier (n 513).

[550] 'Kingsford Legal Centre: UNSW Law: Study' (n 506).

any perceived benefits.[551] It is costly to increase the number of slots available, as this involves hiring additional clinic staff and clients.[552] For example, the Kingsford Legal Centre only has seven students who work there at any time (from a law school year group of 200).[553] Law schools have subverted this issue in a few unique ways. At UNSW, all students can work in the Kingsford clinic—but only for a single night in their course, in which they interview one to two clients.[554] However, a one-night attendance that focuses only on client interviews does not necessarily promote long-term reflective thinking on the law as one might desire. In contrast, the University of Wollongong has a 'compulsory undergraduate subject where the practical component involves 40 days of external placement for the student'.[555] Seeking external placement broadens the range of pro bono and clinical options that are available to students, but it diminishes staff supervision of students in those placements. In a similar manner, the University of Notre Dame has 'a regular community service requirement in its compulsory "Ethics for Lawyers" subject'.[556] This workaround might ultimately help, but it remains the case that cost is a significant barrier for internal legal clinical education.

One way to address the shortage in law student numbers at in-house clinics is to link students with external community legal centres outside university campuses. For example, Sydney University's Social Justice Clinic and Public Interest Clinic program offers law students the opportunity to volunteer at Redfern Legal Centre.[557] Students can act as 'legal assistants' by providing legal advice, assisting with client interviews and drafting. This offers them a chance to work their 'legal knowledge' in the 'real world' and help those who cannot afford traditional legal services.[558] Similar volunteering opportunities for law students are available at Marrickville Legal Centre,

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[551] Kate Kruse, 'Legal Education and Professional Skills: Myths and Misconceptions about Theory and Practice' (2013) 45 *McGeorge Law Review* 48.

[552] Ibid.

[553] Cody (n 423) 4.

[554] Ibid.

[555] John Corker, 'How Does Pro Bono Students Australia (PBSA) Fit with Clinical Education in Australia?' (Conference Paper, Australian Clinical Legal Education Conference, 13–15 July 2015) 9.

[556] Ibid.

[557] 'University of Sydney Law School—Social Justice' (n 509); 'Units of Study: Law Clinics', *The University of Sydney* (Web Page) <https://www.sydney.edu.au/law/study-law/experiential-learning/law-clinics.html>.

[558] 'University of Sydney Law School—Social Justice' (n 509); 'Units of Study: Law Clinics' (n 557).

Community Legal Centres NSW and the NSW Public Defender's Office.[559] The number of these external placement programs is increasing in Australian law schools 'because they are much less resource intensive than in-house programs, do not require establishing infrastructure and clinical supervision is contracted out'.[560] However, one disadvantage is that law schools have less control over the students' learning experience, less supervisory presence and thus a potential for a diminished 'educational experience'.[561] Further, the issue of student numbers persists, in which not all students will be able to find an external placement for their whole course. These community-based legal clinics with a social focus can help students 'develop a commitment to the idea of pro bono work' in their future careers.[562] If the clinic can resist the trend of focusing only on job skills, then it can help law students ask important questions about 'public policy, law reform, social and moral questions, law in a social context, and legal service of the public interest'.[563] The 'real-world' aspect of the clinic can help students interpret the law in context.[564] This includes the potential for critical reflection on issues regarding 'gender, race, disability, [and] socio-economic, philosophical, cultural and indigenous' perspectives on the law.[565] These perspectives on the law contradict the traditional positivist approach of law schools and have new forms of critique.[566]

e) 'Globalisation' as a Justification for New Graduate Attributes

One argument that has been advanced for the vocational turn in law schools is the concept of globalisation. It can be questioned here whether globalisation serves a neoliberal, vocational or liberal arts agenda. On the one hand, globalisation might be framed in neoliberal terms as a driving force behind a global competitive market of semi-privatised law schools, in which law schools compete for the scarce resources of

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[559] 'Units of Study: Law Clinics' (n 557).

[560] German and Pelletier (n 513) 12.

[561] Ibid.

[562] Margaret Castles, Rachel Spenser and Deborah Ankor, 'Clinical Legal Education in South Australia' (2014) 36(4) *Bulletin (Law Society of South Australia)* 38.

[563] Simon Rice, 'Prospects for Clinical Legal Education in Australia' (1991) 9(2) *Journal of Professional Legal Education* 158–9.

[564] Evans et al (n 424).

[565] Ibid.

[566] Ibid.

students and global university rankings. Conversely, globalisation might also be framed in liberal arts terms, in which it can broaden the perspectives of students beyond their own national contexts and help them understand the differentiating anthropological features of law in different contexts. In this way, the latter framing of globalisation might be used as a moderating force within a traditional and sovereign 'law is the law' curriculum by exposing students to competing notions about the law from other cultures.

Globalisation can be used to justify or reinforce the neoliberal turn in legal education, with a focus on global competition for students, global university rankings and graduate attributes that would allow international competition with other law schools. That the workplace is increasingly 'globalised' and 'ever-changing' due to new technologies has become a cliché in academic writing—one used to justify all kinds of arguments, specifically in this context (the focus on law graduate attributes).[567] Law students are said to constantly require more 'legal skills' within this newly internationalised context.[568] They must 'be prepared to practice in an increasingly globalized economy' by developing the 'knowledge and skills' of that global economy.[569] Law deans in Australia similarly asserted that 'law graduates need to be prepared for work across multiple jurisdictions and in a wide range of employment contexts'.[570] However, these statements do not necessarily have as much persuasive meaning as the law deans believe that they do. In some sense, they could even be considered a scare tactic. Historically, universities have highly emphasised intellectual development and 'discovery, innovation and knowledge generation'.[571] In the present day, the globalised marketplace has shifted the language of graduate

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[567] Christensen and Kift (n 390) 4; Bentley and Squelch (n 191) 93; Johnstone and Vignaendra (n 209) 197–203, 355–6; Owen and Davis (n 376) 1–2.

[568] Afshin A-Khavari, 'The Opportunities and Possibilities for Internationalising the Curriculum of Law Schools in Australia' (2006) 16(1–2) *Legal Education Review* 75.

[569] Carmel O'Sullivan and Judith McNamara, 'Creating a Global Law Graduate: The Need, Benefits and Practical Approaches to Internationalise the Curriculum' (2015) 8(2) *Journal of Learning Design* 1–2.

[570] Bentley and Squelch (n 191) 93; Cf Joellen Riley, 'Welcome from the Dean', *Combined Law—The Sydney LLB* (Web Page, 2015) <http://sydney.edu.au/law/fstudent/undergrad/>; Cf David Dixon, 'Welcome from the Dean', *UNSW Sydney* (Web Page) <http://www.law.unsw.edu.au/about-us/who-we-are/welcome-dean>; Cf 'Welcome from the Dean' (by Erika Techera), as found in 'Law School', *University of Western Australia* (Web Page) <http://www.law.uwa.edu.au/the-school/deans-wlcome>; Cf Carolyn Evans, 'Welcome from the Dean', *Melbourne Law School* (Web Page, 2015) <http://www.law.unimelb.edu.au/melbourne-law-school/community/welcome-from-the-dean>; Cf Bryan Horrigan, 'Dean's Message', *Monash University* (Web Page, 2015) <http://www.monash.edu/law/about-us>.

[571] Bentley and Squelch (n 191) 96.

attributes towards one of ideological fear. Today, 'the language used to justify graduate capabilities frequently evokes an apocalyptic view of a future characterised by rapid technological advancement, globalisation, climate change and resource constraints [along with] political instability'.[572] The language is reactive (to the 'new' reality in which people find themselves) rather than proactive in terms of determining what kinds of people are desired from universities, regardless of the world in which they enter. On this topic, Lyn Yates has asked, 'What are the qualities of the educated person[?]', and answered, 'I'll give you a clue. I don't think producing audit-style lists of graduate attributes is good enough'.[573]

In 2014, 95 per cent of Australian universities listed 'global citizenship' as part of their graduate attributes listings.[574] Global citizenship has a broad definition; it can mean anything from exposure to foreign cultures and practices to hard skills (e.g., languages or technical skills) that make students internationally competitive.[575] That a globalised perspective must be quantified, turned into output and often converted into a skill demonstrates the influence of a more vocational or neoliberal educational outlook—in which education is a product with specific outcomes rather than a factor that is valued for its own sake. Further, in the context of law schools, the graduate legal market's increasing mobility (both in terms of 'importing' students to study and 'exporting' law programs overseas) places various countries in competition over the same resource—law students:[576]

> Globalization promotes, of course, increased global competition. Increased student and faculty mobility facilitate the search for excellence, which in turn promotes the creation of leading global education hubs in those countries and regions most able to generate them. These hubs are best placed

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[572] Agnes Bosanquet, 'Brave New Worlds, Capabilities and the Graduates of Tomorrow' (2011) 17(2) *Cultural Studies Review* 101.

[573] Yates (n 253) 259–74.

[574] Agnes Bosanquet, Theresa Winchester-Seeto and Anna D Rowe, 'Conceptualising Global Citizenship: Analysing Intended Curriculum in Australian Universities' in A Kwan et al (eds), *Research and Development in Higher Education: Higher Education in a Globalized World* (HERDSA, 2014) vol 37, 48–60.

[575] For more on culture and language, see Andrew Harvey et al, *Globalization Opportunities for Low Socio-Economic Status and Regional Students* (La Trobe University, 2016) 14–18.

[576] John Flood, 'Legal Education in the Global Context: Challenges from Globalization, Technology and Changes in Government Regulation' (Research Paper No 11–16, University of Westminster School of Law, 8 August 2011) 6.

> to attract the best and brightest students, faculty, and resources, generating, in turn, top graduates, research outputs, university spin-offs, and so on.[577]

However, the concept of globalisation does not need to reinforce a neoliberal paradigm in law schools; it could instead be used to critique both neoliberal and traditional legal education ideas (e.g., legal positivism). Specifically, globalisation can challenge students to think about how the law relates between countries, as well as how the law in one country affects that of another.[578] Instead of conceiving the law as a matter of national authority, the law is revealed in its global context as a function of global relationships and dynamics that change over time.[579] Globalisation, in turn, moves societies away from a mono-dimensional order and towards pluralities, in which it creates a 'premium on … flexibility'.[580] Under a plurality of legal systems, the law is considered changeable and influenced from the outside. Through the language of globalisation, law students can thus be challenged to grapple with how the law interacts with foreign jurisdictions, changes over time and changes as a function of such relationships.[581] This perspective contradicts a strictly vocational and positivist perception of the law (at least on one level), in which law students have typically been taught the law of their own state or country alone, and historically, as a static entity.

Globalisation might be used as a justification not only for teaching the plurality of law but for shifting the law school curriculum towards a broader liberal arts curriculum. If students have to manage a newly globalised world with people from different backgrounds and cultures, then it might be argued that subjects in the humanities would help them do so.[582] Not only must students understand 'several legal systems' in the new 'global law' world, but they must also understand the 'other disciplines

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[577] Javier de Cendra, 'Legal Education in the Era of Globalization—What Should We Expect from Law Schools?', *Law Ahead* (Web Page, 2021) <https://lawahead.ie.edu/legal-education-in-the-era-of-globalization-what-should-we-expect-from-law-schools/>.

[578] William Twining, *Globalisation and Legal Theory* (Cambridge University Press, 2000) 8.

[579] Ibid.

[580] Susanne Soederberg et al, *Internalizing Globalization: The Rise of Neoliberalism and the Decline of National Varieties of Capitalism* (Springer, 2005) 7.

[581] Simon Chesterman, 'The Globalisation of Legal Education' [2008] (July) *Singapore Journal of Legal Education* 61–3.

[582] de Cendra (n 577).

that shape [that] global legal order'.[583] This might include 'politics, economics, and the humanities, particularly philosophy and anthropology'.[584] For example, students could learn the philosophical basis for international law or, through anthropology, the different norms of different cultures that lead to different legal systems worldwide. These arguments could be expressed in comparative legal discussions. A more modern argument is that the globalised world is increasingly technological and that that law students must consequently grapple with new technology subjects.[585]

Conclusion

Australian legal education has observed a growing emphasis on vocational education that might have correlated with the rise of the political philosophy of neoliberalism. Neoliberalism has witnessed the withdrawal of public funding from universities over the last 30 years, as well as the positioning of universities into a competitive market. This has consequently influenced the shift towards graduate attributes, global university rankings and other metrics that play a more important role in universities (and law schools within them) differentiating themselves from their competitors.

This thesis has chronicled the effects of these shifts in terms of the assessment structure and curriculum of Australian law schools. Principally, a more vocational, skills-based and graduate attribute–based curriculum can be observed in the types of assessments that are provided to students, which broadly aligns with the 'employers voice' in curriculum design. The case method or the use of casebooks and case problem questions persists in various law schools across Australia. Concurrently, other types of critical assessments (e.g., essays) are sometimes discouraged. The Priestley Eleven encourage the use of black-letter law rather than critical engagement with the law and the proposal of law reform. There has also been an increasing expansion of legal aid clinics over the last 30 years in Australia, which has led to a dual social–vocational aspect of legal education becoming a more common part of most law schools. Legal aid can be considered both a salve on positivist legal education (exposing students to a different, social justice lens) and a reinforcement of

[583] Ibid.

[584] Ibid.

[585] Ibid.

the vocational paradigm (giving students practical skills). That many of these changes have been driven by students themselves (who are regarded as the new 'customers' of legal education) and that legal education itself is more of a product might be a by-product of the neoliberal market imperatives that have been outlined above.

Despite offering justifications for globalisation and the argument that students live in a new age in which vocationalism is in high demand, the reality is that vocationalism has existed in law schools for over 200 years (as evidenced in Part 1). Future research could consider the link between funding and neoliberal policy, and whether wealthier law schools can resist the shift towards a vocational agenda.

Having established that the modern assessments and curriculum in Australian law schools have correlated with a rise in neoliberal philosophy and vocational teaching (among other factors), the next section will consider an opposing idea—that of law students rising above vocational objectives and towards a higher calling. Specifically, the next section will consider the conceptualisation of the law graduate—as a democratic citizen, public advocate, person who is embedded with a certain moral value and role within society, and someone who has a voice in society, democratic processes and systems of law reform.

Section 2: Charting a Path: Towards Law School Graduates as Democratic Citizens

This section aims to interrogate the notion of teaching law to produce democratic citizens. This encompasses several related points: first, that true civic participation in democracy requires a broad education; second, that law students require a certain training in moral inquisitiveness to interrogate injustices that are committed by institutional forces; third, that law students, in engaging in democratic processes, must not be silenced and restrained by free speech curtailments from corporate stakeholders; and, finally, that democratic citizenship naturally relates to jobs that extend beyond the confines of private practice alone.

Regarding the criteria listed above, the current vocationally focused curriculum can be described as wanting. Under a vocational curriculum, students will, first, not be taught the tools for developing moral inquisitiveness; they will instead be taught to regard law as passive, objective and neutral rather than as an entity that directly affects people's lives.[1] Second, students will remain disenfranchised from non-legal careers, in which they will experience a decreasing number of law jobs yet an increasing focus on legal job skills in law schools.[2] Finally, in a vocational curriculum, society does not perceive the law graduate's role as an active participant in the democratic process who has unique insights into the law and legal processes they have gained from their degree. This section will consider a path towards perceiving the law graduate as a democratic citizen rather than a legal technician.

1) Defining Democratic Citizenship

To be a democratic citizen is to contribute to one's society by having a voice in either praising or critiquing one's laws and institutions and thereby facilitating the democratic process by which the people are placed into positions of power over their own government.[3] An education in democratic citizenship can be defined as the active

[1] Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Zone Books, 2015) 1–5.

[2] Robin West, *Teaching Law: Justice, Politics, and the Demands of Professionalism* (Kindle eBook, Cambridge University Press, 2014) 1–2.

[3] Ahmet Doğanay, 'A Curriculum Framework for Active Democratic Citizenship Education' in Murray Pint and Dirk Lange (eds), *Schools, Curriculum and Civic Education for Building Democratic Citizens* (SensePublishers,

engagement of students in the political processes by which society is governed, including the workings of legal institutions, laws, rules and community organisations.[4] By extension, students learn how these processes and institutions work and how to contribute to the reform of these institutions in instances of injustice.

The notion of democratic citizenship might prompt connotations of nationalism, elitism or racial prejudice (especially since the idea of 'citizenship' can be considered an exclusionary term for immigrants).[5] However, this is not the type of citizenship that this section intends to explore. Instead, in this section, democratic citizenship is defined as a means of describing a participatory form of political engagement, in which people of all races, classes and groups within a country are empowered to speak truth to power and shape the institutions that govern their lives.[6] This definition raises the notion of post-national citizenship (or global citizenship), whereby people have the right to contribute to the country in which they live regardless of the formal citizenship status they possess within that country.[7] Citizenship here is thus considered shorthand for a larger conceptualisation of civic engagement. To be educated as a democratic citizen is to be educated in the means and processes of such engagement.

A democratic citizen has several responsibilities and obligations that extend beyond their vocation. Someone trained as a professional need not engage in law reform and critique the government or hold public institutions accountable for their actions. Conversely, a student who is trained as a democratic citizen might engage in debates regarding the perceived justices or injustices of court and governmental decisions and institutions, volunteer for their community or participate in community organisations

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2012) vol 2, 20–2; Henry Maitles, 'What Type of Citizenship Education; What Type of Citizen?' (2012) 50(4) *UN Chronicle* 2–3.

[4] Advisory Group on Citizenship ('Crick Report') (1998), as quoted in James Weinberg and Matthew Flinders, 'Learning for Democracy: The Politics and Practice of Citizenship Education' (2018) 44(4) *British Educational Research Journal* 1; Civics Expert Group, *Whereas the People: Civics and Citizenship Education* (Australian Government Publishing Service, 1994) 15–16; Maitles (n 3) 2–3.

[5] For more, see Doğanay (n 3) 19; Carole L Hahn, 'Teachers' Perceptions of Education for Democratic Citizenship in Schools with Transnational Youth: A Comparative Study in the UK and Denmark' (2015) 10(1) *Research in Comparative & International Education* 102–5.

[6] Hahn (n 5).

[7] Council for Cultural Co-Operation, *Project on 'Education for Democratic Citizenship'* (Council of Europe, 2000) 10.

that might or might not promote social, legal and institutional change.[8] To be trained as a democratic citizen is not necessarily contrary to being trained as a professional—indeed, the two can occur simultaneously. Rather, being trained as a democratic citizen involves reaching beyond one's vocation to contribute to the community in a larger sense: to take one's place not just as part of a workplace but as part of democratic society.

The notion of democratic citizenship necessitates a broader, liberal arts education in law schools—one that encompasses the interrelation of law with other subjects that are necessary for democratic participation (e.g., an understanding of politics and history).[9] Students who are trained as democratic citizens would reach beyond technical skills training to understand how to think for themselves about their own government, how to express their autonomy and how to fight for the rights of others within their community.[10] How these ideas in a broader liberal arts education can be achieved with relation to teaching methods and content will be covered in later sections of this thesis.

2) Building a Pathway towards Law Graduates as Democratic Citizens

In 1998, the 'Crick Report' in the UK introduced the idea of 'citizenship education' into English secondary schools.[11] The authors described citizenship education as convincing 'people to think of themselves as active citizens, willing, able and equipped to have an influence in public life and with the critical capacities to weigh evidence before speaking and acting'.[12] This style of education was deemed necessary for a well-functioning democracy, as public voices are essential to democratic institutions.[13] A similar report in Australia that was conducted in 1994 highlighted that 'our system of government relies for its efficacy and legitimacy on an informed citizenry [and that] without active, knowledgeable citizens the forms of democratic

[8] Weinberg and Flinders (n 4) 3–4.

[9] Lon Fuller, 'On Teaching Law' (1950) 3(1) *Stanford Law Review* 46.

[10] Martha C Nussbaum, 'The Struggle within: How to Educate for Democracy', *ABC Religion and Ethics* (online at 7 June 2019) <https://www.abc.net.au/religion/martha-nussbaum-education-for-democracy/11191430>.

[11] Advisory Group on Citizenship ('Crick Report'), as quoted in Weinberg and Flinders (n 4) 1.

[12] Ibid.

[13] Ibid.

representation remain empty'.[14] It further suggested that without providing a form of citizenship education to the general public in Australia, the country risked slipping away from democracy altogether and into 'tyranny'.[15] The intensity of this language, as written by a group of experts, should indicate the relevant risks involved if citizens do not know how they can properly engage in democratic governance.

In 2020, the Victorian Government presented citizenship education in a broad manner as teaching students about their 'roles in the community'.[16] This idea, and its application in secondary schooling, would seemingly imply that democratic citizenship education is considered relevant to all students, regardless of the careers they obtain. The government summary further noted the 'rights and responsibilities of students' in upholding the 'values which underpin democratic communities'—such as 'freedom, equality, responsibility, accountability, respect, tolerance and inclusion'.[17] The government proposed that to uphold these values, the students had to be trained in 'community and civic engagement and participation' within their classes.[18] It is implicit in the various accounts and definitions mentioned above that civic engagement is what upholds democracy and protects the various values that a democracy is said to represent. An informed citizenry, active in the political process, is thus considered an essential core function of a successful democratic society.[19]

This role of the active citizen is worth considering, especially within the context of legal education. To be active in public life is to be involved in the processes, rules and laws that form part of the democratic process. Active citizens shape their democracy through their voices, civic participation and engagement with democratic institutions.[20] An active citizen might engage in debates regarding the perceived justice or injustice of a judicial or governmental decision or the merits of certain

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[14] Civics Expert Group (n 4).

[15] Ibid.

[16] 'Civics and Citizenship', *Victoria State Government: Education and Training* (Web Page, 11 March 2020) <https://www.education.vic.gov.au/school/teachers/teachingresources/discipline/humanities/civics/Pages/default.aspx>.

[17] Ibid.

[18] Ibid.

[19] Civics Expert Group (n 4).

[20] Weinberg and Flinders (n 4) 1–3.

institutions; such a citizen might even volunteer for or participate in community organisations that might promote social, legal or institutional change.[21] Active citizens might also participate in debates regarding the future of their society, institutions and the laws that govern their lives.[22] In brief, an active citizen embodies the concept of democracy itself by helping shape institutions that should be directed by the voices of citizens such as themselves. Such a role extends far beyond the scope of a day job and into a lifetime's obligation.

Evidence from 28 countries suggested that simply teaching students about the formal political process can lead to greater active citizenship and engagement with the political process within their home countries, in their lives and after graduation.[23] Education that discusses the nature of political institutions—taught to students in a class—can influence their citizenry engagements in the long term, even after they graduate from that class.[24] For example, citizenship education in children has been proven in multiple studies to have a long-term effect on their active citizenship participation throughout adulthood.[25] By extension, the opposite, logical proposition can also be made: that a lack of instruction in the formal political process might hamper the active citizenship of students after they graduate from formal schooling. If graduates as democratic citizens is desired, then their education must teach them about the political process. In simple terms, only someone informed in the political process can contribute to that process.

Law schools have a unique role in regard to democratic citizenship, as they teach students about the law—the exact topic by which democratic citizens are meant to exert their power and influence. Considering the evidence on learning outcomes that has been listed above, it can be logically asserted that teaching law students about the formal political process and the politics of law (among other features relating to the

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[21] Ibid 3–4.

[22] Kate Krinks, 'Creating the Active Citizen? Recent Developments in Civics Education' (Research Paper No 15 1998–99, Department of the Parliamentary Library: Information and Research Services, 23 March 1999) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99RP15>.

[23] Judith Torney-Purta et al, *Citizenship and Education in Twenty-Eight Countries: Civic Knowledge and Engagement at Age Fourteen* (International Association for the Evaluation of Educational Achievement, 2001).

[24] Paul Whiteley, 'Does Citizenship Education Work? Evidence from a Decade of Citizenship Education in Secondary Schools in England' (2014) 67(3) *Parliamentary Affairs* 513–35.

[25] Weinberg and Flinders (n 4) 3–4.

processes of law in society, law's origins and its effects in society) might help amplify the role of law students as active citizens after they graduate from law school.[26] With unique knowledge of the law, a greater onus is seemingly placed on law schools to provide this kind of education (this argument will be discussed further below). The engagement that such education would provoke could range from volunteering, to law reform, to engagement with community organisations, to calling out justices or injustices as they occur, to holding the government accountable for wrongdoing and to participating in electoral campaigns.[27] The evidence from multiple countries would suggest that avoiding discussions about the political process in schooling might generate the opposite result—more law graduates who do not engage as frequently with the functioning of their democracy.[28] It logically follows that a vocational education, if it is disengaged from teaching students about citizenship, democracy and the political process, might have a tangibly negative effect on the active citizenry engagement of law students in their society after graduation.

This notion of teaching law for democratic citizenship is evidenced in Lon Fuller's research, which encompasses 12 articles and two books on the subject, as well as his authored report by the Harvard Law School Curriculum Committee.[29] According to Fuller, the role of law students role should extend beyond merely applying the law to a hypothetical or real client in a case; it should extend towards upholding, critiquing and reforming the same system of law in which the students work as part of their role in a democratic society:[30]

> We must come … to see law as a quest for the principles that make possible the successful living together of men. We must come again to view democracy—not as a pat formula that can be applied thoughtlessly for the cure of any kind of social disorder, nor as a system of government that by reason of historical conditioning we happen to find congenial—but as a difficult achievement necessary for a realization of the full dignity and power of man.[31]

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[26] See Whiteley (n 24).

[27] Weinberg and Flinders (n 4) 3–4.

[28] For a related discussion, see Torney-Purta et al (n 23).

[29] Robert S Summers, 'Fuller on Legal Education' (1984) 34(1) *Journal of Legal Education* 8.

[30] Fuller (n 9) 46.

[31] Ibid.

In the manner described above, Fuller regarded law students as being an important part of maintaining democratic institutions through their role in maintaining the 'difficult achievement' of democracy itself against the threat of government tyranny.[32] He suggested that law schools must train law students in preparation for considering the 'law as a quest for the principles that make possible the successful living together of men'.[33] He believed that rather than narrowing the mind of the law student to focus on technical skills, law schools could free the minds of students to focus on broader, systemic legal and democratic issues.[34] Law graduates were not intended to simply 'apply the law that someone else created' but to be involved in 'establishing the framework' for future laws.[35] To contribute to law reform and maintain democracy, law students should know the purpose of law, its interrelation with other fields and the reason for its existence.[36] Due to its nature, a legal education this broad would be an interdisciplinary education. It would teach students to become democratic citizens by relating law to the political process and other functioning parts of democracy (e.g., certain notions of justice and law reform).

An objection might be raised here that not all law students need to be trained in the role of democratic citizens, as not all students will want to participate in democratic reform. Although this might well be true—indeed, a vocational education might serve the needs of some students without requiring a further foray into aspects of democracy—law schools are still uniquely placed as one of the few institutions in society that train students in law (a central feature of democracy); therefore, the argument is difficult to make without running into this counter-objection.

It is worth considering this analysis in the Australian context. Describing the state of public debate in modern Australia, Alecia Simmonds wrote:

> For the most part, complex policy is discussed in vapid tweet-sized sound-bites by columnists and politicians. Even those few academics who engage in public debate become celebrity heads for single-issues. There is simply neither the media space nor the inclination to nurture public intellectuals

[32] Ibid.

[33] Ibid.

[34] Ibid 35, 38–9.

[35] Summers (n 29) 11.

[36] Ibid 12–13.

> who could interrogate, inquire and offer an independent dissenting voice on a broad range of themes.[37]

Law students, due to their critical training in the law (the factor at the heart of public policy), could be such intellectuals. An active, argumentative legal class could challenge the political establishment with rational and objective-based arguments, as well as publicly engage with the latest legal issues that the nation faces. Unlike ordinary citizens, law graduates can read through legalese and challenge politicians by directly referring to sections of law, fundamental legal principles and international and constitutional norms. In this way, law students can transition from being mere practitioners to being advocates for social and political change. This has already occurred in the US, where entire litigation firms now advocate on behalf of legal movements on issues such as consumer rights, environmental rights, gay rights, economic libertarianism and poverty.[38]

The public role of people in the US who have trained in law is far wider and more public than the roles of strictly vocational lawyers in Australia. Judges have their own TV shows, and lawyers form parts of television panels in debates and engage more frequently in media interviews. This energises public debates about law and raises the legal consciousness of society in a consistent and beneficial manner for a liberal democracy. Open government requires intellectually engaged legal citizens who have the capability and integrity to challenge bad policy. Bad policy can be reformulated through open and honest debate with those who have been informed about the intricacies of law. Australia's closest equivalent to the US televised 'public lawyer' is the lawyer-run TV show, *Hypotheticals*.[39] However, this show last aired 30 years ago, so it cannot be considered a recent example of the genre.[40]

Instead of hosting television programs, those trained in law in Australia are discouraged from engaging in public debate, as evidenced by the recent public

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[37] Alecia Simmonds, 'Why Do Australians Hate Thinkers?' (30 October 2014) *Womankind Magazine* <http://www.womankindmag.com/articles/why-do-australians-hate-thinkers/>.

[38] Sandra R Levitsky, 'To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements' in Austin Sarit and Stuart A Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford University Press, 2006) 145.

[39] 'Geoffrey Robertson's Hypotheticals', *ABC Library Sales* (Web Page) <https://www.abccommercial.com/librarysales/program/geoffrey-robertsons-hypotheticals>.

[40] Ibid.

denouncement of Australian Human Rights Commissioner Gillian Triggs.[41] An active legal citizenry should publicly question and challenge new laws, consider alternatives and make proposals for reform whenever fundamental legal principles are in danger of being breached or infringed upon by government overreach.

Creating an active legal citizenry is likely impossible due to the current law school system, which narrowly trains law students to enforce rather than critically analyse the law. The problem question method, which dominates most Australian law schools, does not suitably allow students to debate or critique the law. A transformation is needed that will allow law students to become sceptics rather than enforcers of the law.[42] Applying the law to a new set of facts is not enough: students should be asked what is wrong or right with the law, as well as how it can be improved.[43] This kind of scepticism is at the heart of all authentic knowledge, as well as at the heart of the pursuit for truth.[44] Scepticism was once considered a central tenant of university education before neoliberal graduate attributes came to dominate the field. Universities used to celebrate 'a practice of skepticism that means a permanent questioning of those systems of thought and problematic forms of experience in which [they] find [themselves]'.[45] Foucault once called this a 'permanent critique of our historical era'.[46] With scepticism, the idea is to 'constantly interrogate' the law, especially in terms of its effects on real people in real society, as well as to incorporate new insights that are gained in the process of interrogation. Criticising the law will result in better public policy, as devil's advocacy tends to result in new insights and the discovery of overlooked problems.

In the absence of an active, legal citizenry, Australians have predictably formed a 'black hole of ignorance and indifference' with regard to their basic rights (including

[41] Ibid.

[42] Allan Ardill, 'Critique in Legal Education: Another Journey' (2016) 26(1) *Legal Education Review* 1–5.

[43] Ibid.

[44] John Stuart Mill, *On Liberty* (Ticknor and Fields, 1863) 42.

[45] John Smyth and Robert Hattam, 'Intellectual as Hustler: Researching against the Grain of the Market' (2000) 26(2) *British Educational Research Journal* 157–8.

[46] John McGowan, *Postmodernism and Its Critics* (Cornell University Press, 1999) 124.

their rights under the constitution).[47] Many Australians cannot name their constitutional rights or freedoms, and many do not know that Australia has no written bill of rights.[48] In the absence of such knowledge, the rights that do exist can be easily taken away by the government. An active legal citizenry—one aware of its own rights and duties, of the limits of the law, and of the ability to challenge the law—could help educate the public about their rights, as well as publicly engage in legal contests that are based on those rights. This would shift public policy towards favouring the individual's freedoms instead of favouring other corporate or governmental interests. On this topic, William Deresiwicz argued that 'the first thing that college is for is to teach you to think … it means developing the habit of skepticism and the capacity to put it into practice … it means learning not to take things for granted, so you can reach your own conclusions'.[49] He added that 'before you can learn', 'you have to unlearn'.[50] Law students must unlearn the dogmatism suggesting that the law is always right (or the 'law is law' mindset) and begin critically analysing the flaws of judicial reasoning, legal reasoning and the legal system as a whole. Students must engage in public policy debate and critique the norms and systems in which they find themselves. This process is arduous, which is why it is best facilitated by universities rather than accomplished in a student's own time or through their 'other degree', as is often recommended by law deans.

One of the largest problems is that the authority of the law is inextricably tangled with the authority of judges, as well as with the notion that judges are 'experts' with which ordinary citizens (and even law graduates) cannot compete in terms of offering a different, meritocratic opinion on legal issues. This resembles the case of Petrarch, who, at the height of the Renaissance, dared to question the wisdom of Aristotle:

> Sometimes I would smile and ask how Aristotle could have known things that obey no reason and cannot be tested experimentally. They would be

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[47] Michael Kirby, as quoted in Gregory Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (UNSW Press, 2004).

[48] 'Australians Struggle on Our Own Citizenship Test', *News.com.au* (online at 21 January 2013) <http://www.news.com.au/travel/travel-updates/australians-struggle-on-our-own-citizenship-test/news-story/ddaa5b756a94eee76ff8e6530dbb734d>.

[49] William Deresiwicz, *Excellent Sheep: The Miseducation of the American Elite and the Way to a Meaningful Life* (Simon & Schuster, 2014) 79.

[50] Ibid.

> amazed and silently angered, and would look at me as a blasphemer for requiring more than that man's authority as proof of a fact.[51]

Expert culture is reinforced in the legal profession through titles—'Your Honour' being one of the most famous epithets of deference in the Western world. Expert culture undermines the culture of competing ideas by excluding individuals who might oppose or contradict the dominant norm yet who lack sufficient credentials with which to state their opinions. In this way, the culture of expertise implicitly reinforces the status quo by allowing 'experts' to dominate the agenda. It is thus unsurprising that lawyers are increasingly being accused of ignoring the morality of unjust situations in favour of adopting a strictly legal perspective.[52] John R Morss posited that 'if a person can be persuaded to sign up to a contract which puts her at a severe disadvantage in terms of obligations … legal positivism cannot be blamed for that undesirable circumstance'.[53] In this sense, the authority of the law is used to justify an unjust outcome. Lawyers should challenge this kind of legal positivism rather than following the dictates of legal rulings.[54] The problems that must be solved are social, political and economic problems, which are inextricably linked to public policy and the law.

In creating a vision of law students in which they are more than technical workers, it is important to consider other visions of legal graduates. One example is expressed on a plaque on the side of Berkeley Law School, and it emphasises some of the ideas that have been discussed above:

> You will study the wisdom of the past, for in a wilderness of conflicting counsels, a trial has there been blazed. You will study the life of mankind, for this is the life you must order, and, to order with wisdom, must know. You will study the precepts of justice, for these are the truths that through you shall come to their hour of triumph. Here is the high emprise. The fine endeavor. The splendid possibility of

[51] Francesco Petrarca, 'On His Own Ignorance and That of Many Others' (1368).

[52] John Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge University Press, 2011) 35.

[53] John R Morss, 'Part of the Problem or Part of the Solution? Legal Positivism and Legal Education' (2008) 18(1–2) *Legal Education Review* 5, 6.

[54] Summers (n 29) 12–15.

> achievement, to which I summon you and bid you welcome.—Benjamin N. Cardozo[55]

It could be argued that students have free will and they should simply resist corporate messaging and enter the profession they desire. If they dislike corporate law and want to be committed to social justice or another profession instead, then they should simply 'think' their way out of the situation—through sheer willpower, imagination and determination—so that they can do what they actually prefer to do with their lives.

However, this argument does not address a crucial issue. The social justice students who do opt for corporate law firms often rationalise their decisions with various reasons—such as by stating that they will only work at those firms for a short while, need the money to pay their debts or will actively avoid the worst aspects of the corporate world because they are somehow *different*.[56] This subsection does not intend to imply that students lose their free will when they enter law school nor that they are completely indoctrinated into a corporate mindset. Rather, it intends to highlight that law students are guided to some extent, and then they use their free will to rationalise their loss of autonomy in a proactive manner.[57] The resulting overall trend is oriented towards a kind of 'surface cynicism'—towards a recognition of the problem that is inherent in many of the systems in which students are involved, followed by a resignation of powerlessness or an active justification of the system that is based on other irrelevant factors.[58]

If the corporate world is unethical or antithetical to the students' original intentions, then it is merely another part of adulthood, with adulthood defined as a long process of constantly assuming responsibilities that are often uncomfortable or unintuitive.[59] Responsibility here is not about virtue or morality but rather about resignation from

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[55] Benjamin N Cardozo, 'The Game of the Law and Its Prizes' in Benjamin N Cardozo, *Law and Literature and Other Essays and Addresses* (Harcourt, Brace and Company, 1931) 160, 175; Address at seventy-fourth commencement of Albany Law School on 10 June 1925.

[56] Debra J Schleef, *Managing Elites: Socialization in Law and Business Schools* (Rowman & Littlefield, 2005) 74–5.

[57] Cf Tan Ngyuen, 'An Affair to Forget: Law School's Deleterious Effect on Students' Public Interest Aspirations' (2005) 7(2) *Connecticut Public Interest Law Journal*.

[58] Schleef (n 56) 204.

[59] Ibid.

the negative aspects of life; it is a kind of stoic defeatism, of which Seneca would be proud when he uttered 'be happy with what you have'.[60] Freedom of thought—or constant questioning or scepticism—is antithetical to this conception of adulthood, and it is often associated instead with the mind of a young child who always asks the question 'why?' Students who stop asking 'why?' tend to start justifying why their life is how it is. Eventually, students come to perceive their previous goals of entering charity, social justice or any creative field as dreams of youth that were created by a younger and more impressionable pre-adulthood self.[61]

3) Moral Inquisitiveness

One element of democratic citizenship is the notion of moral citizenship through moral inquisitiveness: the moral intuition that is necessary for holding institutions accountable for moral failings. At a basic level, the structure and content of legal education do not provide tools for developing moral thinking or moral inquisitiveness; indeed, they encourage students to avoid moral reasoning altogether. Instead of learning to critique the law and propose law reform (on moral grounds), students learn from early on in their degree 'that legal reasoning must be solely based on doctrinal neutrality' without moral critique (as noted in the previous section).[62] Notions such as 'emotions, imagination or moral considerations' are not relevant to students' interactions with the law.[63] This process prompts students to dismiss their own moral code and become 'less driven by their convictions'.[64]

This process is frequently reinforced by the language of the law (both in textbooks and in the classroom), which tends to reflect the belief that law is somehow post-morality or beyond the spheres of moral philosophy and critical reasoning.[65] Reflecting a broader neoliberal agenda, law faculty members often present themselves as 'bland politically, concealing any passionate commitments' to either side of a

[60] Ibid.

[61] Ibid.

[62] Michael Robertson et al (eds), *The Ethics Project in Legal Education* (Routledge, 2011) [8.3].

[63] Ibid.

[64] Ibid.

[65] Lucy Maxwell, 'How to Develop Law Students' Critical Awareness? Change the Language of Legal Education' (2012) 22(1) *Legal Education Review* 5.

case.[66] In this way, law schools can 'dull their students' moral sense [and] weaken moral intuitions; they loosen the grip of conscience; and at best, they narrow the student's felt obligation to serve justice into a narrow concern for fidelity to clients'.[67]

Law tutors help students 'adjust to the reality' of law rather than resist or question this reality.[68] Despite many tutors and professors exploring areas of legal critique and interdisciplinarity in their own research, this is not always reflected in their teaching methods.[69] As Balkin expressed, 'They say one thing in their law review articles, but do another in' class, 'they teach their students to parse cases and statutes (still mostly cases)' and 'in short, they prepare them rhetorically to be lawyers'.[70] They also establish and reinforce competition among students by establishing the parameters of grades, skills and work as more important than anything else.[71] This sense of competition can drive students away from critical introspection if they lack the time or faculty support to engage in such tasks.

Many students have begun to perceive their relationship to their professors by the same neoliberal parameters—in that their professors are job mentors or sources for future references rather than learning guides or facilitators for career questioning or critique.[72] Students who question the law, their degree or their jobs typically 'do not come to office hours' of professors to ask for help.[73] They fear appearing unprepared—in terms of not completing the readings or being disengaged with black-letter law materials—and they do not regard their professors as their 'peers' who can help guide them in major life decisions.[74] Here, a separation occurs between public and private life, in which students must 'act the part' in public, even while they have private reservations about their studies. Students who go to professor office hours

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[66] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Afar, 1983) 6.

[67] West (n 2) 1185.

[68] Ibid.

[69] Jack M Balkin, 'Interdisciplinarity as Colonisation' (1996) *Faculty Scholarship Series* 266, 966.

[70] Ibid.

[71] Susan Sturm and Lani Guinier, 'The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity' (2007) 60(2) *Vanderbilt Law Review* 534.

[72] Ibid 533.

[73] Ibid; Guinier et al, 'Becoming Gentlemen: Women's Experiences at One Ivy League School' 143(1) *University Pennsylvania Law Review* 34–5.

[74] Sturm and Guinier (n 71); Guinier et al (n 73).

'often treat their interactions as opportunities to perform, to develop relationships with faculty in order to secure positive reference letters, or to prepare for the exam, rather than to learn' in a critically engaged manner.[75]

The artificial separation of law from morality and the social sciences is known as legal positivism. A major proponent of legal positivism, and a major influence on modern law schools, was HLA Hart. In 1959, Hart engaged in a famous debate with Patrick Devlin about whether law should reflect the moral values of society. Devlin argued that laws should reflect a general consensus of society—of society's values and morals.[76] Hart argued in favour of his harm principle—that law should only be created to mitigate harm (though he left room for the relevance of morality).[77] As they argued about what the law should do, neither Hart nor Devlin considered what the law does in practice. Even if the law is only intended to mitigate harm, as Hart suggested, the law's practical reality is that it reflects a society's cultural values and social norms.[78] A harm in one culture is not necessarily a harm in another. For example, what is considered public indecency in the West is different from what is considered public indecency in the Middle East.[79] In short, Hart's argument works in theory, but not in practice. In practice, 'all law is political' and 'all law is social'.[80]

Hart and Kelsen's brand of legal positivism is most evident in the separation of law and morality in the law curriculum (as discussed above). As legal positivism specifically separates law from the social sciences, it poses a serious threat to the moral education of students; it propagates the myth that law has no roots in social life and hides the 'play of power [inherent in law] below the surface'.[81] Instead of

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[75] Sturm and Guinier (n 71) 533.

[76] Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10(1) *The Journal of Ethics* 1, 1–2.

[77] Ibid; Leslie Green, 'Introduction' in Joseph Raz and Penelope A Bulloch, *The Concept of Law* (Clarendon Law Series, 2012) 4–5.

[78] Yehezkel Dror, 'Values and the Law' (1957) 17(4) *The Antioch Review* 1–2.

[79] Danny Scoccia, 'In Defense of "Pure" Legal Moralism' (2013) 7(3) *Criminal Law and Philosophy* 519.

[80] Shannon O'Brien, 'Legal Criticism as Storytelling' (1991) *Legal Theory* 3–4; Emily Durkheim, *The Division of Labour in Society* (MacMillan, 1984) 99.

[81] Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2008) 17(2) *Legal Education Review* 10.

addressing power imbalances in the law outright, legal positivism tends to justify the status quo of those who wield power.[82]

When law is presented as passive, neutral and objective, highly charged issues (e.g., sexual assault) can become sidelined in the curriculum. For example, Denbow explained how US legal educators have found it difficult to teach rape law in criminal law classes due to the passive neutrality that legal education requires.[83] Law should be 'taught without directly addressing conflicts of … values' or experiences.[84] Certain legal educators, influenced by this thinking, refuse to teach rape law in the US due to their general discomfort with the topic.[85] There is a fear that law students who learn about rape law might become less objective in their case analysis, as rape is a highly charged emotional issue, especially for female victims and '#notallmen' men's rights advocates.[86] Yet the '"elephant" of sexual assault is in the class, whether or not lecturers or students acknowledge it'.[87] Conversely, when rape is discussed in law school, it can provide a unique opportunity for discussing an otherwise marginalised topic in society. Mary Heath suggested that 'teaching rape law offers a chance to constructively intervene in public discourse about sex and sexuality, coerced sex and coercive sexuality'.[88] Importantly, when students are informed about the topic of the class ahead of time, they can be prepared for the difficult emotions involved.[89]

However, such a teaching method is, unfortunately, rarely undertaken. According to Tamara Walsh, 'When a choice has to be made [by most law schools], the social is deemed dispensable because its inclusion is not specified by the admitting authorities'.[90] Instead of being taught about how to think in a critical manner—

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[82] Kennedy (n 66).

[83] Jennifer M Denbow, 'Pedagogy of Rape Law: Objectivity, Identity and Emotion' (2014) 64(1) *Journal of Legal Education* 25.

[84] Ibid.

[85] Ibid.

[86] Ibid.

[87] Anna Belgiorno-Nettis, 'Student Perspectives on Talking about Sexual Assault in Australian Law Classes' (2017) 27(1) *Legal Education Review* 9.

[88] Mary Heath, 'Encounters with the Volcano: Strategies for Emotional Management in Teaching the Law of Rape' (2005) 39(2) *Law Teacher* 133.

[89] Belgiorno-Nettis (n 87) 8.

[90] Thornton (n 81) 650.

questioning how, why and if the law is correct—students are taught to substantiate their thinking by using prior legal authority alone.[91] When students are asked to defend someone in a hypothetical case who has prima facie committed murder, students are encouraged to sideline the myriad ways in which the accused can be condemned (aside from proscribed punishments) and defences that can be raised (aside from proscribed defences).[92] Facts are fitted to precedent so that the puzzle of conviction is never questioned, regardless of how puzzling a conviction becomes. It is almost never pertinent for a law student to ask for more facts to uncover contextual information; students might only ask for more information if it is directly relevant to a legal point. However, the general perspective is if you want to dissect the murderer's psyche, then go and study psychology.[93]

In 2013, a group of 64 students raised these and other concerns with the Sydney Law School, petitioning the faculty to change the law school's examination policies in some of core Priestley Eleven subjects.[94] The group felt that by advocating for essays, speeches, group work and other formative assessment tasks, they could help reorient the student mentality at Sydney Law School beyond a simplistic understanding of law as 'pure law'.[95] Rebuffing these suggestions, the law dean at the time suggested that a law degree is mainly a vocational degree and that examinations teach the appropriate 'graduate skills' that are required of those who enter the legal profession.[96] These skills include requiring 'students to demonstrate a thorough understanding of principles and an ability to apply that understanding to solve problem questions'.[97] Essentially, the response was that law school is about teaching how law is applied to a set of facts and that the core of a law school's purpose is vocational skills education not critically engaged assessment tasks.

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[91] Ibid.

[92] Ibid 650–5.

[93] Ibid.

[94] Joshua Krook et al, 'An Open Letter to Professor Wayne Courtney on Sydney Law School's 100% Examinations' (June 2013) *Dissent*.

[95] Ibid.

[96] Joellen Riley, 'Response to Student Petition on 100% Examinations', *Sydney University Law Society* (July 2013).

[97] Ibid.

In its official response, Sydney Law School ignored the fundamental questions that were raised about black-letter law courses.[98] By advocating for a version of 'pure law' through 'rigorous' black-letter study, the school's approach dehumanised the students' response to a highly emotional set of circumstances (the emotional reality of case law); the school rendered emotion and human compassion irrelevant to instruction.[99] In contrast, it can be argued that emotion and human compassion are crucially important for law students, even in the case of preparing them for professional practice.[100] An understanding of emotion helps students build connections with clients and other professionals in the legal sector.[101] A detached approach to teaching law might not only lead to a negative student experience but also to one as a graduate practising solicitor.[102]

Some law schools have adopted several measures to rectify the influence of black-letter law on students' moral inquisitiveness. For example, UNSW adopted the clinical simulation approach, in which students accept real cases with real people in a legal office that is located on campus.[103] Participants in the 2012 program described how interesting it was to observe clients firsthand and directly manage their issues in criminal and family law.[104] The clinical approach offers a direct emotional connection with clients rather than a hypothetical client in examinations.[105] Observing and speaking with real people renders them much harder to dehumanise. Concurrently, the clinical approach risks re-emphasising the vocational aspect of law (i.e., convincing students to 'act' as lawyers) rather than teaching students to regard law as a part of society.

Other law schools have remained stoic in terms of adopting new teaching methods that relate to the topics of emotion, empathy and ethics. Many law schools still abide

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[98] Ibid.

[99] William S Blatt, 'Teaching Emotional Intelligence to Law Students: Three Keys to Mastery' (2015) 15 *Nevada Law Journal* 464.

[100] Ibid.

[101] Ibid.

[102] Ibid.

[103] 'Clinics', *UNSW Sydney* (Web Page) <http://www.law.unsw.edu.au/current-students/law-action/clinics>.

[104] UNSW Law, 'UNSW Law Human Rights Clinic' (YouTube, 24 October 2012) 00:00:00–00:02:58 <https://www.youtube.com/watch?v=bMV7PjC-5Ek>.

[105] Ibid.

by what Justice Kirby once called 'a few [ethics] lectures thrown in at the end of a [law] degree'.[106] Students at Sydney Law School became so frustrated with the status quo that they established the Critical Legal Students Network.[107] This network extends beyond discussions of what the law is and asks 'why is law the way it is?' Although still new, the group has expanded over time and has received attention from students outside Sydney Law School.[108] Its discussions of the oppressive nature of legal institutions, prisons, identity in the law and other unique issues arrive at a critical time when law schools do not teach such topics until fifth-year electives.[109]

Teaching law without considering other aspects that shape its existence is the same as artificially presenting law as more objective, neutral and authority driven than it is.[110] It is to deny students the moral inquisitiveness with which they can analyse legal concepts, by stating that any such consideration is beyond the scope of the curriculum. In brief, it is the same as converting students who are critically engaged thinkers into highly functioning technicians who apply the law without appropriately considering how the consequences of doing so influence the people and society in which the students operate. Without such a consideration, law students cannot function as fully developed moral citizens.

4) Fewer Law Jobs, yet Even More Vocational Education

A vocational education in law risks directing law students towards law-related jobs while dismissing alternative non-legal careers that might better serve society. Indeed, the current focus on vocational education occurs at a strange time, given the underlying economic circumstances in which the legal sector finds itself. The legal industry has contracted over the last few years, which has led to fewer graduate law jobs.[111] This has occurred in Australia and other jurisdictions, including the US,

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[106] Michael Kirby, 'Legal Professional Ethics in Times of Change' (1998) 72 *Australian Law Reform Commission* 5 <http://classic.austlii.edu.au/au/journals/ALRCRefJl/1998/2.html>.

[107] 'Critical Legal Studies Network (CLSN) Discussion #1 Intro' (Facebook, 10 March 2014) <https://www.facebook.com/events/526515474134575/>.

[108] Ibid.

[109] Ibid.

[110] Thornton (n 81).

[111] The Law Society of South Australia, *Submission in Relation to the Review of the Demand Driven Funding System* (The Law Society of South Australia, 2013) 5

where inflated graduate numbers have created a 'crisis situation' and law schools have been blamed for failing their students.[112] Despite the shrinking demand, the number of law students in Australia has doubled in the same period.[113] Universities have created new law courses as cheap alternatives to science and medicine. The number of law schools in Australia has increased from 12 to 32 in the last two decades alone.[114] Due to these trends, a large oversupply of law students has emerged, which does not correspondingly match the lack of demand in the legal industry for graduate placements.

One law dean has suggested that the shrinking number of graduate placements 'happens every cycle', and that 'these cycles are quite short'.[115] At least one managing partner has contradicted this, admitting that 'this is not just a temporary economic cycle thing, it's permanent structural change … get used to it … [t]he market isn't going to improve'.[116] In 2017, former Prime Minister Malcolm Turnbull stated that 'too many kids do law' at university.[117] To a great extent, law schools have become inflexible in terms of adapting to these kinds of changing market circumstances. Instead of becoming more generalist in nature, law schools are becoming more vocational, at a time when the legal profession itself might be facing a permanent structural decline.

It is unusual for law schools to become more vocational at a time when vocation itself is declining. In one sense, it can be perceived as law schools retreating from their

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<http://www.lawsocietysa.asn.au/submissions/131213_Oversupply_of_Law_Students_and_Law_Graduates.pdf>; John D Whyte, 'Finding Reality in Legal Education' (2013) 76 *Saskatchewan Law Review* 98.

[112] Brian Tamanaha, *Failing Law Schools* (Chicago University Press, 2012); Edmund Tadros, 'Oversupply Leaves Law Students Without Jobs' (21 February 2014) *Australian Financial Review* <http://www.afr.com/news/policy/industrial-relations/oversupply-leaves-law-students-without--jobs-20140221-jgec6>.

[113] Department of Education, 'Students Completing Law Courses' in *Graduate Careers Australia* (2012), as cited in Tadros (n 112).

[114] Thornton (n 81).

[115] Sydney University Law Society, 'Final Year Dinner—2013' (YouTube, 28 March 2014) 00:08:00–00:08:25 <https://www.youtube.com/watch?v=K7JbGLaifS8>.

[116] Michael Bradley, 'Law Grad Employment: Hard Truths from a Managing Partner', *Survive Law* (Web Page, 1 May 2014) <http://survivelaw.com/index.php/blogs/careers/1812-law-grad-employment-hard-truths-from-a-managing-partner>.

[117] Malcolm Turnbull, as quoted in Louise Yaxley, 'Don't Study Law Unless You Really Want to Be a Lawyer, Malcolm Turnbull Says', *ABC News* (online at 2 February 2018) <http://www.abc.net.au/news/2018-02-02/malcolm-turnbull-says-too-many-kids-do-law/9387508>.

social obligation to students. The Department of Education, Science and Training stated in 2002 that '[Universities should] maintain a focus on graduate capabilities *in line with the needs of the economy and society*' [emphasis added].[118]

In several law student surveys, approximately 66 per cent of students (61% or 50% on similar surveys) admitted that they wanted to enter legal practice after graduating.[119] However, only 36 per cent successfully did so.[120] This figure is even lower than those in the US, in which only 55 per cent of law students entered a legal profession after graduating.[121] In the Australian experience, this comes without a large student debt, but the crisis of purpose is analogous:

> Out-of-work or never-employed law graduates, many of them carrying between $100, 000 and $200, 00 worth of student debt, are now as ubiquitous in the bartending and cab-driving professions as the proverbial humanities majors.[122]

A large gap is evidenced between the expectations of students who enter law schools and the reality they face when they graduate. According to the NSW Law Society, 'The majority of students study law with a view to practicing law but unrealistic expectations of the job market leave them disillusioned'.[123] Unlike 'in medical and dental schools', which involves meeting 'the supply with expectations', law schools have failed to match the supply of students with the economic realities of the job market.[124] Students remain uninformed about the realities of the graduate job market well into their studies. In the US, certain law schools have even been caught lying

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[118] Department of Education, Science and Training, *Employability Skills for the Future* (DEST, 2002), as quoted in Susanne Owen and Gary Davis, 'Law Graduate Attributes in Australia: Leadership and Collaborative Learning within Communities of Practice' (2010) 4(1) *Journal of Learning Design* 15.

[119] ALSS Survey, *Survivelaw*, as cited in Tadros (n 112); Samantha Woodhill, 'Law Students Don't Want to Be Lawyers, Survey Finds', *Australasian Lawyer* (Web Page, 27 July 2015) <http://www.australasianlawyer.com.au/news/law-students-dont-want-to-be-lawyers-survey-finds-203171.aspx?utm_source=twitterfeed&utm_medium=twitter>; Margaret Thornton, 'Portia Lost in the Groves of Academic Wondering What to Do about Legal Education' (1991) 9(2) *Law in Context* 19, as cited in Tamara Walsh, 'Putting Justice Back into Legal Education' (2008) 17(1) *Legal Education Review* 124.

[120] Erina Cervini, 'Law and the New Order', *Sydney Morning Herald* (online at 12 June 2012) <http://www.smh.com.au/it-pro/law-and-the-new-order-20120611-205o5.html#ixzz3g9Px7ltB>.

[121] Tamanaha (n 112).

[122] West (n 2) 2.

[123] The Law Society of South Australia (n 111).

[124] Tamanaha (n 112).

about graduate job numbers so that they could entice more students to study law.[125] The inflated experience of 'prestige' and 'status' in Australia is analogous, if not just as unethical.

Many law students in Australia graduate without adequate preparation for alternative career placements.[126] In an economy that cannot 'fit' them in, law students are forced to consider obtaining non-law careers; it becomes their only option. Many law students currently enter non-law fields such as politics, public policy, academia and business.[127] Small-scale studies reveal that approximately 48 per cent of law students consider entering 'alternative law' jobs,[128] with other studies placing this figure closer to 50 per cent.[129] Essentially, law students are adapting to economic demands, but they are provided little guidance regarding how to do so.

A suggestion has been made that if law schools 'do not shrink enrolments' and a 'significant portion of law graduates' continue to enter alternative careers, then 'there will be pressure on legal education' to become more generalist in nature.[130] This pressure already exists to a great extent, and a shift in thought is already occurring in Australia. Many law students now recognise law as a generalist degree or as the 'new arts degree', as a joke.[131] However, law schools lag behind by failing to implement substantial changes to their internal curriculum. Instead of becoming more generalist, law schools are becoming even more vocational.

It is important to reiterate that a great number of law students (most, in some estimations) will never become lawyers.[132] Instead, they will become 'policy-makers … politicians and scholars' and enter into business, media, journalism and myriad other professions.[133] Treating all law students as future lawyers, as many law schools

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[125] West (n 2) 2–3.

[126] The Law Society of South Australia (n 111).

[127] Thornton (n 81).

[128] Walsh (n 119) 135.

[129] Ibid 124.

[130] Whyte (n 111).

[131] The Law Society of South Australia (n 111).

[132] Cervini (n 120).

[133] Maxwell (n 65).

currently do, misses the opportunity of guiding how these other professions interact with the law.[134]

To adapt to these realities, the curriculum could be changed in many ways. Different professions require different kinds of knowledge in relation to law. Policymakers are required to know why a specific law should exist, as well as the pros and cons behind proposed law reform.[135] Media and business leaders require a more holistic understanding of law that is entrenched in the wider social context of the economy, politics and social life. Even scholars require a more jurisprudential approach.

Many other professionals (e.g., politicians, charity workers and social workers) require a greater focus on social justice or on the needs of society, which contrasts the current curriculum's narrow focus on black-letter law. Essentially, by not focusing on the needs of these other fields, law schools cater to only half of their cohort. It is not sufficient to dismiss these concerns by referring to a student's other degree, especially when vocationalism has occurred in other university degrees—and, therefore, these other degrees could also provide this form of broader, holistic education.[136]

It should be remembered that law is used 'to achieve economic regulation, social justice and national security', and that the current curriculum does not thoroughly consider these areas.[137] In the current Parliament, 25 per cent of MPs possess a law degree, and 13 per cent have had a job in the occupation of law, in which they acted as 'barristers, solicitors, lawyers, [and] legal officers'.[138] Approximately half of all Australian prime ministers have had law degrees.[139] It is thus not only the health of the Australian economy at stake but also the health of its democracy. If law schools

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[134] Deborah L Rhode, 'Legal Ethics in Legal Education' (2009) 16(1) *Clinical Law Review* 51; Sampford (n 315) 132.

[135] Ashley C Brown, 'Regulators, Policy-Makers and the Making of Policy: Who Does What and When Do They Do It?' 3(1) *International Journal of Regulation and Governance* 1, 2–5.

[136] Brown (n 1) 1–5.

[137] Edward Rubin, 'What's Wrong with Langdell's Method' (2007) 60(2) *Vanderbilt Law Review* 610; Sheppard (n 50) 654.

[138] Martin Lumb, 'The 43rd Parliament: Traits and Trends' (Research Paper, Parliament of Australia, Department of Parliamentary Services, 2 October 2013) <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/43rdParl#_Toc368474619>.

[139] Richard L Abel and Phillip SC Lewis (eds), *Lawyers in Society: The Common Law World* (Beard Books, 2005) 277.

continue producing vocational students who cannot criticise the law in their own field of influence (e.g.., politics, media, business), an active, participant legal citizenry will never be created. To successfully create an active legal citizenry, an active law school is required—one that teaches law students how to engage in the law in different ways not just in the narrow confines of legal skills training.

To do so, students must be aware of the broader opportunities available in alternative law careers. UNSW Law School has recognised this disconnection between law students' expectations when entering law school and the dismal graduate job market. Director of Senior Studies Michael Legg (in a recently created role) understood that students are 'anxious about the fall in graduate places being offered by the major firms' and about the 'increasing numbers of graduates being churned out by universities nationwide'.[140] His role includes outlining alternative career pathways outside corporate law to students.[141] He wants students to 'broaden their minds' and ask 'what kind of career might I be interested in?'[142]

Michael Bradley, Managing Partner of Marque Lawyers, offers similar advice to readers of the popular law blog, *Survive Law*. He stated students should 'stop listening to other people and think about your own career from the perspective of what might make you happy and fulfilled'.[143] Similarly, Justin Whealing, editor of *Lawyer's Weekly*, suggested that 'a law degree is very well regarded in many other professions, such as journalism, so the fact that the majority of law graduates don't take up a career in the law is not an undue cause for concern'.[144]

According to the advice offered above, an argument can be made that the solution is a matter of telling these students that other options exist. UNSW law student, Amber Karanikolas, suggested that 'there are lots of students who are passionate about social justice and may be interested in alternative paths … but just don't know where to

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[140] 'Uni Helps Pupils Think Outside the Box', *UNSW Sydney* (Web Page, 31 January 2014) <http://www.law.unsw.edu.au/news/2014/01/uni-helps-pupils-think-outside-box>.

[141] Ibid.

[142] Ibid.

[143] Bradley (n 116).

[144] Joshua Krook, 'Clerking Mad', *Honi Soit* (Web Page, 12 May 2014) <https://honisoit.com/2014/05/clerking-mad/>.

look'.[145] The focus on corporate careers 'is still quite visible' at most law schools, to the extent that it can blind out all other options.[146] A final year juris doctor student responded to a survey on the subject with trepidation:

> Let's be honest: from a distance, being a lawyer looks like a lot of fun. Only later on do [you] realize the crippling conditions that most young lawyers have to deal with at major firms. Corporate law firms have a lot to answer for, in relation to caring for the mental and physical health of their employers.[147]

Those who responded suggested that many social justice–oriented students felt like they should 'do their time' at large firms, but that many get 'swallowed up' and 'drawn in by the tempting income'.[148]

Other students were more forthcoming about their fears of never obtaining a job in law and having to resort to other careers out of resignation rather than choice. Responding to a student survey, one student said that:

> Getting a job [in law] is like getting into the popular clique in high school—reserved for a small crowd of people. It seems as though the future of the legal profession will be saved exclusively for those outstanding, all-round HD recipients that tick all the additional requirements.[149]

The University of Wollongong seems to manage the right balance successfully. In its public brochures, it argued that 'legal education in a University must provide students with a critical and questioning attitude with broad perspectives and with the skills and knowledge needed *for whatever career they may choose*' [emphasis added].[150] Focusing on legal skills training alone, to the detriment of a wider, holistic approach, involves missing the crucial opportunity to broaden students' minds during their time in university. A broad approach not only empowers students to choose whichever job

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[145] Ibid.

[146] Ibid.

[147] Ibid.

[148] Ibid.

[149] Ibid.

[150] University of Wollongong, 'Undergraduate Handbook 2015: School of Law' (University of Wollongong, 2015) 2 <http://lha.uow.edu.au/content/groups/public/@web/@lha/@law/documents/doc/uow188835.pdf>.

they desire, but it prepares them for the many skills that are required in jobs today and for a more generalist employment market.

5) The Wider Legal Culture: The Silencing and Restraint of Australian Lawyers

A final point to be made regards how law graduates should be able to engage in the public square if they are to be part of an active legal citizenry. Since the late 1990s, lawyers and judges in Australia have been discouraged in their professional duties from engaging in public television (apart from carefully controlled news and current affairs programs).[151] Part of this culture has developed due to the current neoliberal legal education agenda in universities. If law students are encouraged to perceive law as being passive, objective and neutral, it logically follows that graduating lawyers would not act as 'public' lawyers as required to intellectually engage with and critique the law.[152] The culture of Australian law schools has filtered into a wider legal culture, one that is passive and unconstructive in regard to law reform. Today, at the top law firms, new lawyers sign media confidentiality contracts that bar them from appearing on television without written permission from their superiors.[153] Similarly, new lawyers sign social media contracts that bar them from speaking freely online.[154] Finally, Australian courts maintain strict control over what lawyers can say regarding ongoing cases, while also limiting the use of film and audio recording equipment in court.[155]

Most Australian law firms restrict what lawyers can say to the media without authorisation. In some cases, there is a strict policy 'against media or public comment',[156] while in other cases, there is a 'more strategic or liberal approach'.[157]

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[151] Of course, there are lawyers who have engaged in public or political roles outside their profession by breaking professional norms or by working in firms in which such media contact is permissible: Carl Olson, 'Social Media in Law: Take Ownership or Risk the Consequences', *Thomson Reuters* (Web Page, 2021) <https://legal.thomsonreuters.com.au/about-us/news/social-media-in-law.aspx>.

[152] Schleef (n 56).

[153] 'Trial by Media: Where Should Lawyers Draw the Line?', *Lawyers Weekly* (online at 4 March 2012) <https://www.lawyersweekly.com.au/sme-law/9191-trial-by-media-where-should-lawyers-draw-the-line> ('Trial by Media').

[154] Olson (n 151).

[155] Michael Kirby, 'Improving the Discourse between Courts and the Media' (Speech, Victorian Legal Reporting Awards, Library of the Supreme Court of Victoria, 8 May 2008) 3.

[156] 'Trial by Media' (n 153).

[157] Ibid.

However, the trend orients towards standardised contracts that prevent junior lawyers from speaking freely and without permission from their supervisors. This includes the rule denoting that junior lawyers cannot talk about ongoing cases in which a lawyer is involved.[158] However, this rule can also include further restrictions on talking in general about the law in the media altogether. In brief, lawyers must now ask their superiors before they talk about the law in public—a situation that at face value seems absurd.

Rules that restrict lawyers from speaking freely to the press are often justified by referencing the right to a fair trial. Speaking to the press could 'prejudice' ongoing proceedings.[159] This rule applies even when considering the 'public interest in free discussion' on the case.[160] It can be admitted that this is an important rule; however, it does not justify media bans on lawyers talking to the press about the law in general, about their law firms or about areas of law reform. Indeed, as codified by the United Nations:

> Lawyers like other citizens are entitled to freedom of expression ... in particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights … without suffering professional restrictions by reason of their lawful action.[161]

It has been noted that 'a lawyer has a moral, civic and professional duty to speak out when he sees an injustice'.[162] To the extent that media bans issued by law firms prevent such a discussion, they are an undue restriction on free speech. It must also be stated that lawyers play an important role in the media and democracy, as they publicly speak about changing legal standards. They help 'teach the public about the legal system' and explain 'the rule of law in our democratic society'.[163] Restrictions

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[158] *Legal Profession Uniform Law Australian Solicitors Conduct Rules* (2015) s 28.1.

[159] Ibid.

[160] *Hinch v Attorney General (Vic)* [1987] 164 CLR 15.

[161] 'Basic Principles on the Role of Lawyers: Adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990'.

[162] *Klein v Law Society of Upper Canada* (1985) 16 DLR (4th) 489 (Superior Court of Justice of Ontario).

[163] Brian Foster and Jared Craig, 'The Lawyer and the Media: What Can a Lawyer Say to the Media?' (2014) 43 *The Advocates Quarterly* 60.

on the free speech of lawyers should thus only be enacted with extreme caution and trepidation, as the consequences are significant.

In more recent years, law firms have reached beyond television media bans to social media bans. A study by Thomson Reuters found that 76 per cent of Australian law firms have established 'social media strategy'.[164] Corrs Chambers Westgarth, a leading Australian law firm, suggested that law firms 'ban the use of social media' for junior lawyers or 'introduce contractual provisions governing the use of social media' for all new employees.[165] This kind of social media provision is already standard practice. For example, the Law Institute of Victoria recommended that 'all individuals in [a law] firm should be instructed not to say anything on their personal social media channels which may … impact adversely on the firm'.[166] It should be noted that this claim is directed at *personal* social media accounts. A law firm's social media contract will apply to everything that lawyers say outside work, even during their own time in their private lives. The Law Society of New South Wales expressed it even more starkly by stating that 'it would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences'.[167] In this case, the law society is somewhat threatening lawyers to keep in line.

In Australia, saying something untoward about a law firm online can result in immediate termination.[168] This includes posting negative comments on Facebook or other social media sites.[169] Even government department lawyers might be legally fired for criticising their departments online due to social media guidelines stating that lawyers cannot impugn the implied freedom of political communication; these guidelines are said to not apply to the cases of individuals but to political communication as a whole.[170] Most lawyers are now heavily restricted in terms of

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[164] Olson (n 151).

[165] Corrs Chambers Westgarth, as cited in Duncan Abate, *The Use of Social Media in the Workplace* (Mayer Brown, 2011) 2.

[166] *Guidelines on the Ethical Use of Social Media* (Law Institute Victoria, 2016) 2.

[167] Law Society of NSW Legal Technology Committee, 'Guidelines on Social Media Policies', *The Law Society of New South Wales* (Web Page, 2021) <https://www.lawsociety.com.au/resources/resources/my-practice-area/legal-technology/guidelines-social-media>.

[168] *Fitzgerald v Smith t/as Escape Hair Design* (2010) 204 IR 292.

[169] Ibid.

[170] *Comcare v Banerji* [2019] HCA 23.

what they can say online about their law firm, the law and ongoing cases. It is difficult to comprehend how a 'public lawyer' such as Geoffrey Robertson can emerge in this new environment, filled as it is with social media potholes and perils.

It should be conceded that many risks are associated with lawyers using social media—such as bringing the profession 'into general disrepute' by posting racist or sexist pictures or comments, engaging in cyber bullying, breaching confidentiality agreements or harassing a witness, juror or client.[171] Some of these risks are a breach of Australian law, while others are merely unethical. However, all these risks are legitimate. There is an even greater risk in banning lawyers from engaging in social media altogether: the risk of limiting the public's access to justice. The conceded fact is that 'increased use of social media by the legal profession [improves] public access to legal information and access to justice'.[172] Lawyers should be publicly available to serve the public. An outright ban on social media use is thus not in the public's best interest.

The experience of Australian lawyers differs markedly from the this of US lawyers. In the US, it is employers who have restricted access 'to private social media sites used by employees', and only with first gaining permission from those employees.[173] The *Stored Communications Act* 'prohibits employers from monitoring employees' online without authorisation.[174] Consequently, it is difficult in the US to fire a lawyer for comments made on a private Facebook page. Indeed, in a significant case, company restrictions on 'employee blogging and social media communications' were considered a violation of section 7 of the *National Labor Relations Act* (which covers the right to self-organisation and collective bargaining).[175] The US thus has some better protections established for the free online speech of lawyers.

In Australia, courts have frequently sided with the big law firms in terms of restricting the rights of lawyers to speak in the media about ongoing cases. Most judges fear that

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[171] Kylie Burns and Lillian Borbin, 'E-Professionalism: The Global Reach of the Lawyer's Duty to Use Social Media Ethically' (2016) *Journal of the Professional Lawyer* 161.

[172] Ibid 154.

[173] Abate (n 165) 18.

[174] Ibid.

[175] National Labor Relations Board (2010), as cited in Law Society of NSW Legal Technology Committee (n 167).

the media will distort a trial and present a biased perspective.[176] They are equally concerned about the risk of a 'trial by the media', whereby a jury is influenced by public opinion. Finally, judges prefer to maintain a professional distance from the media so that everyone can remain objective in a case.

Historically, this has resulted in television cameras being banned in Australian courtrooms. Banning cameras from courts and issuing gag orders to prevent speaking about specific cases has negatively affected Australia's legal culture in various ways. Geoffrey Robertson himself has argued that it is vitally important for courts to allow the filming of all trials to be shown on television so that the public can observe and understand the justice system.[177] Quoting Freeborn John Lilburne, he suggested that 'justice must be seen to be done'.[178] In a democracy, secret trials are not aligned with the general principle that the law is enforced by the will of the people. Of course, any recording of the proceedings should be carefully controlled. Robertson argued for a proviso that jury members should not be revealed on television, nor 'vulnerable witnesses', nor defendants—unless they were protesting or appearing as a witness.[179] In the UK, cameras have been allowed in the British Court of Appeal with these limitations since 2013.[180] It is unclear why Australia cannot follow this example.

Former High Court Justice Michael Kirby has extended one step further to suggest that there should be a 'dedicated High Court television channel' because 'the public has a right to see the court in action'.[181] In this case, the ABC's *On Trial* (2015) series can be praised; it took the public inside the courtroom and featured 'unprecedented access to major criminal trials in Australian courts'.[182] Although positive, the show lasted for a single season, and it was filmed over a single year. There are arguments in favour of granting longer-term access. First is the argument that courts and lawyers

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[176] Kirby (n 155).

[177] Geoffrey Robertson, 'Put Cameras in British Courtrooms, and Make Justice Truly Transparent', *The Guardian* (24 April 2018).

[178] Freeborn John Lilburne, *Trial for Treason* (1649), as quoted in Geoffrey Robertson, 'In the Balance' (2009) 38(3) *Index on Censorship*.

[179] Robertson (n 177).

[180] Owen Bowcott, 'Televising of Court of Appeal Proceedings Start This Week', *The Guardian* (30 October 2013).

[181] 'Kirby: Bring Cameras into Court', *ABC AM Radio* (14 November 2008).

[182] 'On Trial', *ABC iView* (Web Page, 23 June 2015) <https://www.abc.net.au/tv/programs/on-trial/>.

play an active role in educating the public about the law. It has been said that 'Australian images of their legal system and proceedings are distorted by the plethora of United States media portrayals'.[183] In brief, there are too many US legal dramas that distort what people observe as Australian law. More than one-third of Australians do not know that Australia has a constitution, and even more cite the US constitution when trying to explain Australian law.[184] In a democratic society, it is essential that people also have a chance to openly critique the courts with full knowledge of their legal system at work.[185]

In a democratic society like Australia, open courtrooms are an essential part of the rule of law.[186] The common saying that 'no one is above the law' entails public observation of the judicial process. As noted in *Vancouver Sun (Re)*, judges must be observed to apply the law evenly in all cases to ensure 'that justice is administered in a non-arbitrary manner'.[187] Jeremy Bentham expressed this point differently by suggesting that open courts should keep 'the judge himself, while trying, under trial'.[188] Allowing cameras into the courtroom thereby allows the public to play a role in maintaining the rule of law in its society. Even when trials might embarrass the accused, Lord Atkinson similarly suggested that 'the hearing of a case in public may be … humiliating', but a public trial is the 'best security for the pure, impartial, and efficient administration of justice'.[189]

The rule of law also requires that the public knows what crimes attract which punishments in court.[190] At a basic level, the public should know how the law is enforced so that people can avoid breaking it.[191] On this point, Lord Hope argued that

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[183] 'Courts and Electronic Media', *Access to Justice Advisory Committee* (Australian Government Publishing Service, 1994), as quoted in Kathy Laster (ed), *Law as Culture* (Federation Press, 2001) 323.

[184] Nick Miller, 'More Than One Third of Australians Have Not Heard of the Constitution, Survey Finds', *Sydney Morning Herald* (21 February 2015).

[185] 'Courts and Electronic Media' (n 183).

[186] Tom Bingham, 'The Accessibility of the Law' in Tom Bingham, *The Rule of Law* (Penguin, 2011); *Canadian Broadcasting Corp. v New Brunswick* [1991] 3 SCR 459 ('*Canadian Broadcasting Corp. v New Brunswick*'); *Vancouver Sun* (*Re*) [2004] 2 SCR 332 ('*Vancouver Sun* (*Re*)').

[187] Ibid; *Canadian Broadcasting Corp. v New Brunswick* (n 186); *Vancouver Sun* (*Re*) (n 186).

[188] Jeremy Bentham, *The Works of Jeremy Bentham: Now First Collected* (William Tait, 1843).

[189] *Scott v Scott* [1913] AC 417.

[190] Bingham (n 186); *Canadian Broadcasting Corp. v. New Brunswick* (n 186); *Vancouver Sun* (*Re*) (n 186).

[191] Bingham (n 186); *Canadian Broadcasting Corp. v. New Brunswick* (n 186); *Vancouver Sun* (*Re*) (n 186).

the right to a fair trial also includes the right to know the 'the reasons for the outcome' of the trial, as well as how that trial compares to similar comparable cases.[192] This includes the ability to observe, review and understand past cases through an open court system.[193] Therefore, open justice or open-access courtrooms are critical for both a right to a fair trial and the rule of law. Open courtrooms inform the public of the punishments of a crime, while also holding judges accountable for evenly enforcing those punishments. Therefore, it can be stated that 'the media and the courts [in concert] are vital to a free, questioning and just society'.[194]

In contrast with the Australian media market, the US media market is brimming with lawyers and judges on television. The section below details the unique role of the US Attorney-General before covering the general trend of outspoken US lawyers in the media.

6) Public Legal Culture in the US

The public legal culture of the US is best exemplified by the role of the US Attorney-General—the president's legal advisor and public spokesperson. The post involves close relations with the media, so it is an extensively public role.

The original *Judiciary Act 1789* created the office of the Attorney-General, which 'evolved over the years into the head of the Department of Justice'.[195] What began as a professional post is now much more political, with attorney-generals expected to maintain close relations with the press as a core part of their job.[196] Today, attorney-generals must head the department, advise the president on legal matters, occasionally represent the government in court and represent the public's interest in the media by proposing new legislation.[197] It is this last role—representing the public's interest—that makes modern attorney-generals public lawyers in the manner that has been

[192] *Bank Mellat v Her Majesty's Treasury* [2013] UKSC 38, [81].

[193] Ibid.

[194] Kirby (n 155) 7.

[195] 'Office of the Attorney General: About the Office,' *The United States Department of Justice* (17 July 2018).

[196] Cornell W Clayton, *The Politics of Justice: The Attorney General and the Making of Legal Policy* (M.E. Sharpe, 1992) 51–5.

[197] Luther A Huston et al, *The Roles of the Attorney General of the United States* (American Enterprise Institute, 1968) 100–6.

previously discussed. Representing the public's interest also helps solidify the attorney-general's role in promoting an active legal culture in which the law is discussed, criticised and reformed.

US Attorney-Generals speak in the press on issues of law, justice and law reform, and they campaign on certain legal issues that are personal and in the public interest. The development of this role over time can be tracked since the 1940s, beginning with US Attorney-General Tom Clark (from 1945 to 1949). Clark was known for being 'familiar and engaging with the press. He understood what the media could do for him and his agenda and … he could be quite effective with them.'[198] Clark used what the Americans call the 'bully pulpit' (i.e., the ability to use one's basis of power to advocate for an agenda) to emphasise the 'importance of rehabilitation and education' for young criminal offenders.[199] He hosted a golf tournament in Washington DC to raise awareness of this issue, to which he invited 'top golf and movie stars of the day'.[200] The media also attended.[201] Clark gave speeches that promoted civil rights,[202] though this was not unique to Clark. Clark's son, Ramsey Clark, was also a US Attorney-General (from 1967 to 1969). Ramsey Clark similarly used the bully pulpit to push for opposition to the death penalty, defend the United States Bill of Rights and promote civil rights laws.[203] Ramsey also used his advisory role with the president to push his own agenda. At one point, he advised former president Johnson against laws that could have inflamed racial tensions due to his personal commitment to civil rights.[204]

A US Attorney-Generals are not restricted in terms of what they can say to the media.[205] This makes them capable as public lawyers who can represent the public interest. In addition to campaigning for certain causes, US Attorney-Generals can publicly attack what they consider errors in judicial decision-making. In a series of

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[198] Alexander Wohl, *Father, Son, and Constitution* (University Press of Kansas, 2013) 68.

[199] Ibid 79.

[200] Ibid 80.

[201] Ibid.

[202] Ibid 123.

[203] Ibid 321.

[204] Ibid 323.

[205] Clayton (n 196) 71.

speeches, US Attorney-General Edwin Meese (from 1985 to 1988) 'attacked specific rulings of the Supreme Court' that he viewed were errors in the law.[206] He did so 'by appealing to the public and the legal profession in speeches [and the] written word'.[207] Remarks by US Attorney-Generals on these kinds of controversial legal issues 'receive extensive media coverage' and can thus start a public conversation about the law and potential law reform.[208] This can lead to the US Attorney-General proposing legislation in the public interest, as in the case of US Attorney-General Herbert Brownell when he responded to business demands with anti-trust legislation.[209]

US Attorney-Generals frequently defend existing legal norms for the sake of the public interest. For example, US Attorney-General Jeff Sessions (from 2017 to 2018) regularly appeared in the media to defend freedom of religion and the First Amendment.[210] He also defended what he called 'the primacy of law', stating that 'courts and advocates and politicians' had lost their respect for the legal system and ignored legal norms and traditions.[211] In defending the 'primacy of law', US Attorney-Generals can extend one step further and appear alongside a plaintiff in court.[212] This is called appearing as amicus curiae or as a friend of the court—as an advisor to the proceedings on behalf of the public.[213] This occurred in various civil rights cases, in which US Attorney-Generals lent the government's resources to particular plaintiffs to assist their cause.[214]

Finally, there have been cases when US Attorney-Generals have stood up to presidents for the sake of the public's interest and that of the Constitution of the United States. In 2017, acting US Attorney-General Sally Yates famously stood up to

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[206] Ibid.

[207] Ibid.

[208] Ibid.

[209] Herbert Brownell and John P Burke, *Advising Ike: The Memoirs of Attorney General Herbert Brownell* (University Press of Kansas, 1993) 153.

[210] 'AG Jeff Sessions Talks Faith and Religious Freedom on Faith Nation', *CBN News* (online at 10 November 2017) <https://www1.cbn.com/cbnnews/politics/2017/october/ag-jeff-sessions-talks-faith-and-religious-freedom-on-faith-nation>.

[211] Ibid.

[212] Huston et al (n 197) 114.

[213] Ibid.

[214] Ibid.

President Donald Trump and refused to implement his travel ban on people who travelled to the US from Muslim-majority nations.[215] She did so because she believed that the so-called Muslim travel ban violated the constitution[216] (namely, that it violated the Establishment Clause of the First Amendment for the freedom of religion). She decided that the Department of Justice would not enforce the order, as it was both unconstitutional and not in the public's interest to do so.

US Attorney-Generals are part of the broader US legal culture, whereby lawyers and judges frequently appear on television. Many have had their own television shows, while others have negotiated 'a personal media deal' to talk about their clients with the press.[217] An old US saying states: 'Let's try this lawsuit the old-fashioned way: in the newspapers'.[218] This perception of law can be criticised for becoming a spectacle or theatre; however, it should also be remembered that the public loves spectacles and theatre.

To engage the public, the law must be open and available, easily accessible and, in some cases, entertaining. An active legal culture requires lawyers to engage in this process rather than retreat from it. Australia has much that it can learn from the US's media culture, the free speech rights that it provides its lawyers and the freedom that the public has to critically engage with the law. Rather than restricting the rights of lawyers to speak freely, Australia should empower lawyers to inform the public, educate and entertain. Geoffrey Robertson's *Hypotheticals* series offers a helpful model from which to base the Australian public legal culture. Not only should lawyers form part of our media culture, but lawyers should be at the heart of critiquing and questioning the law.

To conclude, a possibility exists for a different kind of law graduate to emerge in the future—one who is empowered to think about moral challenges and speak freely about the injustice of the law. The current neoliberal agenda does not provide students a moral education in law; rather, it prioritises a focus on profitability and personal

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[215] Ryan Lizza, 'Why Sally Yates Stood Up to Trump' (29 May 2017) *The New Yorker*.

[216] Ibid.

[217] Peter A Joy and Kevin C McMunigal, 'Clients, Lawyers and the Media' (2004) 19 *Criminal Justice* 78.

[218] Charles W Wolfram, 'Lights, Camera, Litigate: Lawyers and the Media in Canada and the United States' (1996) 19(2) *Dalhousie Law Journal* 374.

enrichment.[219] Students are also currently not encouraged to consider alternative career paths that can be distinguished from private practice or corporate law jobs, despite the severe lack of private jobs available.[220] In contrast, society does not gain the role of a lawyer as an active participant in the democratic process, with students who can take are trained as democratic citizens.

Part 3 of this thesis will consider the notion of a new law school that champions the lawyer's role as a democratic citizen. A new kind of law school could move beyond the neoliberal agenda to experiment with alternative forms of legal education that allow students to think for themselves and prepare them for numerous jobs beyond private legal practice. A broad, liberal arts education in law school would allow students to understand the law in its proper context, the purpose behind law and the relationship between law, history, politics and society; consequently, students would gain several different perspectives through which they can critique legal institutions and traditions. This thesis will conclude with a curriculum that embraces new and alternative methods of understanding, critiquing and reflecting on the law that students learn in class. Some of the methods will be generally relevant to modern educational theory (e.g., small class sizes); however, even these methods have been observed in Part 1 of this thesis, in which they have allowed for more sustained discussions about the law in society, the law in context and the relationship between law and other fields of study.

[219] Brown (n 1).

[220] West (n 2) 1–2.

Part 3: Proposal for a New Kind of Australian Law School

Section 1: Current Teaching Methods and Assessments

One of the greatest problems in legal education today is the reluctance of law schools to experiment with new and innovative teaching methods that already exist in other university departments.[1] Traditional methods of teaching law (e.g., casebooks and, in some examples, the case method) remain 'antiquated and ineffective', as they were created in the late 1800s and have only been marginally adjusted since.[2] This is despite the widespread and broad changes to education in universities, including entire education departments that were established for this explicit purpose. Properly evaluating law schools necessarily involves considering new methods for teaching law and new experimental teaching techniques.

This thesis explores the relevant alternative teaching methods in the field, and it provides a critique of current methods. First, it argues that the Socratic method and case method require significant revision or adaptation to remain relevant in the present day. Although the Socratic method is not commonly used in Australian law schools, discussing it reveals how it could be used for a humanities-based education in law. For example, the method might not be directed towards students, but it could be directed *from* students towards law professors, judges and the law itself. Second, this thesis argues that the case method currently promotes an unjust and passive understanding of the law. A more effective case method might involve students considering the effect of applying the law to a set of facts (e.g., a client potentially being sent to prison, someone losing their home, someone losing their livelihood) rather than having no regard for the consequences. In both cases, this thesis contends that the Socratic method and the case method require a more thorough connection between legal principles and the reality of the law as it affects society.

Section 2 of this part considers new and alternative teaching methods. These include teaching critical thinking and the effects of law enforcement and philosophy, as well as providing new technological tools that can enhance the empathy of students (e.g., virtual reality, simulations and games). Principally, this thesis suggests that new

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[1] Robin West, *Teaching Law: Justice, Politics, and the Demands of Professionalism* (Kindle eBook, Cambridge University Press, 2014) 1212.

[2] Ibid.

technology can be combined with a traditional liberal arts education to create a new kind of law degree—one that not only teaches students what the law is but also allows them to question what the law ought to be. Many of the alternative techniques that will be discussed in this section have beneficial effects for a humanities-based education in law. These include reading groups, essays, small class sizes and critical questions in class—all of which contradict the more traditional styles of large lecture halls and case-based questions. However, it is true that changing teaching methods alone does not guarantee a humanities-based curriculum. Teaching methods are only one-half of the proposed curriculum, and the proposed substantive changes to content and subject listings are outlined later in this thesis.

1) Moving towards the 'Real' Socratic Method

> Professor Kingsfield stands at the front of a law class and picks on a student at random.
>
> > 'Mr Hart,' the lecturer says, 'What are the facts of the case?'[3]
>
> The student stands.
>
> > 'I haven't read the case,' the student says quietly.[4]
>
> The professor grumbles in frustration, mentioning that the assignment has been stuck on a wall in Langdell Hall for over a week.
>
> > 'I will give you the facts of the case myself, Mr Hart,' the professor says, to the student's visible worry.[5]

The above scene from the film *The Paper Chase* (1973) is a classic example of the Socratic method—a system in which students are asked questions about a specific case of law. Invented by the law professor Christopher Langdell in 1870, the Socratic method minimally resembles the actual ideas of Socratic wisdom in *Meaieutics* and the *Apology*. This section intends to challenge Langdell's interpretation of Socrates

[3] *The Paper Chase* (Thompson Paul Productions, Twentieth Century Fox, 1973).

[4] Ibid.

[5] Ibid.

and asks whether his method reinforces authoritative structures of law rather than granting students the ability to test their own critical thinking skills.

This thesis suggests that in a true Socratic law school, students would be instructed to ask questions of those in authority instead of answering questions from authority. Nothing would be beyond a student's questioning, especially regarding claims to authority or expertise alone. Students would be empowered to question the wisdom of law professors, judges, politicians and the law itself; they could unpack the hidden values, ideological motivations and philosophical foundations of legal principles. By questioning the origins of the law, students would learn to refine their critical thinking and analytical skills in a manner that Langdell himself intended to teach, but which he never truly managed to achieve.

The analysis below will begin by exploring Langdell's style of the Socratic method, and then it will discuss how this compares to the method as advocated by Socrates himself.

a) Langdell's Socratic Method

To thoroughly cover the Socratic method, it is worth revisiting the character of Christopher Columbus Langdell, as introduced earlier in this thesis. As Dean of Harvard Law from 1870 to 1895, Professor Christopher Langdell systematically laid the foundation of modern legal education.[6] His two primary inventions were the case method of instruction and the Socratic method. Langdell taught based on 'a settled conviction that law could only be taught or learned effectively by means of cases'.[7] He taught these cases by asking students a series of questions about the 'principles and doctrines' that were contained within them.[8] Students were expected to understand the facts and legal principles of a case, as well as how those legal principles could be applied to a new set of factual circumstances.[9]

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[6] 'The Case Study Teaching Method', *Harvard Law School: The Case Studies* (Web Page, 2021) <http://casestudies.law.harvard.edu/the-case-study-teaching-method/>.

[7] Christopher Columbus Langdell, as quoted in William Schofield, 'Christopher Columbus Langdell' (1907) 55(5) *The American Law Register* 278.

[8] Harold Anthony Lloyd, 'Raising the Bar, Razing Langdell' (2016) 51 *Wake Forest Law Review* 231.

[9] Todd D Rakoff and Martha Minow, 'A Case for Another Case Method' (2007) 60(2) *Vanderbilt Law Review* 599.

Langdell's Socratic method was inspired by a similar method outlined by Socrates in *Maieutics*.[10] The ancient philosopher outlined a method for interrogating young Greek men by asking them questions to draw out fallacious reasoning in their logic.[11] Socrates boasted about an 'ability to apply every conceivable test to see whether [the] young man's mental offspring [was] illusory and false'.[12] This somewhat resembles Langdell's technique of interrogation; by forcing students to justify illusory or false understandings of case law, Langdell was applying his own version of Socrates' technique.

With his Socratic method, Langdell encouraged students to develop different opinions regarding the ratio decedendi of a case. However, his method lacked any sustained debate regarding the origins of those legal decisions or the methods by which they were reached by judges. A student could distinguish a specific case from a new set of facts, which suggests that the old legal principle might not apply in a new circumstance; however, when a judge provided an opinion, it was not the student's place to disagree with the judge on first principles or mention philosophical foundations of that opinion. Indeed, philosophy was not part of the method at all (which is ironic, given that the method is named after the most famous philosopher of all time: Socrates). If students did question a judge, then they could only do so by referencing another case and another judge (i.e., they had to question authority by referencing prior authority alone, rather than questioning authority itself).[13] In this sense, the current Socratic method might prevent students from questioning what they are taught. This is similar to how ideologies discourage lateral thinking by discouraging followers from questioning the basic foundations of the ideological principles. As Yuval Harari suggested, 'How do you cause people to believe in an imagined order[?] First, you never admit that the order is imagined.'[14]

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[10] 'Maieutics' in Plato, *Theaetetus*, tr R Waterfield (Penguin, 1987) 25–9.

[11] Ibid.

[12] Ibid.

[13] John D Whyte, 'Finding Reality in Legal Education' (2013) 76 *Saskatchewan Law Review* 99.

[14] Yuval Noah Harari, *Sapiens*: *A Brief History of Humankind* (Random House, 2014) 20.

Langdell himself occasionally questioned legal authority—but only if an 'opinion did not square with the original [cases themselves]'.[15] He 'cultivated the intellectual autonomy of students' but only in so far as they had a different, judicial opinion regarding how a case should be read and understood.[16] If a student uncovered a new ratio decedendi in a case, then Langdell was the first to reconsider his opinion on the case in question.[17] He is cited as doing so three times in a week on one particular case.[18] However, what mattered to Langdell was not so much the law's origin but the outcome itself:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer.[19]

In the above reasoning of law as a 'science [of] principles', Langdell closely mirrored the German legal philosopher, Hans Kelsen. Like Kelsen, Langdell's method encouraged students to learn that the law was self-justifying, so they would thus have to 'draw boundaries between the spheres of legal, moral and political consideration'.[20] By focusing solely on the reasoning of judges, students were taught that a decision is always justified by reference to another prior decision.[21] Never is the 'end point' or the original conception of law (in terms of its derivation from politics, society, morality and social values) allowed to be questioned.[22]

The final flaw in Langdell's Socratic method is its tendency to promote inequitable power by allowing those in a position of power—the teacher, judge and law—to interrogate those in a position of weakness—the student. As Benjamin Franklin once

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[15] Schofield (n 7) 277.

[16] Bruce A Kimball, 'The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic "Abomination," 1890–1915' (2006) 46(2) *History of Education Quarterly* 30.

[17] Ibid.

[18] Ibid.

[19] Christopher Columbus Langdell, 'Preface' in Christopher Columbus Langdell and Samuel Williston, *A Selection of Cases on the Law of Contracts* (Brown & Little, 2nd ed, 1879) x.

[20] Vanessa E Munro, 'Legal Education at the Intersection of the Judicial and the Disciplinary' (2003) 2(1) *Journal of Commonwealth Law & Legal Education* 39; Gonzalo Villalta Puig, 'Legal Ethics in Australian Law Schools' (2008) 42(1) *The Law Teacher* 34.

[21] Edward J Phelps, 'Methods of Legal Education' (1892), as quoted in Steve Sheppard (ed), *The History of Legal Education in the United States: Commentaries* (Salem Press, 1888) 532.

[22] Whyte (n 13).

elucidated: 'I found this [Socratic] method the safest for myself and very embarrassing to those against whom I used it'.[23] Orin Kerr described the method as 'cruel and psychologically abusive' because it creates a strange power dynamic between teacher and student.[24] This kind of power dynamic, which Socrates himself sought to redress in his actual use of the Socratic method in ancient Greece, will be discussed below.

b) Restoring Socrates to the Socratic Method

Although Langdell correctly identified a Socratic form of questioning in *Maieutics*, he failed to understand that in the time of Socrates, the Socratic method was primarily used on figures of authority rather than on students. This is revealed in wider readings of Socrates, such as in his discussions in the *Apology*.

The heart of the *Apology* centres on Socrates' trial for corrupting the youth of Athens.[25] Socrates is charged with corrupting the youth by questioning their wisdom but also by questioning the social and political institutions of Athenian high society. His 'curious' nature is what condemns him in the eyes of his Greek accusers.[26] At the trial, Socrates expresses a vision of what it means to be wise, including a Socratic method for analysing the state. Socrates explains that before one can look to his own private interests, one must 'look to himself and seek virtue and wisdom'.[27] He similarly stated that before one can look to the interests of the state, one must 'look to the state'.[28]

By using the term 'look', Socrates means 'examine'—in the sense that one must examine the state before blindly following its dictates. One must look to himself in the same way that the 'unexamined life is not worth living'.[29] At this point, the idea of

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[23] Benjamin Franklin, *Benjamin Franklin: His Autobiography* (Harpers & Collins, 1849) 26.

[24] Christopher M Ford, 'The Socratic Method in the 21st Century' (Master's Thesis, United States Military Academy West Point, 2008) 3 <http://www.usma.edu/cfe/literature/ford_08.pdf>.

[25] 'Apology: By Plato', *The Internet Classics Archive* (Web Page, 2009) <http://classics.mit.edu/Plato/apology.html>.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid.

the state's 'interests' can be extended to the enforcement of the law. After all, the law is a state's primary interest; it is its existential interest, as a state can only exist on the basis that people support the law (foremost of which is the constitutional basis of the state's authority).[30] Lawyers who do not examine the law they learn or what the state wishes them to do or what the state's 'interests' are in terms of enforcing the law is not virtuous or wise, in Socrates' phrasing. He is not 'looking' to the state before enforcing its interest. A study of law that neglects to mention that the state has any interests in applying a specific law, case or agenda is not a Socratic study of law.

Instead of using the Socratic method on inexperienced students, the *Apology* suggests that the Socratic method should be used on figures of authority. In the middle of the trial, Socrates recounts the story of the Oracle of Delphi, who declared that he was the wisest of all men.[31] To disprove this claim, Socrates searches for figures of authority and wisdom, whom he suspects are wiser than he is. He begins to interrogate these figures using his Socratic method, which is what places him in trouble with the Greek authorities.[32] In this example, the Socratic method is used as a tool to interrogate those who hold themselves as wise—to test whether it is the truth.

To undergo such a test, the relevant figure must have authority—which is why using the technique on a student is considered strange. Socrates himself stated that he primarily used the method on three particular individuals: a politician who claimed himself wise, an artist who did the same and a poet whose wisdom was self-evident in his poetry.[33] In each of these cases, Socrates questioned the figures of authority on the subject matter of their authority. In the case of the politician, Socrates was literally 'looking' to the state in the manner expressed above before following the state's interests.[34]

The above examination of the Socratic method (as used in the *Apology*) reveals three distinct claims: that the method should be used to question the interests of the state,

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[30] Dean Russell, 'Sources of Government Authority' (1963) *Foundation for Economic Education* 3–4.

[31] 'Apology: By Plato' (n 25).

[32] Ibid.

[33] Ibid.

[34] Ibid.

that the method should be used to question those in authority, and that the method should be used to question those who believe they are wise. A modern version of the Socratic method would thus encompass all three.

The law as an interest of the state, a source of authority and an often self-proclaiming source of wisdom would be an ideal target for the modern Socratic method. The student as a subject of the state, a subordinate and a self-proclaimed amateur in his or her field of training would not be an ideal target for the Socratic method. It is this foundational mistake that Langdell made in his formulation; this should be corrected and the method adjusted for the use of students.

This section does not argue that Socrates' ideas should be accepted without critique or further discussion, which may make them more appropriate for a more modern educational experience. Indeed, there are aspects of Socratic dialogue that might contradict modern notions about science and learning. One complication is Socrates' idea that learning is a form of 'recollection'.[35] In his dialogues, Socrates contends that people can 'recollect' answers to questions posed in a past life.[36] He uses the example of someone noting the imperfections in the world (in terms of equality of measurement) and recollecting 'the Equal itself' from a time before they were born.[37] Socrates contended that answering a Socratic question was sometimes a form of 'recollecting' the answer from this previous life, and that 'I am confident that there truly is such a thing as living again, and that the living spring from the dead'.[38] Such a statement would seemingly contradict modern notions about education and science, and it would have to be discounted from a modern version of Socratic questioning. It should be noted here that Socrates' techniques, not his scientific or religious beliefs, are the matter of inspiration in this section.

Although Langdell's Socratic method was an improvement compared to prior forms of legal education, a new formulation is required to accommodate the actual wisdom

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[35] Tim Connolly, 'Plato: Phaedo', *The Internet Encyclopedia of Philosophy* (Web Page) [xx] <https://iep.utm.edu/phaedo/>; David Apolloni, 'Plato's Affinity Argument for the Immortality of the Soul' (1996) 34 *Journal of the History of Philosophy* 5–32.

[36] Connolly (n 35); Apolloni (n 35).

[37] Ibid.

[38] Ibid.

and virtue of Socrates, as moderated by modern ideas of education. It is time to adopt the originally intended Socratic method that equalises the power dynamics between professor and student, and empowers the student to examine legal principles critically. Once students are empowered to admit that they do not have all the answers to law waiting for them in a casebook—that they must reason through the law for themselves by asking questions to those in authority—then they will understand that the foundation of knowledge is ignorance (as Socrates suggests) and wisdom originates from challenging authority rather than from unquestioningly following it.

2) The Unjust Case Method

This subsection seeks to demonstrate an unjust case problem and use it as an example to explore how case problems can fail to offer students the chance to question unjust, immoral or outdated laws. This thesis argues that by asking students to merely identify and apply the law, the typical case problem silences a student's dissenting views and forecloses the possibility of students questioning how the law influences their society. Instead, students are trained to perceive the law as a static science—one that is built on the internal logic of precedent, which has no extrinsic justification as an emergent theme of the Harvard case method.[39]

The second part of this section examines public policy considerations, which are often regarded as the 'liberal arts' component of the case problem format. This subsection argues that problem questions have limited scope and marginal utility. This section also considers public policy considerations, which might not offer students a proper chance to discuss how law affects society. In discussing policy, students are encouraged to consider existing frameworks—case law, statute law and international law—when they construct their answers rather than to think for themselves. In this way, public policy considerations do not 'fix' the case problem question. A more radical solution is necessary.

This section argues that fixing the case method would require radically changing it or replacing it with more critically engaging teaching tools. These could include critically engaging essays, cross-disciplinary research papers and political philosophy

[39] 'Apology: By Plato' (n 25).

questions. Critical assessment tasks have the advantage of contextualising the law for students and giving them an understanding of how the law relates to real life, politics and society.

a) The Case Problem

A case problem is a hypothetical problem question in law in which a party or several parties are involved in a legal dispute.[40] Case problems are typically presented as a series of facts containing legal issues that the student must identify.[41] Parties are framed as clients who have come to the student for advice regarding the law.[42] Students must advise these hypothetical clients about their legal duties, rights and liabilities. To answer a problem question, students tend to resort to the memorisation of case law and statute law, as well as, in some cases, foreseeing potential future developments in the law in 'grey' areas or undecided cases.[43] Students must conclude their answers by declaring one side of the case the likely 'winner' if the case had been decided in court.

Students will generally answer a case problem using a prescribed formula. The most common method is the IRAC method: issue, rule, application and conclusion.[44] Using IRAC, students begin by identifying 'the relevant legal issues' that are raised in a question.[45] They then consider the 'relevant legal principles' that those issues prompt.[46] After this, they apply the legal rules to the issues and known facts.[47] Finally,

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[40] 'Why Are Problem Questions Given as Assessment Tasks?', *Sydney Law School Learning and Teaching* (2017) <http://sydney.edu.au/law/learning_teaching/legal_writing/problem_question_task.shtml>.

[41] Mary Dunnewold, 'A Tale of Two Issues: "Applying Law to Facts" Versus "Deciding What the Rule Should Be"' (Fall, 2002) 11(1) *Perspectives: Teaching Legal Research and Writing* 12.

[42] Ibid; 'Why Are Problem Questions Given as Assessment Tasks?' (n 40).

[43] Dunnewold (n 41); 'Why Are Problem Questions Given as Assessment Tasks?' (n 40).

[44] 'Answering Questions in Contract Law—2 Ways to Structure Your Answer', *Routledge Textbooks* (Routledge, 2016) <http://www.routledgetextbooks.com/textbooks/optimize/data/Contract_Podcast_2.pdf> ('Answering Questions in Contract Law'); SI Strong and Brad Desnoyer, *How to Write Law Exams: IRAC Perfected* (West Academic, 2015) 1–5; Brent McDonald, *How I Beat Law School at Its Own Game, and You Can Too: The Step-by-Step Techniques Used by an Average Undergraduate Student to Ace Law School* (Brent McDonald, 2014) 24; NA Capozzi, *Law School in Plain English* (Primedia E-Launch, 2014) 20.

[45] 'Answering Questions in Contract Law' (n 44).

[46] Ibid; McDonald (n 44).

[47] 'Answering Questions in Contract Law' (n 44).

students offer an opinion regarding which party will likely succeed in 'winning' the case.[48]

IRAC is one of many formulas or acronyms that are taught to students. However, regardless of which formula is used, students are encouraged to have the same three goals: identify the legal issues, state the law and apply the law.[49] The theory is that by identifying and applying law, students will quickly come to 'know' the law, and thus have the requisite knowledge to enter private practice after graduating.[50]

However, the IRAC method can leave students completely detached from understanding the moral 'cost' of law or how it affects society. Using IRAC, students are merely asked to 'advise' a client regarding his or her respective argument in court and the likely result.[51] The law is thus coldly applied to the facts of the client's case. No regard is given to the extrinsic circumstances, including the client's mental state, social context, political context or origin of the law or norm. Students can be penalised for straying too far beyond a 'policy' boundary of discussion.[52] For example, it is irrelevant to term a law a 'legal technicality' or 'bad law', even in situations when the law has led to a substantial injustice to the injured party. The law's effect is typically irrelevant to the problem question. Students must ignore all moral and philosophical questions if they are to apply the law strictly and clinically.

b) The Question

Below is a problem question and answer that uses the typical IRAC method. The intention of using this question is to analyse the boundaries of an acceptable answer to a case problem, as well as highlight what these boundaries are and how they normalise injustice in the minds of typical law students. The case problem and answer are taken from Matt Berkahn's *Company Law: Questions and Answers*.[53] As such,

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[48] Ibid.

[49] Ibid.

[50] W David Slawson, 'Changing How We Teach: A Critique of the Case Method' (2000) 74 *Southern California Law Review* 343.

[51] 'Why Are Problem Questions Given as Assessment Tasks?' (n 40).

[52] Tamara Walsh, 'Putting Justice Back into Legal Education' (2008) 17(1) *Legal Education Review* 126–7.

[53] Matt Berkahn, 'The Company as a Legal Entity' in *Company Law: Questions and Answers* (LexisNexis, 3rd ed, 2016) 23.

they reflect a typical 'textbook' example of a question that is given to students. Although Berkahn's book is situated in the New Zealand context, it reflects broad principles and cases from the UK.

The question in Berkahn's book considers the legal rule from *Salomon v Salomon* concerning a company's legal status as a legal person who is separate from its directors and shareholders.[54] Put simply, the rule stated that 'a corporation is a distinct person with its own personality separate from and independent [to] the persons who formed it'.[55] The rule is commonly revised as 'a company is a legal person':

Berkhan asks:

> Max holds 800 out of 1000 issued shares in Northland Motels Ltd. He and his wife Susan have separated, and Max has transferred most of his valuable assets to the company in return for the issue of a further 100 shares, with the object of ensuring that these assets are not subject to the property division provisions of the Property (Relationships) Act 1976.[56]

And answers:

> Max will argue that the property transferred to the company no longer belongs to him, and is therefore not available for division under the Property (Relationships) Act 1976, on the grounds that he and the company are two separate legal persons despite his apparent control of the company: Salomon v Salomon & Co Ltd [1897] AC 22.
>
> It is irrelevant that he is the major shareholder of the company—such a person is still considered a separate entity from the company: Lee v Lee's Air Farming Ltd [1961] NZLR 325. Although Max is a shareholder of the company, he has no legal or equitable interest in the company's property: R v McCurdy [1983] NZLR 551; Re Grasslands Farms Ltd [1975] 1 NZLR 92.
>
> The fact that the outcome may be unfair or inequitable to Susan does not warrant a departure from the Salomon principle. Such a departure can only be justified [in a case of] 'substantial injustice': Chen v Butterfield (1996) 7 NZCLC 261,086; Re Securitibank Ltd (No 2) [1978] 2 NZLR 136.[57]

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[54] *Salomon v Salomon & Co Ltd* [1897] AC 22.

[55] Gonzalo Villalta Puig, 'A Two-Edged Sword: Salomon and the Separate Entity Doctrine' (2000) 7(3) *Murdoch University Electronic Journal of Law* 3; Berkahn (n 53) 15; Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19(4) *Company and Securities Law Journal* 250–1.

[56] Berkahn (n 53) 23–5.

[57] Ibid.

The question can be summarised succinctly as follows: Max is using his company to divert assets away from his wife upon separation.

The answer can be summarised as follows: Max can avoid liability by using the doctrine of separate corporate personhood to prove that his company is legally 'separate' from him.

The example answer provided above is a typical answer to a case problem. The answer follows the IRAC format by raising legal issues and legal rules and then applying those rules to the facts at hand.[58] The answer is also typical in that it ignores ethics, morality and fairness, and it does not question whether the law itself is just or whether it should be changed. Although important, a further discussion of these points is outside the scope of analysis.

At first glance, a strict application of the law in this case will clearly result in an unjust outcome—namely, that Susan might be denied assets from Max that are owed to her in their separation. The fairness of this outcome is irrelevant under a strict IRAC analysis. The IRAC method does not concern itself with the ethical result of a decision but merely with how that decision was logically reached. The method centres on applying the law rather than on questioning whether the law is just or fair. A correct answer, as the textbook answer above suggests, is a list of legal rules that are applied formulaically to Max's situation, in which the consequences of that application are ignored.[59]

That the above case problem results in an unjust answer should promote a careful consideration of the case method. If students should merely enforce the law as provided in the books when they answer a case problem, then it can be asked whether the students are implicit collaborators in unjust and outdated legal norms. What if a student reaches an unjust or immoral conclusion that goes against the higher principles of humanity? Is it justified to allow students to proceed without questioning the conclusion in some explicit way?

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[58] 'Answering Questions in Contract Law' (n 44).

[59] Anne MacDuff, 'Deep Learning, Critical Thinking and Teaching Law Reform' (2005) 15(1) *Legal Education Review* 125–6.

A stereotypical answer would be that lawyers exist to serve the needs of their clients rather than to provide moral advice. A law student's role is thus to learn the law and become a lawyer rather than to learn how to provide moral advice. Under a neoliberal paradigm, this belief is heavily encouraged: students are trained in law schools to adopt a post-morality perspective.[60] They learn to ignore questions of morality and to focus on job-relevant knowledge.[61] As Nick James suggested, 'Unless it is going to be directly relevant to their future careers, [students] are not really interested'.[62] To most students, law school merely involves 'passing all their courses and getting their degree as quickly as possible and with a minimum of fuss'.[63] They tend to avoid 'critical question[s]' or 'philosophical questions', instead preferring skills-based questions.[64] Students consider critical thinking tasks a 'waste' of time.[65]

At this point, counterarguments can be made in response to the example answer provided above (in the case of Max v Susan). Some of these counterarguments would even align within the IRAC framework. Some could even lead to a just outcome. It could be argued that the court could perceive Max hiding the assets in a company as an injustice, and the court could act to prevent this injustice by relying on exceptions to the *Salomon* rule. Susan might argue that the court should 'pierce the corporate veil' and hold Max personally liable for the assets due to her in the separation.[66] In this case, the corporate veil could be lifted if Susan proves 'substantial injustice'.[67] However, the court could equally decide that Susan is only a victim of minor injustice and dismiss her claim.

Example questions such as the one discussed above tend to present an opportunity for a just outcome to occur if the law was twisted in some way. The limitation of the case problem is thus as follows: if a student can only answer the question by referring to

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[60] Walsh (n 52) 121.

[61] Ibid.

[62] Nickolas James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 16(1) *Legal Education Review* 64.

[63] Ibid.

[64] Charles Sampford and David Wood, 'Theoretical Dimensions of Legal Education' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish Publishing, 1998) 104.

[65] Ibid.

[66] Berkahn (n 53) 16.

[67] Ibid 24–6.

legal rules, then the student is bound by the limitations of those rules. If those rules tolerate minor injustices, then so too must the student. If those rules have a high bar for a victim, then so too must the student. If those rules amount to substantial injustice when applied, then the student must accept this when applying those rules.

The case method in this example reinforces a belief that the law is the law, and that the law's authority is self-evident and final. It is beyond the scope of a case problem to allow students to ask the most basic moral question: 'Is the outcome just?'

Berkahn's textbook answer also contains various assumptions about law's role in society, its authority and its status as indisputable. Principally, his answer stated the doctrine of separate legal personality upfront, without questioning whether that principle should exist. If students state legal rules (the 'R' of IRAC) without questioning those rules, then they implicitly endorse that rule as already correct, authoritative and somehow worth applying. The assumption is that the judge in *Salomon v Salomon* case was correct to decide the doctrine of legal personhood and that all the student must do now is apply that doctrine. The doctrine of precedent itself suggests that judges are correct in a definite way unless they are contradicted by another judge or parliament.

Realistically, the doctrine of legal personhood as discussed above (Max v Susan) is not final, decisive nor indisputable. Corporate legal personhood is an extremely controversial area of law.[68] The *Salomon v Salomon* case remains controversial to this day.[69] Some have argued that the case was badly decided.[70] It is also commonly argued that the separate legal personhood doctrine had unintended consequences and a wide ambit and that it offered company directors a 'get out of jail free' card.[71]

The doctrine can be criticised in various ways. At the most basic level, the doctrine has been described as 'a legal fiction'.[72] Companies are not really people. The court's decision in *Salomon v Salomon* is an example of an 'anthropomorphic fallacy: the

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[68] Otto Kahn-Freund, 'Some Reflections on Company Law Reform' (1994) 7 *Modern Law Review* 56.

[69] Ibid.

[70] Ibid.

[71] Ibid.

[72] Lon L Fuller, *Legal Fictions* (Stanford University Press, 1969) 20–30.

fallacy of ascribing human traits to a non-human entity'.[73] Metaphors like this can start 'as devices to liberate thought [in a courtroom, but] often end by enslaving it'.[74] In this case, judges are enslaved to a narrow perception of what a company is: a person. They are then enslaved to a limited amount of discretion in terms of ignoring that view, and they 'lift the veil' in only some minor cases. All future judges must typically rely on the decision of the original judge in *Salomon v Salomon*. This presumption (perhaps the core presumption of precedent itself) suggests that original judges are beyond human error, incorrect thinking or poor judgment—when, realistically, the opposite is more likely.

If given the chance to critique the *Salomon v Salomon* doctrine, law students could gain a greater understanding of the law they are learning. For example, they could learn that legal doctrines contradict public interest. One argument suggested that when 'corporations are seen as private creations, corporate law is insulated from politics [and] political pressure' to change.[75] Without public pressure, companies can make decisions in their own best interests without feeling threatened by accountability.[76] Following the Wells Fargo incident and the GFC (to name just two examples), this can lead to decisions that contradict the public's best interest to disastrous effects.[77]

However, the doctrine in *Salomon v Salomon* still applies today, even to these extreme examples of company dishonesty and negligence. It allows those responsible (directors of companies) for harming others economically (e.g., the GFC, in which the decisions of a few bankers led to a mortgage and then financial crisis) go unpunished.[78] Without direct legal responsibility, company directors can exercise 'power without responsibility'—the kind of power to make decisions without any responsibility for how those decisions affect the public.[79]

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[73] Noel Pearson, 'The Corporate Fallacy' (July 2009) *The Monthly* <https://www.themonthly.com.au/issue/2009/july/1360559523/noel-pearson/comment>.

[74] Justice Benjamin Cardozo, *Berkey v Third Avenue Rly [(1926) 244 NY 84 at 94–5]*, as quoted in Puig (n 55).

[75] Kent Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (University of Chicago Press, 2010) 41–2.

[76] Ibid.

[77] Pearson (n 73).

[78] Ibid.

[79] Ibid.

Finally, by questioning the example case on legal personhood, a student might argue that the original *Salomon v Salomon* case did not anticipate the globalised world, in which the decisions made by a few companies in the US can cause a global financial crisis.[80] This, again, reveals the inherent problem in precedent and case law itself. This problem can be expressed as a question: how can an old rule be applied to new facts in a new world that the rule never anticipated? As long as the world continues to change, old precedents will become inconsistent with its new realities.

A strict doctrinal approach to case problems (whereby the law is narrowly identified and applied) fails to realise the long-term effect of 'bad laws'.[81] In examining the history of law, it is important to recognise that bad laws have had a role in all countries since the first laws were written and the first punishments pronounced.[82] Although the laws of slavery in the US and of the apartheid in South Africa were considered logical in their own time, they are now considered fundamentally unjust.[83] Blindly applying bad laws to new facts or to a hypothetical problem does not ensure a 'good' law student. Being an effective lawyer involves reaching beyond the technical and scientific application of law; it involves understanding 'not just … what the law is, but, secondly … what it might or should become'.[84] To be an effective lawyer is to understand that the law can be wrong, that its application can be wrong and that a question demanding its application can be wrong. It is to understand the ramifications of law on society and its ability to control relationships, civic institutions, businesses and personal freedom. Being an effective lawyer involves denying the relevance of hypothetical questions and proclaiming that laws are never hypothetical but always real—with real effects on real people. The role of an effective lawyer is thus to reach beyond the strict application of legal rules and attempt to correct the law when it

[80] Ibid.

[81] Michael Coper, Dean's Welcome (2010) ANU College of Law, as quoted in K Economides, 'Being a Lawyer: Professionalism, Values and Service' in James Stellios (ed), *New Ways Forward: Reform and Renewal in Constitutional Interpretation and Legal Education*: *Essays in Honour of Professor Michael Coper* (Federation Press, 2018) 2; Philip Lipton, 'The Mythology of Salomon's Case and the Law Dealing with the Tort Liabilities of Corporate Groups: An Historical Perspective' (2014) 40(2) *Monash University Law Review* 473.

[82] Ibid; Lipton (n 81).

[83] Ibid; Lipton (n 81).

[84] Ibid; Lipton (n 81).

harms society.[85] The ability of a lawyer to consider whether the law is just and whether it should be reformed and changed is thus an integral part of the profession.[86]

If integrated into the curriculum, the ability to consider what the law should be would greatly expand the kinds of answer that students could give to a problem question.[87] Students would be empowered to ask whether a case they study is unjust or unfair. A top law student could provide suggestions for improving the law, which could thereby improve the likelihood of a just outcome in future cases.[88]

The above question regarding Susan's separation would thus trigger an entire string of questions about the role of law, purpose of law and effect of law on society. This kind of analysis applied against the principle of separate legal personhood would reveal several issues that typically exist outside the boundaries of a student's answers to a case problem. As Simon Rice suggested, this is the obligation that law professors have to their students: 'We do our students … a profound disservice when we teach them law—and represent law to them—as only doctrine and rules.'[89]

This is because law reaches beyond rules and doctrine. It structures society, defines relationships and resolves conflicts.[90] To teach law as merely an application of legal rules is thus to lack the opportunity to contribute to how society should be structured, how relationships should be defined and how conflicts should be resolved. These missed opportunities are too costly in a law to pay in a law school and university, in which learning and knowledge are meant to extend the student.

Some law schools, both in Australia and in the US, ask their students to consider a 'public policy question', either inside or separate to a case problem analysis.[91] A

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[85] Ibid; Lipton (n 81).

[86] Coper (n 81) 2.

[87] MacDuff (n 59) 128–9.

[88] Ibid.

[89] Simon Rice, 'A Place for Critical Perspectives in Legal Education' (Conference Paper, The Future of Australian Legal Education Conference, 12 August 2017) 5.

[90] Spencer A Benjamin, 'The Law School Critique in Historical Perspective' (2012) 69 *Washington and Lee Law Review* 4.

[91] 'Law: Public Policy and Law', *Macquarie University Sydney Australia* (Web Page) <https://www.mq.edu.au/study/find-a-course/law/public-policy-and-law>; Chris Lijima and Beth Cohen, 'Reflections of IRAC' (November 1995) 10(1) *Legal Writing Institute: The Second Draft* 9–10. For a US example, see Jason C Miller, *Excelling in Law School: A Complete Approach* (Wolters Kluwer Law & Business, 2012) 20.

policy question asks a student to consider 'why' the law is the way it is or to consider competing viewpoints regarding law reform or, in rare cases, posing a new perspective of the law.[92] In the above example question, students could be asked to discuss the doctrine of legal personhood. Occasionally, a policy question can be so broad that it is 'more like undergrad liberal arts exams'.[93] However, students should mainly base their answers on past precedents and existing discussions in legal circles rather than on their own opinions.

Public policy discussions 'are of minor importance' in most law schools, which are subsumed by the dominance of the case method and legal positivism.[94] One revision book for law students has attempted to reassure them: 'Remember, public policy reasons are of minimal importance for excelling on your final exams'.[95] Another suggested that policy questions 'are likely to be relevantly short and count for 5 to 20 percent of your exam'.[96] Yet another suggested that 'policy questions require the same three skills as traditional questions—distilling the law, issue spotting and argument'.[97] Requiring the same three skills signifies that policy questions can be considered minor alterations of the traditional case problem format.

It is argued that public policy questions, despite their rarity, offer students the opportunity to critique the law. A student might be asked to justify a particular doctrine or discuss a grey area of law that is not completely covered in a course. However, this is not the case realistically. Policy questions are generally much narrower than their name would suggest. Students are typically expected to narrowly reflect on established policy objectives and guidelines.[98] They might be asked to consider an existing policy objective, such as to limit 'the scope of a defendant's

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[92] 'Law: Public Policy and Law' (n 91); Lijima and Cohen (n 91); Miller (n 91).

[93] Miller (n 91).

[94] Slawson (n 50) 344; Lijima and Cohen (n 91).

[95] Aaron Siri, *The Siri Method: The Formula for Top Law School Grades with Minimal Effort* (Kay Cee Press LLC, 2007) 65.

[96] Miller (n 91) 25.

[97] Andrew B Ayers, *A Student's Guide to Law School: What Counts, What Helps and What Matters* (University of Chicago Press, 2013) 15.

[98] Siri (n 95) 63.

liability' or they might be asked about a government's existing policy objective of reducing reoffending or incarceration rates.[99]

Students tend to answer policy questions by referring to existing arguments (i.e., judicial, legal, international and academic) rather than their own.[100] They are often tasked with examining 'statutory materials, administrative regulations, legal documents, articles' and cases.[101] In this way, their opinions are not free flowing or critical but 'evidenced' and couched in existing legal thought. The intention of answering a policy question is much the same as it is for answering a case problem: to identify the policy problem, identify the relevant commentary and apply that commentary.[102]

Far from being robust critical thinking exercises, public policy questions merely hide hidden intentions. Students are typically limited by the existing boundaries of legal thought. With the ability to refer to dissenting judgements or obscure cases, policy questions often result as exercises in which students paraphrase the 'courts' reasoning' or their favourite judge's minority opinion.[103] If they refer to the courts' reasoning, then they do not reach beyond precedent in their answers.[104] Indeed, at best, they only refer to a dissenting view of a minority judge. Sometimes, they will refer to an existing discussion in academia or a politician's new proposal (both of which are existing sources) rather than their own novel ideas.[105] Students' inability to think for themselves in policy questions goes against the spirit of a critical legal education.

W David Slawson suggested that 'the inclusion of public policy … has not fundamentally changed the case method'.[106] Rather than radically challenging the status quo, public policy questions can reinforce existing views about the law, which

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[99] Lijima and Cohen (n 91).

[100] Miller (n 91) 20.

[101] Gregory L Ogden, 'The Problem Method in Legal Education' (1984) 34(4) *Journal of Legal Education* 655–6.

[102] Miller (n 91) 20.

[103] Lijima and Cohen (n 91).

[104] Ibid.

[105] Ibid.

[106] Slawson (n 50) 344.

involves justifying the reasons (policies) for the law's enactment.[107] They have similarly reaffirmed the importance of case law, as judges themselves often 'include considerations of public policy' in their judgements.[108] To discuss a public policy is thus another method for discussing case law, one that does not reach into related fields of history, psychology, philosophy or political theory. Even when students are allowed to explore public policy (e.g., proposing law reform as aligned with government objectives), they do so by referring to those government objectives—to an existing document with prescribed legal boundaries.[109]

A true public policy discussion would extend beyond to consider students' own perspectives of how law affects society and whether the law is just, fair, moral and effective in its aims.[110] The role of a law student under this conception would be to question and interrogate existing law, not by referencing precedent or dissenting judgements, but by referencing higher principles, moral and political philosophy, theories and data. This kind of analysis is more like the role of a politician (i.e., someone trained in daily public policy decisions) than that of a judge (i.e., someone narrowly trained in enforcing and reinterpreting the existing law).

The case problem format boxes student thinking and dissuades students from thinking for themselves about the practical reality of legal principles. Far from being a critically engaging research task, case problems tend to reapply the legal status quo, justify legal norms and make students complicit in outdated or unjust legal norms. Typical methods of discussing a case problem (including the IRAC method) offer limited opportunities for students to voice their own opinion, question the law, critique the rules or suggest law reforms. In contrast, identifying and applying the law makes students blind to its changing nature, its effect on society and the injustices that it can perpetuate.

Despite the ubiquity of the 'policy' question in case problems, policy alone does not solve the issue discussed above. Rather than freeing students' minds to discuss their

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[107] Siri (n 95) 63.

[108] Slawson (n 50) 344.

[109] Siri (n 96) 63.

[110] Mary Heath et al, 'Learning to Feel Like a Lawyer: Law Teachers, Sessional Teaching and Emotional Labor in Legal Education' (2018) 26(3) *Griffith Law Review* 16–18.

own opinions, Policy questions force students to consider the same sources of legal authority: judges, politicians and the legal academic community. Students are limited in policy questions by the boundaries of existing legal thought, the whims of minority judges or the occasional comments from politicians. This prevents students from practically considering the morality of law, the effect of law and students' internal compass regarding whether a law is right or wrong. Without this internal compass, law students begin to perceive the law as passive and static rather than active and living.

Section 2: Alternative Teaching Methods & Assessments

This section argues that alternative assessments should be used in Australian law schools to reorient student learning towards a broader liberal arts education in law. Students should be given new assessments that challenge them to think for themselves about law's origin, purpose and effect on society. This can include teaching 'soft' skills (e.g., empathy, compassion, critical thinking and reflection). However, law students should also graduate with the capacity to critically reflect on the psychological and emotional effects of law on society; they should know how to unpack the surface objectivity of judicial decision-making to reveal the subjective social forces underneath. It is only through building compassion and an understanding of the law that law educators can deconstruct each student's detached and clinical perspective of law, as is currently encouraged by the curriculum.[1]

New assessment methods can help with this 'human' training by allowing students to engage with their own emotional reactions to cases and laws, rather than barring them from feeling any emotion in class.[2] Alternative assessments can also teach students the social, political and economic sides of law, which would reveal hidden agendas and subversive injustices.[3]

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[1] Margaret Thornton, *Privatizing the Public University* (Taylor and Francis, 2011) 45, 48.

[2] Jennifer M Denbow, 'Pedagogy of Rape Law: Objectivity, Identity and Emotion' (2014) 64(1) *Journal of Legal Education* 25.

[3] James Edelman, 'The Role of Specialized Legal Knowledge' (Speech, Council of Australian Law Deans, 22 March 2012) 1.

This section draws from the ideas of various thinkers in the history of educational theory and humanities education, in which each theorist will be used as a launching pad for more modern ideas about legal education in the liberal arts tradition. One source of inspiration is the curricular design of WPM Kennedy, the first dean of the University of Toronto Faculty of Law.[4] Teaching in the 1930s and 1940s, Kennedy suggested various different methods for assessing law outside the traditional and clinical (and often 'cold') case method; instead, he created innovative new assessments that challenged students to think critically about the law from new social perspectives.[5] At the core of Kennedy's teaching was the belief that law was a liberal art and the intent to place it in its proper context, rather than learning law as an objective abstraction.

Instead of lecturers guiding students to comprehend law through a single method of instruction (i.e., the case method), students in Kennedy's classes had to find their own method.[6] Instead of regarding law as objective and apolitical, students were encouraged to question the social purpose of law and the political ends that it served.[7] Instead of being detached from the cases they read about, students were encouraged to have opinions and emotional reactions to each case.[8] Kennedy's law school taught students to connect with the political and social forces that underpinned the legal system, and, in doing so, students could connect with their own humanity. To this end, he described the role of law lecturers as follows:

> The teacher of the law … is no longer merely a contemplative creature describing the law as it exists … Law must be designed, assessed, and taught, not in the abstract, but in the context of the complex relations and processes of modern society.[9]

Being connected to modern society allowed students to reflect much more critically on the role that the law realistically played within that society. Kennedy advanced the

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[4] Richard Risk, 'Canadian Law Teachers in the 1930s: When the World Was Turned Upside Down' (2004) 27(1) *Dalhousie Law Journal* 7.

[5] WPM Kennedy, 'Law as a Social Science' (1934) 3 *South African Law Journal* 100.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] WPM Kennedy, 'Tendencies in Canadian Administrative Law' (1934) 46 *Juridicial Review* 203, 214; Risk (n 4) 372.

notion that law schools should use more essays, critical thinking tasks, reflective tasks, law reform tasks, small class discussions and simulations to achieve this end.[10] These assessments aimed to help students understand critiques of the law, reflections on how the law affected society, the social function of law and how to enact law reform.[11] Taught in this way, students could understand the law in an interdisciplinary manner, in which they observed the 'countless relationships' that existed between law and other fields.[12] This helped them gain a greater understanding of law in the context of various interdisciplinary narratives linked to it (e.g., politics, philosophy, history and anthropology). As Kennedy was not unique in this interdisciplinary idea, this section will also draw from various other leading legal theorists and educators—such as Margaret Thornton, Markus Dubber, Dean Spade and Robin West. However, a specific focus and emphasis on Kennedy will be discussed in greater detail below.

Australian law schools have been slow to adopt critical and innovative assessment methods that diverge from case problems.[13] According to a landmark survey from 2003, unlike Kennedy's Toronto Law School program, most modern Australian law schools still used the case problem—a key component of the case method—as their core method of assessment.[14] The continued use of case problems was previously discussed in Part 2 of this thesis. Sturm and Guinier have suggested that law school 'culture is remarkably static, non-adaptive, and resistant to change, even in the face of strong pressure from significant constituents of legal education'.[15] Despite the widespread benefits of new and alternative methods of assessment, a strong allegiance to traditional teaching pedagogy yet prevails. This is despite the importance of assessment tasks in terms of setting the tone of the curriculum.

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[10] Kennedy (n 9) 214; Risk (n 4) 372.

[11] Kennedy (n 9) 203, 214; Risk (n 4) 372, 374, 377; WPM Kennedy, 'Some Aspects of the Theories and Workings of Constitutional Law', *Lectures on the Fred Morgan Kirby Foundation for Civil Rights* (Macmillan, 1931) 27, 33 ('Some Aspects of the Theories').

[12] Kennedy (n 9) 27.

[13] Petra Sterling et al, *How to Educate Lawyers in the Digital Information Age* (InfoTrack, 2018).

[14] Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Developments in Law' (Report, Australian Universities Teaching Committee, 2003) 16.

[15] Susan Sturm and Lani Guinier, 'The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity' (2007) 60(2) *Vanderbilt Law Review* 520.

As BR Snyder in the US and Miller and Parlett in the UK discovered in the 1970s, university students value assessment tasks above everything else in the curriculum.[16] Although this study was conducted overseas, it is still considered a landmark study in the field of international student motivation because it established the concept of the 'hidden curriculum'.[17] The study found that students relied on assessments to determine what does and does not matter in the curriculum. When asked about 'all aspects of their studies', it was found that students prioritised assessment tasks above teaching and learning. Based on Snyder's research, it can be concluded that students in modern law schools will prioritise the case method and black-letter law above everything else (if that is what they are mainly being tested on).[18] Their assessments will shape the perception they gain about the law. Arguments for introducing students to concepts of jurisprudence, ethics, justice, morality and other 'human' ideals—through course guides, teaching or general guidance in the curriculum apart from assessments—will thus not be effective.[19] Unless specifically tested and assessed in terms of their 'human' capabilities, students will not prioritise these aspects of law school.[20] In brief, the only way to change what students prioritise is to change how they are tested in law schools.

The first method for accomplishing this is to assess the law in context—to teach students to have an interdisciplinary notion of law through class discussions and broad lectures that use multiple different fields. The second method is to teach critical thinking through reading groups, in-class questions and essays. The third method is to teach reflection through reflective tasks and journals, self-reflection and peer feedback. The fourth method is to teach law reform by critiquing the law in class and providing law reform tasks. The fifth method is to teach law in small class sizes, which would allow students to receive more personal feedback on their assessments. Finally, the sixth method is to use simulations and role-plays—to persuade students to

[16] Benson R Snyder, *The Hidden Curriculum* (MIT Press, 1971) 50, 62–3.

[17] Graham Gibbs, *Using Assessment to Support Student Learning* (Leeds Metropolitan University, 2010) 2–6.

[18] Ibid 5.

[19] Ibid.

[20] Ibid.

visually observe how law affects society. Each of these techniques is examined in the following subsections.

This section will start with two preliminary discussions. First, it will explain why WPM Kennedy of the University of Toronto Faculty of Law is considered as the inspiration in this section for the alternative teaching methods mentioned above. His curriculum existed almost 100 years ago, so objections would naturally arise regarding its relevance today. Second, this section will explore how relevant a liberal arts education would be to the suggested alternative teaching methods. A brief discussion will be provided on the topic of how alternative teaching methods emerge, sometimes uniquely, from a liberal arts framework, and what this might mean for law schools specifically. This can be contrasted against a vocational curriculum, which might prefer technical skills over other forms of learning, and thereby diminish the possibilities for alternative teaching methods to gain a foothold.

1) WPM Kennedy's Curriculum as a Tentative Blueprint for a Modern Liberal Arts Law School

When searching for an alternative to the modern vocational law school, historical law schools that de-emphasised vocational education should be examined, such as the Toronto Law School. In the 1930s, Kennedy founded the Toronto Law School, stating that it had 'no professional ends to serve'.[21] Instead of preparing students for private practice, Kennedy's curriculum aimed to teach them the 'social science' of law.[22] Students would be trained in research and writing from within an interdisciplinary curriculum that related the study of law to history, philosophy, anthropology and other related subjects.[23] This was reflected not just in the curriculum's content but also in his teaching methods—such as class sizes (to encourage long discussions), assessments for understanding law in context and reflective tasks that encouraged critical thinking.[24]

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[21] Kennedy (n 5).

[22] Ibid.

[23] Kennedy, 'Some Aspects of the Theories' (n 11) 25; Richard Johnstone, 'Rethinking the Teaching of Law' (1992) 3(1) *Legal Education Review* 17, 21.

[24] Martin Friedland, 'The Enigmatic W.P.M. Kennedy' in WPM Kennedy, *The Constitution of Canada* (Oxford University Press, 2014) xxix.

Without being restricted to admissions requirements, Kennedy was free to embark on a highly experimental curriculum formulation. He sought to teach law as something that was larger than vocation alone, and he linked it to other aspects of society through the humanities and social sciences.[25] Law students in his classes were not meant to simply learn the law and apply it as a technical skill; it was intended that students extend beyond this technical knowledge and understand how the law relates to politics, as well as influence that political process after they graduated.[26] Kennedy's thoughts can best be understood in how he framed the role of the law lecturer:

> The teacher of the law or the jurist is no longer merely a contemplative creature describing the law as it exists. The very development of the administrative system has forced him to be constructive, not only in interpreting the tendencies of social existence, but also in assisting in the molding and guiding of them.[27]

In this way, the Toronto Law School might be considered a prototypical blueprint for a non-vocational law school. Even if other educators at the time and since have advocated for a similar focus on the liberal arts, it is Kennedy's single-mindedness in claiming that Toronto Law School had 'no professional ends to serve' that marks the school as a unique starting point for a discussion based on alternative teaching methods.[28] Kennedy's teaching methods were centred on this notion of preparing students for a broad role in society, for a fundamental contribution to social and political practices.[29] This involved a necessary expansion of assessment beyond technique; it involved interrogating the law and legal processes for the benefit of society through law reform so that the origin of law, its purpose and its social functioning could be understood.[30] Law students were not simply lawyers in training,

[25] Ibid.

[26] Kennedy (n 9).

[27] Ibid.

[28] Kennedy (n 5) 100.

[29] Kennedy, 'Some Aspects of the Theories' (n 11) 33.

[30] Ibid.

but citizens who were ready to help reform society for better social outcomes after graduation; the law was social, and law graduates were considered social actors.[31]

In this sense, Kennedy's teaching method can be described as using law for social and political change. Students were asked to inquire 'into the social worth of legal doctrines' and deduce whether laws served 'the ends of society'.[32] Essentially, all law students were trained to be law reformers. Seeking to serve 'the ends of society' was a vague ambition. It could be asked of the students: Whose ends would be served? And by what judgement could students understand society's aims? Kennedy's answer appeared to be democracy. Students required a 'comprehensive survey of social values' in class, in which 'survey' signified a literal undertaking of understanding public perception of social or legal issues.[33] Specifically, Kennedy highlighted the broad principles of governance prevalent in his time, such as 'the interest of a child in a good home, and the interest of the state in conserving resources'.[34] Law was a means to resolve these 'problems in political science', like a functioning arm of democratic government.[35] Kennedy thus perceived law students in the way that politicians are perceived: they are accountable to, and responsible for, upholding the will of the people in their pursuit and governance of the law. This teaching framework extends well beyond technical skills, and it shifts the focus towards the public administration of justice.

In contrast to the Toronto Law School in the 1930s, modern law schools in Australia are restricted by admission requirements (including the Priestley Eleven) that naturally limit the curriculum's scope, content and teaching methods.[36] By having 11 core units that focus on admission requirements for practice (a vocational goal), Australian law schools ultimately must change to a more vocational educational

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[31] Kennedy (n 5) 100.

[32] Kennedy, 'Some Aspects of the Theories' (n 11) 26–7.

[33] Risk (n 4) 366.

[34] WPM Kennedy, 'Some Aspects of Family Law' (1937) 49 *Judicial Review* 18, as quoted in RCB Risk, 'The Many Minds of W. P. M. Kennedy' (1998) 48(3) *The University of Toronto Law Journal* 367.

[35] Kennedy (n 5).

[36] Grace Ormsby, 'Priestley 11 "Not Keeping Up" with Reality', *Lawyers Weekly* (online at 26 May 2019) <https://www.lawyersweekly.com.au/biglaw/25707-priestley-11-not-keeping-up-with-reality>.

framework than that of Kennedy's.[37] This hinders a law school's capacity to experiment with new subjects or teaching styles that diverge from either the core units or their admission imperatives.[38] When so much of a curriculum is oriented towards practice, it logically follows that much of the curriculum will be focused on technical skills.[39] In this context, alternative and non-vocational ideas about the law's social effect and origin—in addition to jurisprudence, legal philosophy or a critical understanding of law in society—can be regarded as either secondary or disregarded entirely from the curriculum.[40] Instead, law educators might focus on 'areas of law that are believed to facilitate market interests', including topics 'such as corporations, business, trade practices, competition, international trade, intellectual property and taxation law', which might be 'taught from a technocratic and applied perspective'.[41] Reaching outside this vocational focus requires the benefit of distance from current practices and the modern neoliberal turn in education. In this way, Kennedy's distance in time is perhaps more advantageous than it might first appear. That Kennedy's law school existed before the emergence of neoliberal political philosophy is another factor in its favour, as it removes students from modern forces and modern biases. In summary, Kennedy's law school offers an alternative framework through which to consider legal education outside admission requirements and the vocational imperative.

The second benefit of considering Kennedy's curriculum is that it was centred on the liberal arts and social sciences, which made it relatively unique among historical law schools of the time (or law schools since).[42] It is a logical step to examine a historical liberal arts law school when searching for a blueprint for a modern liberal arts curriculum. From the history, several alternative teaching methods that emerge and have emerged simply by nature of having a liberal arts focus can be observed. These methods might not emerge in a vocational curriculum. In Kennedy's case, the ability

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[37] See Part 2 above.

[38] Ibid.

[39] Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2004) 26(4) *Sydney Law Review* 481.

[40] Ibid.

[41] Ibid.

[42] For more on this, see the history discussion in Part 1. For more about the social science aspect, see Kennedy (n 5).

to extend beyond vocation signified that classes were not limited to a focus on law, in terms of both discussions and assessment tasks.[43] Without admission requirements, there was no imperative to centre education on training future lawyers; therefore, non-legal topics could be relevant in class. Extending beyond law signified that assessments could cross over into other topics (e.g., politics and social theory).[44] In class, this resulted in interdisciplinary discussions that drew different ideas from different disciplines related to law, and students could discuss these cross-over assessments in detail.[45] This was Kennedy's key contention when he stated that 'we relate law to life, not life to law'.[46] Instead of positioning everything in a student's life into a legal context, the law was positioned within the context of everything else.

Students at Toronto Law School were taught courses in history, legal philosophy, 'economics, psychology [and] political theory'.[47] The philosophical foundations of law were also taught to students,[48] as was the skill of critical thinking. Students were encouraged to 'criticise what is accepted' and 'reflect critically on the "why," not just the "what" and the "how," of the law'.[49] Bora Laskin, a student who would later become Chief Justice of Canada, wrote that 'even more important than the law he learnt [in Kennedy's law school], was what he learned "about things that affected the law"'.[50] Kennedy's law school 'gave [Laskin] a feeling that law was something more than a narrow discipline'.[51] Laskin contrasted this with the type of education that was provided at Osgoode Law School (a professional law school at the time), which he believed would not have allowed students to gain the same appreciation for law as a social science (and for multiple other disciplines like legal philosophy and legal history).[52] Essentially, the limit of a vocational curriculum was its inability to

[43] Kennedy, 'Some Aspects of the Theories' (n 11) 33.

[44] Ibid.

[45] Kennedy (n 5).

[46] WPM Kennedy, as quoted in RCB Risk (n 34) 366.

[47] Kennedy (n 5).

[48] Ibid.

[49] Ibid.

[50] As quoted in a draft copy of Martin Friedland, *Searching for WPM Kennedy: The First Dean of Law and the Law Character in the University* (2019) 162–4.

[51] Ibid.

[52] Ibid.

naturally clarify these connections between law and other disciplines.[53] In contrast, Kennedy's curriculum naturally did so by teaching law as a broad liberal art.[54]

Another aspect of Kennedy's teaching methodology was a dedication to small class sizes.[55] A liberal arts approach to education generally involves allowing students to ask the 'big' questions about society, and then debate the answers to these questions in class.[56] These questions can be related to philosophy, science, law or justice, but they were mostly interdisciplinary in nature, extending into multiple fields.[57] To have in-depth discussions of this nature, students had to have the time to speak and be listened to in class. This leads to the necessity of small class sizes.[58] It is difficult to imagine a productive class discussion about philosophical questions that had time for each student to talk, when the class had as many as 200 students in a lecture hall.[59] Conversely, a small class allows students time to voice their thoughts and for those thoughts to be considered seriously. Kennedy's classes would only comprise '12 or 14' people—and they would sometimes even be held in Kennedy's personal office, which encouraged a personalised feel to the education.[60] Part of his ability to do this was because the law cohort itself was quite small.[61] Nevertheless, this approach can be contrasted quite starkly to the large lecture hall environment.

Kennedy's vision for a liberal arts law school was not only unique in its aims; it also obtained concrete results by producing a staggering class of alumni. 'Canada's greatest criminal lawyer' was arguably taught at Toronto Law School (G Arthur Martin), as were other prominent officials (e.g., two chief justices of Ontario and a

[53] Ibid.

[54] Ibid.

[55] Friedland (n 24).

[56] Mark William Roche, *Why Choose the Liberal Arts* (University of Notre Dame Press, 2010) 15.

[57] Ibid; Kara A Godwin and Philip G Altbach, 'A Historical and Global Perspective on Liberal Arts Education What Was, What Is, and What Will Be' (2016) 5 *International Journal of Chinese Education* 8; William Deresiewicz, 'The Neoliberal Arts' (September 2015) *Harper's Magazine* 2.9.

[58] For example, see Clara Haberberger, 'A Return to Understanding: Making Liberal Education Valuable Again' (2017) 50(11) *Educational Philosophy and Theory* 2–4.

[59] Ibid.

[60] G Arthur Martin, a former student of Kennedy and a famous criminal lawyer in Canada, as quoted in Friedland (n 50) 163.

[61] Ibid.

judge of the Ontario Court of Appeal).[62] These alumni were taught in the five years that Kennedy was dean of Toronto Law School. Ironically, Kennedy's non-vocational law school produced a class of alumni that succeeded at their vocation—which can be considered a testament to the notion that a broad education can produce success, even for those who pursue specialist vocational aims.

Modern educators might object to Kennedy's teaching methods or curriculum and state that it is not progressive enough according to today's standards. His courses did not cover critical race theory, feminist theory, modern ideas about economics and the law or the various movements that occurred in the latter part of the twentieth century—such as critical legal studies and the law and society movement.[63] These movements had to be considered for a more modern liberal arts law school to be created. However, this does not signify that Kennedy's teaching methods should be discarded all together. If teaching is separated into style and substance, then much can be gained from Kennedy's style of teaching. Further, Kennedy's methods can be used as a launching pad from which newer pedagogical techniques can be discussed. Examining his work is merely the start of the conversation regarding what a liberal arts law school might comprise.

2) The Liberal Arts Give Rise to Alternative Teaching Methods

A liberal arts law school might prompt certain teaching methods that would not necessarily emerge in a vocational law school. These include assessment tasks covering law in context, law as an interdisciplinary pursuit, broader classroom discussions, critical thinking tasks, reading groups, small class sizes, journals, reflective tasks and essays. It is worth reflecting briefly on why such ideas might emerge in a liberal arts curriculum. Of course, this section does not intend to argue that these teaching methods cannot exist in a vocational curriculum, nor to state that the methods will individually (aside from interdisciplinarity) create a liberal arts curriculum on their own. Teaching methods are simply one component of a liberal

[62] Martin Friedland, 'Introduction' in WPM Kennedy, *The Constitution of Canada: An Introduction to Its Development and Law* (Oxford University Press, 2014) xxix.

[63] For a broader discussion of these movements, see Part 1.

arts curriculum, with the second component—the subject matter—also being a significant part.

As a starting point, a liberal arts curriculum might prompt a greater focus on law as an interdisciplinary subject, which could lead to interdisciplinary teaching methods. A liberal arts education generally refers to an education that is taught across multiple different fields of study.[64] The term *liber* originated as the Latin word for 'to free'.[65] Educators in the Middle Ages thought that a broad study of seven liberal arts subjects would somehow 'free' the mind.[66] At the time, these subjects included 'arithmetic, geometry, astronomy, grammar, rhetoric, logic and music'.[67] In modern times, a liberal arts education can extend to various subjects in the humanities, such as history, philosophy, science, 'social institutions … ethics and values', 'public policy, and law'.[68] To study the liberal arts is to be a 'free person' or 'whole person', in the sense that a wide-ranging education can help someone understand the 'whole' of the human experience.[69] Students learn about subjects that nurture their moral, social, emotional and, in some cases, spiritual understanding of the world.[70]

Learning these subjects might be described as a best-case scenario; indeed, some authors have challenged the true 'freedom' of a liberal arts education.[71] For example, conservative authors argued that a liberal arts education is often biased towards progressive values or is impractical, which ultimately leads students to consider

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[64] Galan M Janeksela, 'The Value of a Liberal Arts Education' (2012) 16(4) *Academic Exchange Quarterly* 2; WR Conner, 'Liberal Arts Education in the Twenty-First Century' (AALE Occasional Paper in Liberal Education No 2, Kenan Center Quality Assurance Conference, 2020).

[65] Martina Rodriguez, 'The Seven Liberal Arts: The Foundation of Modern Education' *STMU History Media* (Web Page, 4 November 2018) <https://stmuhistorymedia.org/the-seven-liberal-arts-the-foundations-of-modern-day-education/comment-page-8/>; Robert Appleton Company, *The Catholic Encyclopedia*, vol 1 (1907) 'The Seven Liberal Arts'; Janeksela (n 64) 2.

[66] Rodriguez (n 65) 1.

[67] Ibid; Robert Appleton Company (n 65); Janeksela (n 64).

[68] Janeksela (n 64).

[69] Ibid; Conner (n 64).

[70] Janeksela (n 64).

[71] Matt McManus, 'Conservative Critiques of the Liberal Arts' (31 March 2019) *Areo* <https://areomagazine.com/2019/03/31/conservative-critiques-of-the-liberal-arts-a-reply-to-ben-shapiro/>; Dinesh D'Souza, *Illiberal Education: The Politics of Race and Sex on Campus* (The Free Press, 1991) 5–10; Roger Scruton, 'Free Speech and Universities' (Speech, Future of Higher Education Conference, Buckingham University, September 2020) 6.

philosophical hypotheticals rather than reality.[72] Part of this critique relates to the increasing prominence of discussions regarding topics such as race, sex and class, which have emerged in liberal arts courses.[73] Duke Pesta argued that the notion that students must 'diversify' their minds in a liberal arts education 'is a political statement, not an educational statement'.[74] According to Pesta, liberal arts educators want students to adopt 'non-traditional, non-conservative, non-Christian, [and] non-patriotic' views; Pesta cited courses such as gender studies as an example of this.[75] Courses on gender and race are considered challenges to traditional notions of hierarchy, patriotism and Christian values (e.g., traditional gender roles).[76] Conversely, the liberal arts are critiqued for being too broad, unfocused and lacking in career outcomes, which has prompted some authors to consider them 'useless'.[77] The bias of existing liberal arts courses is beyond the scope of this thesis, although any proposed liberal arts curriculum should consider bias.

In terms of practical career outcomes, the various criticisms of the liberal arts can often be overstated. A central benefit of a liberal arts education is that it can make links between different areas to better illuminate the primary subject of study. This can have practical benefits, even for a vocational focus. For example, Boschiero described how students who studied science could contextualise their understanding of science in a broader study of politics and social forces.[78] By understanding 'the social and political aims and interests' of a scientist, students can understand the shortcomings of that scientist's research objectivity.[79] This can help interpret the data from studies by uncovering biases in reported figures.[80] It should be noted here how

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[72] McManus (n 71); D'Souza (n 71); Scruton (n 71).

[73] D'Souza (n 71); Scruton (n 71).

[74] Robin Kinderman, 'Useless College Majors' (3 April 2017) 33(7) *The New American* <https://thenewamerican.com/useless-college-majors/>.

[75] Ibid.

[76] Ibid.

[77] Ibid.

[78] Luciano Boschiero, 'Teaching the History and Philosophy of Science and the Sociology of Scientific Knowledge' in Geoffrey Caban (ed), *Education through the Liberal Arts* (Warrane College, 2019) 1–2; Cf Jan Golinski, *Making Natural Knowledge: Constructivism and the History of Science* (Cambridge University Press, 1998) 2, 6–7.

[79] Boschiero (n 78).

[80] Ibid.

contextual knowledge assists students with a technical skill in a manner that would not be possible without that contextual knowledge. Similarly, students studying law can contextualise their learning in a broader study of politics and social forces.[81] By understanding the social and political aims and interests of judges, lawyers and politicians, students can understand the shortcomings of the law's objectivity.[82] This can help them interpret case law by uncovering biases in decision-making and thus proposing either law reform or new arguments in court. Again, a practical outcome is evident from a contextual starting point. Far from being impractical, the liberal arts can have tangible outcomes in relation to how one engages in their profession.

It is not suggested that students who advocate for a liberal arts curriculum live a less practical life or that they ignore vocation altogether. In contrast, it is suggested that both civic life and vocation are enhanced by a broader study. A relevant example is the art of Leonardo da Vinci, the famed Renaissance painter. Part of the reason why da Vinci's art was so realistic was that he dabbled in medical research—he secured corpses from local hospitals for self-study.[83] This was not a narrow exercise in the mastery of art as a technical skill. Rather, by pursuing medical research, da Vinci gained an understanding of the science of the human body, which helped his art, assisted his drawings of human figures and thus made his art more realistic. Conversely, da Vinci's skill in art allowed him to effectively capture the human body in his dissections, thereby directly assisting him in his ground-breaking medical research.[84] Briefly said, da Vinci's art helped his science, and his science helped his art. This interrelationship of knowledge is what the liberal arts teach at their core; every skill is interrelated with another skill—every piece of knowledge has a corollary piece of knowledge in a secondary field that will enhance that primary field. Da Vinci's sketches of human anatomy are still considered some of the most realistic

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[81] As discussed by Duncan Kennedy and others at a Students for Inclusion Event (Law School Matters: Reassessing Legal Education Post-Ferguson) at Harvard Law School; Systemic Justice Videos, 'Contextualization in Legal Education: A Teach In' (YouTube, 13 August 2015) 00:00:00–01:29:41 <https://www.youtube.com/watch?v=RE8wG89_Jkw&feature=emb_logo>.

[82] Ibid.

[83] Shantal Riley, 'Anatomy Professor Uses 500-Year-Old da Vinci Drawings to Guide Cadaver Dissection', *PBS Body + Brain* (online at 13 November 2019) <https://www.pbs.org/wgbh/nova/article/leonardo-da-vinci-anatomy-dissection/>.

[84] Leonardo da Vinci, *Leonardo's Anatomical Drawings* (Dover Publications, 2012) 1–3; Martin Clayton and Ron Philo, *Leonardo Da Vinci: Anatomist* (Royal College Publications, 2014) 2–4; Riley (n 83).

sketches in human history.[85] Art has thus contributed to science. The story of da Vinci and Boschiero's students of science has revealed a longstanding myth at the core of vocational teaching methods—that a singular study in a field's technical skills alone will lead to a complete mastery of that field of study.[86] Instead, da Vinci revealed that the interrelationship between knowledge and different fields leads to a mastery of both, in which technical skills are expanded through context. Far from being useless, a liberal arts education might have tangible and practical outcomes for a student's career.

It must be admitted that interdisciplinary teaching can be accomplished and that it has been desired in vocational institutions.[87] Indeed, employers are increasingly seeking broadly trained graduates.[88] A study by Burning Glass of 25 million job advertisements found that employers frequently sought the 'human factor' in employees, including a set of 'baseline skills' that were unrelated to technical 'hard skills'.[89] As opposed to specialists, employers sought candidates with 'soft skills' that can cross disciplines (e.g., communication, critical thinking and writing).[90] Those skills were more likely found in the liberal arts, in which courses such as English and History specifically focus on developing a student's writing, communication and critical thinking skills, as opposed to purely technical skills.[91] If a 'skills gap' exists in the workforce, then it is perhaps in these intangible skills—which are more difficult to

[85] da Vinci (n 84); Clayton and Philo (n 84); Riley (n 83).

[86] For example, see the popular myth that 10,000 hours of practice in a niche field leads to mastery of that field. A more recent study found that other factors, including genetics and 'interactions' with the wider world, may play a role. Also note that studies of this nature (of violinists and sportsmen, for example) bias this type of research when applied to knowledge-based pursuits, which are not 'muscles' to build linearly; Ian Sample, 'Blow to 10,000-Hour Rule as Study Finds Practice Doesn't Always Make Perfect', *The Guardian* (online at 21 August 2019) <https://www.theguardian.com/science/2019/aug/21/practice-does-not-always-make-perfect-violinists-10000-hour-rule>.

[87] However, if such a recommendation were adopted, the curriculum would become a liberal arts curriculum.

[88] Ashley Bear and David Skorton, 'The World Needs Students with Interdisciplinary Education' (2019) 35(2) *Issues in Science and Technology* 61–2.

[89] Burning Glass Technologies, *The Human Factor: The Hard Time Employers Have Finding Soft Skills* (Burning Glass Technologies, 2015) <https://www.burning-glass.com/wp-content/uploads/Human_Factor_Baseline_Skills_FINAL.pdf> 4–8.

[90] Ibid 4.

[91] Maureen Murphy Nutting, 'How Interdisciplinary Liberal Arts Programs Prepare Students for the Workforce and for Life' [2013] (163) *New Directions for Community Colleges* 70.

quantify in a vocational curriculum that focuses on hard skills alone.[92] Breaching this skills gap might involve extending the curriculum to include liberal arts subjects.

It is interesting to consider that both a vocational and purely liberal arts curriculum in law might benefit from interdisciplinarity, even if that interdisciplinarity would be used to achieve different goals.[93] Lawyers in practice require communication, critical thinking and writing, in addition to a contextual framework for practice. Democratic citizens (as discussed previously) require this training too. However, interdisciplinarity has historically been embedded in a liberal arts context rather than a vocational one. For example, a survey in 2006 of all private liberal arts colleges in the US found that 60 per cent required an interdisciplinary subject and that 94 per cent offered 'at least one' interdisciplinary major.[94] The liberal arts naturally prompted interdisciplinarity because students in the liberal arts ask the big questions in their fields of study that extend beyond one field of study and into others.[95] Concurrently, Nutting suggested that a liberal arts education (through interdisciplinarity) might help students 'discern what is missing from an argument, a presentation, or an equation', as well as help them 'communicate ideas and disseminate knowledge widely and effectively to different populations; and work well with others with different training'.[96]

These arguments may be overstated. For example, Nutting suggested that an interdisciplinary education allows liberal arts students to 'work well with others with different training', implicitly suggesting that a narrow and vocational training might not be the same.[97] However, it is possible that students, even in a vocational curriculum, might gain soft skills (e.g., communication) outside the classroom through interactions with their peers, social groups and clubs, which are a natural extension of campus life.[98] It might be argued that intangible skills do not need to

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[92] Burning Glass Technologies (n 89) 4–5.

[93] For a discussion on the liberal law school dimension, see for example, Thornton (n 39).

[94] Diana Rhoten et al, 'Interdisciplinary Education at Liberal Arts Institutions' (White Paper, Teagle Foundation, 2006) 3–10.

[95] Godwin and Altbach (n 57); Deresiewicz (n 57).

[96] Nutting (n 91) 69–70.

[97] Ibid.

[98] George D Kuh, 'In Their Own Words: What Students Learn outside the Classroom' (1993) 30(2) *American Educational Research Journal* 278–82; this may also be true of MOOCs and other new forms of learning; Ruth

come from the classroom. Therefore, the need for a liberal arts education might be challenged.

However, in the context of law schools, an interdisciplinary education might create a different kind of law graduate altogether by changing the focus of teaching. In an interdisciplinary law school, students would be allowed to consider the 'ought' of the law rather than just the 'is'.[99] By reframing their studies to be aligned with history, philosophy and other topics, students could extend from the narrow confines of what laws exist today into what laws have existed, and what could exist in the future.[100] In a liberal arts curriculum, students would consider different 'perspectives, theoretical positions and critical methods that transcend a narrow, rules-orientated pedagogy' of law.[101] Interdisciplinarity would show the law in context, reveal its origin and allow students to discuss its purpose.

An old saying from the 1950s stated that 'the study of law sharpens the mind by narrowing it'.[102] In contrast, an interdisciplinary education in law expands the mind by introducing students to the interrelationship between law and other fields, as evident in the 'law and ____' movements (e.g., law, society, economics, literature and history).[103] On the one hand, this interrelationship helps students in a vocational sense, such as when the application of case and statute law often involves considering the history of that case or statute law.[104] Conversely, the interrelationship would also help expand the minds of students for non-vocational pursuits.[105] Teaching law in an interdisciplinary manner remains a relatively rare phenomenon in Australia.[106] It is rarely part of the core curriculum, and interdisciplinary subjects are usually relegated

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Helyer and Helen Corkill, 'Flipping the Academy: Is Learning from outside the Classroom Turning the University Inside Out?' (2015) 16(2) *Asia–Pacific Journal of Cooperative Education* 131.

[99] Thornton (n 39).

[100] Ibid.

[101] Ibid.

[102] Brainerd Currie, 'The Place of Law in the Liberal Arts College' (1953) 5 *Journal of Legal Education* 428.

[103] Timothy J Berard, 'The Relevance of the Social Sciences for Legal Education' (2019) 19(1) *Legal Education Review* 189–90.

[104] Ibid 190–1.

[105] Thornton (n 39).

[106] Berard (n 103).

to electives.[107] This would have to change if a truly liberal arts law school were to be created.

To consider how teaching methods might appear in a liberal arts law school embedded with interdisciplinarity, it is necessary to search overseas. One pertinent example is that of Boston College Law School. In 2016, the dean of this law school wrote a 'Defense of the Liberal Arts', arguing that law schools should maintain a liberal arts focus and have science and technology (along with the humanities) in core subjects.[108] As examples, the dean of Boston College Law School highlighted the school's Center for Law and Public Policy, which trained students to 'engage with policymakers' after graduation,[109] along with the school's Center for the Study of Constitutional Democracy, in which students researched the cross-section of multiple fields with law.[110] Of course, centres such as these do not necessarily indicate the content of classes. However, the dean further described the entire mission of the law school as follows:

> BC Law is and will be the place that trains the kind of professionals that a world preoccupied with business, science, and technology needs most—men and women who can apply ideas from the liberal arts to humanize the market and ensure that technology serves people rather than the other way around.[111]

This mission to humanise 'the market' partly derives from Boston College Law School's Jesuit foundation, which gives the school a distinctly religious moral character that is associated with a public religious mission.[112] This mission has existed for a long time. In 1954, the religious purpose of the law school was described as: 'advancing the ideals of justice in a democratic society'.[113] Students were taught 'the techniques of law, not as positivistic ends in themselves, but as a rational means … to

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[107] Ibid.

[108] Dean Vincent Rougeau, 'In Defense of the Liberal Arts' (Summer 2016) *Boston College Law School Magazine* <http://lawmagazine.bc.edu/2016/06/in-defense-of-the-liberal-arts/>.

[109] Ibid.

[110] Ibid.

[111] Ibid.

[112] 'A Brief History of Boston College' in Boston College, *Boston College Fact Book* (Boston College, 2004) <https://www.bc.edu/content/dam/files/publications/factbook/pdf/03-04_fact_book.pdf>.

[113] *Boston College Bulletin, Law* (Boston College, 1954) 14.

the attainment of objective justice in civil society'.[114] Part of this focus was the adherence to natural law theory.[115] By observing the law through God-given justice, the college could repudiate the notion that the law was static and immovable; it could instead observe the study of law as a 'critical search for the better'.[116] To enable students to reform the law, Boston College Law School had to offer them a broad liberal arts education. The 'search for the better' required 'an exhaustive scrutiny of the available data of history, politics, economics, sociology, psychology, philosophy, and every other pertinent font of human knowledge'.[117] Comparisons had to be made with other laws and other societies—in the pursuit of justice. Boston College Law School contended that it was only through an interdisciplinary education and a search through other forms of knowledge that can apply to law that the causes of 'objective justice' could be advanced through law reform.[118] To teach this kind of theory, a law school would naturally have to adopt teaching methods that embed interdisciplinarity into the curriculum.

Although natural law has been critiqued over the past century from the perspective of legal positivism, not to mention atheism, the mission to search for the best kind of law (and the moral order of law) is still relevant today.[119] Even when disregarding a religious focus, there are certain atrocities (e.g., Nazi war crimes) that illuminate notions about a higher standard of justice—one that extends beyond the positivistic law of the state.[120] The logic of Boston College Law School applies to these sorts of atrocities. If a higher moral code above a state regime such as Nazi Germany is searched for, then other fields of knowledge (beyond the state's national law) are possibly the only places in which to look.[121] Therefore, if law schools are to engage in the idea of justice or morality, above a mere adherence to state law, then interdisciplinary assessments and content beyond state law are a natural part of that

[114] Ibid.

[115] Ibid.

[116] Ibid.

[117] Ibid.

[118] Ibid.

[119] Daniel Mirabella, 'The Death and Resurrection of Natural Law' (2011) 2 *The Western Australian Jurist* 254–8.

[120] Ibid.

[121] Ibid 257–62.

engagement. At the least, comparative law would be required; at the most, a full-scale search among all relevant subjects for moral and ethical critiques and alternatives to current legal standards would be required. To empower law students to perform such a search would require a different kind of legal assessment.

Along with interdisciplinarity, the nature of the liberal arts also reveals certain assessment tasks that encourage critical thinking.[122] For example, a study of 33 Bachelor of Arts programs in Australia found that 'critical thinking and skills in communication [were] core attributes of programs within the field of Arts', and that they were thus evident in assessments.[123] Although there is some ambiguity regarding what the term 'critical thinking' might mean in this context (as will be discussed below), a few propositions can be made.[124] It is a student's job in a liberal arts classroom to ask questions, interrogate authors and understand arguments.[125] This naturally leads to a form of critical thinking, in which students are asked to challenge the texts that are given to them, either individually or through peer or self-assessment of the own work.[126] These kinds of critical thinking assessments, at best, can guide students to find fallacious arguments in their own work and in the work of others; this would lead to a critical engagement with texts and, through those texts, the wider world.[127]

Martha Nussbaum described this form of critical thinking as 'the capacity to reason logically, to test what one reads or says for consistency of reasoning, correctness of fact, and accuracy of judgment'.[128] Engaging in this form of critique might sharpen

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[122] Gabriela Pleschová et al, *Learning and Teaching in the Liberal Arts: A Teacher Training Kit* (The European Commission, 2017) 12–13, 23–4; Susan Forde, 'If the Government Listened to Business Leaders, They Would Encourage Humanities Education, Not Pull Funds from It', *The Conversation* (online at 22 June 2020) <https://theconversation.com/if-the-government-listened-to-business-leaders-they-would-encourage-humanities-education-not-pull-funds-from-it-141121>.

[123] Deanne Gannaway and Faith Trent, *Mapping the Terrain: Trends and Shared Features in BA Programs across Australia 2001–2008* (DASSH, 2008) 5, 10, 12.

[124] Joel Frykholm, 'Critical Thinking and the Humanities: A Case Study of Conceptualizations and Teaching Practices at the Section for Cinema Studies at Stockholm University' [2020] (August) *Arts and Humanities in Higher Education* 6.

[125] Pleschová et al (n 122) 12.

[126] Ibid 12–18; Forde (n 122).

[127] Pleschová et al (n 122) 12–18.

[128] Martha Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Harvard University Press, 1997) 18.

the students' minds, which might lead to stronger logical argumentation. As John Stuart Mill suggested, the well-reasoned mind will 'listen to all that could be said against him; to profit by as much of it as was just, and expound to himself, and upon occasion to others, the fallacy of what was fallacious'.[129] This is similar to the formation by Socrates that 'the unexamined life is not worth living'.[130] To understand themselves, and the world, students might need to engage in this form of critical introspection and external interrogation. These arguments can be equally applied in a law school context, to the examination of laws, judgements and political decisions—of which further details will be provided in the 'critical thinking' assessment section below.

Finally, the liberal arts prompted the use of essays as a formative assessment task.[131] This partly due to their focus on writing and communication as distinct educational outcomes.[132] For example, the previously mentioned study of 33 Bachelor of Arts courses in Australia found that 'communication' was a central feature of all arts courses.[133] In the US, 'Creative thinking, written and oral communication, quantitative literacy [and] information literacy' are regarded as the core competencies expected of a liberal arts course.[134] This leads to using 'shorter and longer essays' and final 'research projects' as standard features in liberal arts courses.[135] In brief, testing communication requires communication assessments (of which essays are one example).

Essays can similarly be considered a by-product of the liberal arts focus on interdisciplinarity, as they might provide the scope that students need to question big

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[129] John Stuart Mill, *On Liberty* (Broadview Press, 2014) 68.

[130] Plato, *The Apology*, as quoted in *Plato in Twelve Volumes*, tr Harold North Fowler (Harvard University Press, 1966) vol 1, s 38a.

[131] Laurent Boetsche et al, *Guide to Emerging Liberal Arts and Sciences Practices in the EU* (Erasmus+, 2017) 60; Benjamin Rifkin, 'The Power of Performance-Based Assessment: Languages as a Model for the Liberal Arts Enterprise' in Paula Winke and Susan M Gass (eds), *Foreign Language Proficiency in Higher Education* (Springer, 2019) 15–17.

[132] Boetsche et al (n 131); Rifkin (n 131); Tricia A Seifert et al, 'The Effects of Liberal Arts Experiences on Liberal Arts Outcomes' (2007) 49(2) *Research in Higher Education* 109–10.

[133] Gannaway and Trent (n 123).

[134] Rifkin (n 131); Association of American Colleges and Universities, *The Essential Learning Outcomes of LEAP* (AAC&U, 2005).

[135] Boetsche et al (n 131); Seifert et al (n 132).

ideas. For example, Kennedy's Toronto Law School included essays as a core part of the curriculum and engaged students in cross-disciplinary research.[136] Using essays can also help students challenge dominant avenues of thought, such as the vocational imperative of their education.[137] This notion, along with the reason why essays are less common in a vocational curriculum, will be discussed in further detail in the 'Essays' section below.

It follows that a liberal arts educational framework can prompt numerous alternative teaching methods—from interdisciplinarity and law in context assessments to critical thinking tasks, small class sizes and essays. The rest of this section will outline each of these teaching methods and how they can be integrated into a modern law school in Australia.

3) Teaching Law in Context

When Kennedy founded Toronto Law School, he declared that it had 'no professional ends to serve'.[138] Instead of teaching a narrow, black-letter law curriculum, Kennedy aimed to teach the law in context.[139] He believed that law 'should not be taught in vacuo [in a vacuum], apart from the other social sciences'.[140] Instead, lectures and class discussions should be used to take students beyond the law and into politics, philosophy, history, sociology and other disciplines.[141] Students would learn that the law originates from social forces, politics, ideas about right and wrong, and social movements.[142] They would learn why the law exists, who benefits and loses from it, and how it affects society. Most importantly, students would learn how the law relates to other disciplines in the interplay between one field and another.

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[136] Risk (n 34) 372, 374, 377; Kennedy (n 9); Kennedy, 'Some Aspects of the Theories' (n 11).

[137] Margaret Thornton, 'The Market Comes to Law School', *The Australian* (online at 13 September 2011) <http://www.theaustralian.com.au/higher-education/opinion/the-market-comes-to-law-school/story-e6frgcko-1226134877209&gt>.

[138] Kennedy (n 5).

[139] Risk (n 4) 7.

[140] Kennedy (n 9) 25; Johnstone (n 23).

[141] Risk (n 4) 7.

[142] Ibid.

Today, we would call this an interdisciplinary legal education. Unlike the traditional case-based approach (which relies on 'humiliating students if they bring in other ways of thinking or knowing about the world'), interdisciplinary legal education rewards students for drawing from other disciplines.[143] Although not a popular idea in Kennedy's time, interdisciplinary legal education is expanding across US law schools in the present day.[144] A new generation of young professors is entering the legal academy, with the determination to relate law to other fields.[145] New programs are also being created—such as law and economics, law and literature, legal philosophy and legal history.[146] Further, professors are engaging with law students using 'different ways of thinking about law … behavioral, economic or classical economic, sociological, philosophical, historical, critical, literary and so on'.[147] They are doing so on the basis that something is gained when combining law with other disciplines.[148]

Many arguments can be cited for what exactly is gained in this process. Some have argued that interdisciplinarity offers students a broader, well-rounded understanding of how the law can change in response to social forces.[149] Others have argued that interdisciplinarity allows students to observe how law affects society.[150] Others have further argued that interdisciplinarity is a new job requirement in the new, digital and globalised economy, in which workers are expected to move rapidly across disciplines, languages and countries.[151] Regardless of the argument that is used—there is yet a growing consensus that interdisciplinarity adds something to traditional methods of legal education.

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[143] Dean Spade, 'For Those Considering Law School' (Online Document, October 2010) <http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School.pdf>.

[144] Robin West, *Teaching Law: Justice, Politics, and the Demands of Professionalism* (Kindle eBook, Cambridge University Press, 2014) 3954; Cf Ernest J Weinrib, 'Can Law Survive Legal Education?' 60(2) *Vanderbilt Law Review* 428–9; Johnstone (n 23) 21.

[145] West (n 144); Weinrib (n 144); Johnstone (n 23) 21.

[146] West (n 144); Weinrib (n 144); Johnstone (n 23) 21.

[147] West (n 144); Weinrib (n 144); Johnstone (n 23) 21.

[148] West (n 144); Weinrib (n 144); Johnstone (n 23) 21.

[149] Spade (n 143).

[150] Weinrib (n 144) 428–30.

[151] Kathryn Giroux, 'The Direction of Legal Education Reform: Facilitating Access to Justice' (Working Paper, McGill Faculty of Law) 7 <https://www.mcgill.ca/law/files/law/les-paper-kathryn_giroux.pdf>.

However, teaching in an interdisciplinary manner is more difficult than it seems. Despite a growing movement of interdisciplinary legal research, many law professors have themselves been taught in the old-fashioned and traditional case method style, so they struggle to change their teaching style to new methods accordingly.[152] Consequently, 'There is a norm … of teaching in a black letter law manner, despite what the professor is researching in their private time'.[153] Professors might separate their 'research and teaching' and expound something 'in their law review articles' while performing something else in class.[154] This is reinforced by the conservatism of law faculties—many of whom remain wedded to the case method.[155] There is also some resistance to, or intransigence towards, the notion of marking assessments when the students themselves push beyond the discipline of law (as if this is somehow beyond the curriculum's scope).[156]

One way to fix this status quo is by convincing professors to incorporate interdisciplinary discussions into their lectures. For example, Kennedy used his lectures to take students beyond the law and into other fields. Speaking in front of groups of students, he drew extensively from his knowledge of 'history, politics, current events' and various 'prominent people he knew', linking legal principles together with 'problems in political science'.[157] The intent was to relate law to life, rather than life to law—to unpack the various interconnections between law and other fields for students.[158] His students greatly appreciated this approach, which they described as 'excellent', 'always interesting, often funny' and enjoyable; they stated that Kennedy taught them to think critically and expansively about legal doctrine.[159]

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[152] Jack M Balkin, 'Interdisciplinarity as Colonisation' (1996) *Faculty Scholarship Series* 266, 966.

[153] Ibid.

[154] Ibid.

[155] Max Huffman, 'Online Learning Grows Up—And Heads to Law School' (2015) 49(1) *Indiana Law Review* 57; Sturm and Guinier (n 15).

[156] Spade (n 143).

[157] Sydney Robins, as quoted in Friedland (n 24).

[158] Ibid.

[159] Edwin A Goodman and Eric Richard Lovekin, as quoted in the 50th Anniversary video commissioned by the Faculty of Law at the University of Toronto; 'Brief History of the Law School', *University of Toronto Faculty of Law* (Web Page, 2002) <https://www.law.utoronto.ca/about/brief-history>; Robins, as quoted in Friedland (n 24).

Professors can act as facilitators for interdisciplinarity in this way, by incorporating it into the lecture hall.

A second way to teach in an interdisciplinary manner is through class discussions or out-of-class informal reading groups. Markus Dubber, a modern successor to Kennedy at the Toronto Law School, takes this approach tin the present day.[160] In 2012, he established the critical analysis of law (CAL) lab at Toronto Law School.[161] The CAL lab is an interdisciplinary legal institute that aims to contextualise law for students through a law review, student reading group, student film group, research workshops, seminars and flash workshops.[162] The reading group, specifically, promotes class discussion about law as it relates to other disciplines.[163] Students are provided with virtual documents that are available for reading online, and informal 'read-in' 'sessions [are held] in the faculty'.[164] Students and professors gather to discuss various texts on legal education and teaching/learning the law, with an eye to interdisciplinarity and relating the law to politics, sociology and the broader social context.[165] The CAL film group also encourages class discussion—by persuading students to watch topical films that illuminate an aspect of law or that critique current legal norms. Discussions after the film screenings have included questions about various topics, such as the rule of law, the role of the lawyer, law and order, freedom of speech, constitutional law and criminal law.[166] In this sense, law is discussed in the context of popular culture—which reveals similar psychological insights into the 'law and literature' movement.

Kennedy himself held class discussions that joined the law with other disciplines. In his classes on law and economics, he drew correlations 'between the social and economic forces in society and those institutional and legal controls [on the

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[160] 'Critical Analysis for Law Students', *Critical Analysis for Law Students* (Web Page) <http://individual.utoronto.ca/dubber/CALreading.html>.

[161] Markus Dubber, 'About CAL Lab', *CAL Lab: Critical Analysis of Law in Action* (Web Page) <https://criticalanalysisoflaw.wordpress.com/>.

[162] Ibid.

[163] 'Critical Analysis for Law Students' (n 160).

[164] Ibid.

[165] Ibid.

[166] 'CAL Flix: Student View-ins: A CAL Lab Project', *Critical Analysis of Law CAL Flix* (Web Page) <http://individual.utoronto.ca/dubber/CALFlix/CALFlix.html>.

economy]'.[167] In classes on law and philosophy, students were taught to relate basic theories of logic with the legal system.[168] In classes on political science, students were told to discuss the 'great texts from Hobbes to Mill', which allowed them to question the purpose of law or why we have law (e.g., to prevent anarchy, as a social contract).[169] Some of these classes were taught by professors with a background in economics or philosophy, as opposed to law. This had several distinct benefits. As Robin West expressed it, having legal philosophers in law faculties offers students a far 'richer understanding … of the relationship between law and our canonical works of political and moral philosophy, and a greater appreciation of the philosophical structure of law's foundations'.[170] Bringing these other disciplines and texts into class discussions thus enriches a student's understanding of the legal system.

One argument that was often made against interdisciplinarity is that it is somehow impossible to achieve in practice or it is poorly established as a teaching methodology. For example, Balkin critiqued the various 'law and ___' movements that have emerged in recent years (e.g., law and literature, law and economics) as being taught in bad faith.[171] He suggested that a real interdisciplinary education would involve observing law *as* economics and law as literature.[172] The popular 'and' dichotomy maintains a strict separation between the disciplines that are being combined—with law on the one hand and, say, economics on the other.[173] It is not the relationship between law *and* other fields that makes an education interdisciplinary; it is observing law *as* those of other fields.

Although this is a valid critique, it seems to miss how interdisciplinarity attracts other disciplines into the classroom, so that it can be used to change the way students see the law. As Joel Modiri highlighted, 'Philosophy, the critical social sciences, literature, history, and art enter legal discourse to disrupt the purported fixity and

[167] Kennedy (n 5).

[168] Ibid.

[169] Ibid.

[170] West (n 144) 3978.

[171] Balkin (n 152) 965–7.

[172] Ibid.

[173] Ibid.

determinacy of law and legal discourse'.[174] Instead of being 'rigid', law is revealed to be fluid and changeable, according to the whims of social forces. In the words of the legal realists, interdisciplinarity can reveal that the law is 'living'. For example, during the height of apartheid laws in South Africa, art, music, political philosophy and other disciplines have helped activists question the laws of segregation in a manner that a strict black-letter law approach to law could not.[175] Similar examples can be observed in the fight for women's rights, gay rights and environmental rights.[176] To understand the law in its entirety requires an understanding of this interplay between law and other areas of knowledge, between law and society and law and social forces. It is perhaps true that the limit of the 'law and ____' approach is to just offer a new viewpoint to the law, but perhaps a new viewpoint on law (one that transgresses the black-letter law approach) is sufficient to persuade students to start questioning what they are being taught.

A second counterargument is that interdisciplinarity reveals how the law affects society. 'Law and ____' movements typically combine a new discipline with law to reveal the psychological, physical or social ramifications of the enforcement of legal norms.[177] As Weinrib stated, 'medical misadventure, for example, may raise not only issues of liability, but also issues of economics, of sociology, of political science, of psychology, and so on'.[178] By incorporating other disciplines into law school, law students can learn what occurs after a case is decided, who is affected and how, and what economic and psychological damage is inflicted to the victim or defendant. This brings the law much closer to the other discipline, and it can result in students perceiving law *as* economics.

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[174] Joel Modiri, 'The Crises in Legal Education' (2014) 46(3) *Acta Academia* 13.

[175] Ibid.

[176] For a more in-depth discussion of law in context and social movements, see Paul Havemann, '"Law in Context": Taking Context Seriously' (1995) 3 *Waikato Law Review* 137; Michael McCann (ed), *Law and Social Movements* (Ashgate, 2006).

[177] Markus Dubber and Simon Stern, 'Critical Analysis of Law and the New Interdisciplinarity' (2014) 1(1) *Critical Analysis of Law* 1; Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analysis, Recommendations* (2014).

[178] Weinrib (n 144) 428–30.

Finally, it has been argued that, in a traditional sense, interdisciplinarity can prepare law students for a growing diversity of international graduate jobs.[179] This argument can be framed in the following sentence: large, transnational companies require interdisciplinary thinking in the newly globalised world.[180] Students require transferable skills to move between different countries, languages and offices.[181] Occasionally, the threat of automation is mentioned here, which heightens the need for interdisciplinary skills.[182] Law schools owe it to their students to provide broad training that would help prepare them for the market.[183] It is worth noting that this traditional view seems to conflict with the traditional view of protecting the case method as the dominant mode of teaching. If graduates require diverse skills, then surely, assessments must change to meet those needs.

4) Critical Thinking Assessments

A core component of Kennedy's curriculum involved developing skills to think critically about the law. In a lecture in 1931, Kennedy told a group of students: 'I wish you to consider that, behind each particular state, each particular law, there lies a political and social concept—*the* state, *the* law'.[184] Students were encouraged to ask questions about whose interests a statute served, where the law came from, who benefited from the law and who lost, along with what social ends was law *meant* to serve.[185] These critical questions revealed that the law was not objective and apolitical, by rather inherently subjective and political. The law actively helped shape certain interests and establish and determine the outcome of the competition and thereby the socially engineering our world.[186] It was nothing like a science; it was more like a system of power and social order. This kind of detached, critical

[179] Giroux (n 151).

[180] Ibid.

[181] Ibid.

[182] Ibid.

[183] Ibid.

[184] Kennedy (n 9) 4.

[185] Ibid.

[186] Kennedy (n 5).

understanding of law required students to learn critical thinking in class—something that was a relatively new concept at the time.

Critical thinking has become something of a truism in university education since Kennedy's days. In a 2013 study of 200 US provosts or vice presidents of universities, 'Critical thinking was one of the most frequently mentioned competencies … for both academic and career success'.[187]

The problem is that no-one can agree on what 'critical thinking' denotes exactly.[188] For the purpose of this discussion (and as aligned with WPM Kennedy and others), this thesis defines critical thinking as 'challenging assumed wisdom' and seeing the intent, purpose and structure behind a text[189] (a legal text such as a judgement, statute or political decision, in this case). This might include some investigation into the history or political origins of the law, its motivation and who benefits or loses from it.[190] In short, it involves the notion of empowering students to see the hidden side of law, the underlying power structures, origins and motivations.[191] Kennedy suggested that a critical education in law reveals that the law is subjective and political, rather than objective and apolitical.[192] Empowered by critical thinking, law students could gain the capacity to 'ask pertinent questions, recognize and define problems, identify arguments on all sides … search for and use relevant data' and so on.[193] However, ultimately, critical thinking should empower students to reach their own conclusions about the law they are learning (which would radically empower them to think for themselves).

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[187] Ou Lydia Liu, Lois Frankel and Katrina Crotts Roohr, 'Assessing Critical Thinking in Higher Education: Current State and Directions for Next-Generation Assessment' (ETS Research Report No 14–10, ETS, June 2014) 1.

[188] Lucas Lixinski, 'Critical Thinking in Legal Education: What? Why? How?', *Law School Vibe* (Blog Post, 23 November 2016) <https://lawschoolvibe.wordpress.com/2016/11/23/critical-thinking-in-legal-education-what-why-how-by-lucas-lixinski/>.

[189] Ibid; Cf Bert van Klink and Bald de Vries, 'Skeptical Legal Education: How to Develop a Critical Attitude?' [2013] *Law and Method* 1; Cf Jerry L Anderson, 'Law School Enters the Matrix: Teaching Critical Legal Studies' (2004) 54 *Journal of Legal Education* 201.

[190] Lixinski (n 188).

[191] Anderson (n 189) 201.

[192] Ibid.

[193] Derek Bok, *Our Underachieving Colleges: A Candid Look at How Much Students Learn and Why They Should Be Learning More* (Princeton University Press, 2006) 109; Roger Benjamin et al, *The Case for Critical-Thinking Skills and Performance Assessment* (Council for Aid to Education, 2016) 7–8.

In a law classroom, critical thinking can be taught by convincing students to answer critical questions in class and to work in reading groups or answering essay questions.

a) Critical Questions in Class

Critical questions that were asked of students in class can be used to interrogate the implications of a law, a student's view of a law or the different ways of viewing a law (e.g., a statute, case or political decision).[194] Historical inquiry can help students 'overcome the closures and silences generated by orthodox and traditional theories' of law, as well as develop their own understanding of why a law is created.[195] At its best, this can lead students towards an understanding of 'justice of the future' through knowledge of the deep past.[196] Law is revealed not to be 'a fully rational, technical fair and neutral body of rules', but rather a product of society, social forces, politics, influence and power.[197] Without asking critical questions about the history and origin of law, students will be unable to fully appreciate what made the law the way it is today.

One important question to ask is: what lies behind the law, aside from the legal authority itself? Students should be encouraged to 'step back' from their preconceptions of the legal system, and correspondingly try to understand 'not what the law is, but why it is and what it is for'.[198] This could include asking students to consider the political reality behind legal decisions, along with other social and economic 'interests and powers'.[199] Laws typically benefit one group more than another, and social and power relations are formed along these lines. Questions related to this could include: 'Who created the law and where does it come from? Whose interests does a statute serve? Who benefit and loses?

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[194] Lisa Gueldenzoph Snyder and Mark J Snyder, 'Teaching Critical Thinking and Problem-Solving Skills' (2008) 50(2) *The Delta Pi Epsilon Journal* 95; Neil M Brown and Stuart M Kelly, *Asking the Right Questions: A Guide to Critical Thinking* (Englewood Cliffs, 1986); Thomas Haynes and Glenn Bailey, 'Are You and Your Basic Business Students Asking the Right Questions?' (2003) 57(3) *Business Education Forum* 33–7.

[195] Modiri (n 174) 1.

[196] Ibid.

[197] Ibid 12.

[198] RR Reno, 'Critical Thinking and the Culture of Skepticism' (2016) 2(3) *Principles: A Publication of Christendom College* 1; Caesar Wright, as quoted in Martin Friedland, *Searching for W.P.M. Kennedy: The First Dean of Law and the Last Character in the University* (University of Toronto Press, 2019) 168.

[199] Modiri (n 174) 12.

Critical questions can also be directed to students regarding the history of law. Case law can be contextualised by asking students what had occurred at the time that a particular case was decided.[200] According to Justice Cardozo, law is 'intelligible only in the light of history'.[201] The history underlying a precedent often establishes why a law was created, what purpose it serves and who benefits the most from it. To use an example, the police power in US constitutional law empowers the states to create regulations for the 'morals, safety and convenience' of the people.[202] As a product of case law, the police power evolved over time in accordance with evolving definitions of 'police'.[203] The word 'police' in the nineteenth century came to mean not only a source of authority but a protector of safety in the community.[204] The case law at the time thus reflected a linguistic evolution of the word.[205] Historical questions relating to the law can also reveal the prevailing philosophical or social conditions that created law at a specific point in time in a particular country.[206] Law can embody the zeitgeist. For example, the *Civil Rights Act 1964* embodied the zeitgeist of the civil rights movement (a protest movement that pushed for equal rights for African Americans).[207] The act resulted in greater equality 'in the American workforce', and it reached far to ensure an end to decades of racial discrimination in housing and politics.[208] It benefited both women and the African-American community—as it ensured equal rights and protections under the law.[209]

When asked critical questions in class, students had be given time to think properly about their answers, rather than responding immediately.[210] Surface answers should

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[200] West (n 144) 3966.

[201] Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 55.

[202] Westel Woodbury Willoughby, *The Constitutional Law of the United States* (Hardpress, 1766) (2nd ed, 1929); Walter Wheeler Cook, 'What Is the Police Power?' (1907) 7(5) *Columbia Law Review* 322–36.

[203] Santiago Legarre, 'Historical Background of the Police Power' (2007) 9 *University of Pennsylvania Journal of Constitutional Law* 781–91.

[204] Ibid.

[205] Ibid.

[206] Kennedy (n 9) 33.

[207] Juliet Aiken, Elizabeth D Salmon and Paul Hanges, 'The Origins and Legacy of the Civil Rights Act of 1964' (2013) 28(4) *Journal of Business and Psychology* 1–2.

[208] Ibid.

[209] Ibid.

[210] Brown and Kelly (n 194) 1–5.

be avoided, and, when possible, students should be tasked with going deeper behind the law. They should not be asked a follow-up question until they have answered the first question, and they should not be prompted to continue answering.[211] To assist with this, certain critical questions can also be asked of students outside the class, such as on online discussion groups or eLearning software.[212] The benefit of discussion groups online is that students can answer anonymously, which reveals their true impression of a text or law, as well as any biases they find in the legal system. This is particularly true if students have a controversial opinion or an opinion that questions the status quo of legal authority.[213]

Critical questions about the law are already being asked in at least one class at UNSW Law School. Lucas Lixinski, a professor of law at UNSW, wrote that he uses this style of questioning in his first year 'Introducing Law and Justice' class.[214] In his first year class, Lixinski used the opportunity to persuade students to read 'a list of questions that they should be asking of materials they read' throughout their law degree, including 'cases, statutes [and] scholarly texts'.[215] Lixinski saw this 'as a means to stimulate critical thinking'.[216] The questions that were asked of students included the following:[217]

- Why is the law this way?
- Who stands to gain? Who loses?
- What does the law, as is, miss?
- What are its blind spots?
- What do other people do when faced with similar legal problems and why? Can we learn lessons there?
- When was this case decided?
- What was the broader context of this case?

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[211] Ibid.

[212] Hermann Astleitner, 'Teaching Critical Thinking Online' (2002) 29(2) *Journal of Instructional Psychology* 53–77.

[213] Modiri (n 174) 13.

[214] Lixinski (n 188).

[215] Ibid.

[216] Ibid.

[217] Ibid.

- What was the court/law-maker trying to say between the lines?
- Who is the court/law-maker? (white, male, property owner)?
- What is this legal statement/assertion/rule a reaction to?
- How does the private affect the public (and vice versa)?

This list is not exhaustive, but it offers some indication regarding the type and style of questions that can be asked to convince students to think critically about the law.

b) Reading Groups

Critical reading groups that extend law students beyond class discussions (as extracurricular or seminar-based activities) are becoming increasingly common at various law schools in the present day.[218] Typically, these reading groups emerge from an interdisciplinary framework (i.e., persuading students to read about law in context) or from one of many new critical theories on law.[219] A popular framework is critical race theory, but reading groups also exist for law and feminism, economics, film and literature.[220] In each case, students are invited to a reading group that centres on a specific set of readings that are critical of legal texts (e.g., cases, statutes and/or political decisions).[221] Students are tasked with reading the texts, teasing out questions and interrogating 'ideas, notions, theories [and] propositions' presented therein.[222] Students then discuss the reading in the manner of a tutorial or book club and in a critically engaging manner.

Reading groups help students learn critical thinking skills by leading them beyond the normal curriculum into self-directed study. Black-letter law classes are typically hostile to the notion of critical thinking, with regard to the law and interdisciplinarity.

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[218] 'Critical Race Theory (Reading Group)', *Stanford Law School* (Web Page, 2017) <https://law.stanford.edu/courses/critical-race-theory-reading-group/>; 'Critical Thinking Reading Group @ Wits Law School', *Critical Thinking Reading Group @ Wits Law School* (Web Page, 2015) <https://criticallyreadingatwls.wordpress.com/about/>; 'CAL Perspectives Seminar', *CAL Lab: Critical Analysis of Law in Action* (Web Page) <https://criticalanalysisoflaw.wordpress.com/cal-perspectives-seminar/>.

[219] 'Critical Race Theory (Reading Group)' (n 218); 'Critical Thinking Reading Group @ Wits Law School' (n 218); 'CAL Perspectives Seminar' (n 218).

[220] 'Critical Race Theory (Reading Group)' (n 218); 'Critical Thinking Reading Group @ Wits Law School' (n 218); 'CAL Perspectives Seminar' (n 218); 'Critical Race Theory', *Harvard Law School* (Web Page, 2018) <https://hls.harvard.edu/academics/curriculum/catalog/default.aspx?o=67956>.

[221] 'Critical Thinking Reading Group @ Wits Law School' (n 218).

[222] Ibid.

To quote Dean Spade: 'It took years of social movement engagement for me to shed some of the internalized dominance behaviors I gained in law school, to remember how to think about solutions that cannot be won in law'.[223] One remedy to this common complaint is introducing students to contrary perspectives while they are in law school, during critical reading groups.[224]

Examples of critical reading groups in law exist at the University of Toronto, Stanford, Harvard and Wits Law School.[225] Of these three, the University of Toronto presents the broadest approach. Markus Dubber leads a reading group and seminar on critical thinking in regard to the law and 'Perspectives on Law'.[226] In the seminars, students are given various readings that critique legal traditions. The reading includes topics such as law in perspective, legal realism, legal processes, law and society, critical legal studies, law and gender, law and race, law and economics, law and literature, law and history, law and film and comparative law.[227] In each case, students are meant to read the works with a critical eye. They are meant to 'step back from legal rules in various shapes and sizes … and, in this way, to gain some perspective(s) on "the law": the better to assess it with''.[228] Similarly, Witts Law School has a 'critical thinking reading group' that aims to convince students to question legal texts and interrogate the author's intention for bias, balance and validity in legal judgements.[229] This all-encompassing approach is intended to prepare students for their education in law; it introduces them to all sorts of different perspectives and manners of understanding the legal system.

Other law schools take a narrower approach. Stanford, UCLA and Harvard have more focused reading groups on topics like critical race theory and feminist theory.[230] The reading group for critical race theory, as an example, aims to unpack the power

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[223] Spade (n 143).

[224] 'Critical Thinking Reading Group @ Wits Law School' (n 218).

[225] Ibid; 'Critical Race Theory (Reading Group)' (n 218); 'Critical Analysis for Law Students' (n 160).

[226] 'Critical Analysis for Law Students' (n 160).

[227] Ibid.

[228] Ibid.

[229] 'Critical Thinking Reading Group @ Wits Law School' (n 218).

[230] 'Critical Analysis for Law Students' (n 160); 'Critical Race Theory (Reading Group)' (n 218); 'Critical Race Studies', *UCLA Law* (Web Page, 2021) <https://law.ucla.edu/centers/social-policy/critical-race-studies/about/>.

structures behind the law that lead to institutional racism and discrimination.[231] It critiques traditional legal education by suggesting that 'both liberal and critical legal theories marginalized the voices of racial minorities'.[232] Reading groups consider the founders of critical race theory such as 'Richard Delgado, Jean Stephancic and Carol Aylward' who are presented in contrast to other law thinkers.[233] This narrower approach has been criticised as being too prescriptive or ideological; it typically offers students a new view of law, but not one they would have derived by themselves.[234] Nevertheless, critical race theory and other new critical modes of thought do allow students to see the law from a new perspective, as well as develop their critical thinking capacities.

c) Essays

Critical thinking can also be taught by way of essay questions. Every law school in Australia uses essays as a form of assessment.[235] However, essays are not the central form of assessment.[236] That privilege is bestowed on case problems.[237] However, essays could play a more central role in legal education, especially if assess is sought from student's critical thinking ability in law.[238] In a liberal arts curriculum, essays would come to dominate law schools—as well as convince students to compare, evaluate and analyse certain legal topics. This section will outline the various benefits of using essays as a tool for teaching critical thinking before it addresses the potential drawbacks of the format.

In terms of benefits, essays are generally acknowledged as an effective method for testing a student's critical thinking on a subject matter.[239] They are considered a more

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[231] 'Critical Analysis for Law Students' (n 160).

[232] Ibid.

[233] 'Critical Race Theory (Reading Group)' (n 218).

[234] Heather MacDonald, 'Law School Humbug' (Autumn, 1995) *City Journal Magazine* <https://www.city-journal.org/html/law-school-humbug-11925.html>.

[235] Johnstone and Vignaendra (n 14) 10, 20.

[236] Ibid.

[237] Ibid.

[238] Thornton (n 1).

[239] Linda B Samuels and Richard L Coffinberger, 'Balancing the Needs to Assess Depth and Breadth of Knowledge: Does Essay Choice Provide a Solution?' (2005) 22(2) *Journal of Legal Studies Education* 1.

effective tool than other assessments when it comes to testing 'analysis, synthesis, and evaluation'.[240] They help students unpack an idea beyond mere rote memorisation or recitation.[241] In this sense, essays serve a different role than the more 'objective' forms of assessments (e.g., case problems).[242] When students are asked to respond to an essay question, they are tasked with obtaining their own opinions and ensuring they are supported y relevant evidence.[243] This is uniquely different from the case method, in which students are encouraged to lean on the opinions of judges. Consequently, essays can be an effective method for students to demonstrate their own perspectives and reach their own conclusions.

A secondary benefit of essays is they encourage 'reading around' a topic.[244] Essays naturally involve independent research and the critical analysis of texts. A student's individual research can extend beyond the course curriculum and prescribed reading list. Students who answer essays can consequently learn the important skill of self-teaching and understand new areas of a topic through research.[245] This can prepare them for the kind of independent mindset that is required for critical thinking.

Despite the benefits of essays, they remain a sidelined component of the law school curriculum. In Australian law schools today, case problems are still considered more 'concrete' and 'relevant' to students than essays.[246] Professors regard essays as too difficult to create, write and mark—and these professors are otherwise preoccupied with both black-letter law and their own professional research.[247] It is easier to teach a formal 'doctrinalism' in law by focusing on 'known knowledge and "right answers"' than to teach via critically engaging essay tasks.[248] Because essays are sidelined, 'It is now possible to go through law school without having done a single research

[240] Ibid.

[241] Ibid.

[242] Ibid.

[243] Ibid.

[244] Gibbs (n 17) 14–15.

[245] Ibid.

[246] Michael Robertson et al (eds), *The Ethics Project in Legal Education* (Routledge, 2011) [8.3.3].

[247] Thornton (n 137).

[248] Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2007) 17(2) *Legal Education Review* 17.

paper'.[249] Instead, essays are often replaced by short answer, multiple-choice and problem questions:[250]

> Essays are optional for the students. Not many take them up, probably a dozen a year out of 250 students—a very low percentage. (3rd Generation law school).[251]

Essays are also considered incompatible with 'market orthodoxy' or the broader neoliberal education agenda, in which everything must relate to a job, technical skill or graduate attribute.[252] Although they teach critical thinking, essays are not in themselves a technical skill, which is similar to case problem questions. Due to their critical and creative component, essays are generally considered separate from professional skills altogether.[253] They might relate to the graduate attribute of communication; but, again, less critical tasks also relate to this attribute.

In a cynical interpretation, students who answer too many critical essay questions might not become obedient employees after graduation.[254] A fear exists that critical students will themselves ask too many employees about their law, role and firm.[255] This is partly reflected by what law firms ask law schools to teach. It is rare for a law firm to ask for more essay questions, although it is common for law firms to demand more practical and technical skills.[256] As suggested earlier in this thesis, law schools are immensely pressured to obey the dictates of law firms regarding topics to teach. Minimising the role of essays is one way of doing accomplishing this.

A final objection to essays is levelled at the format itself. Comparative studies of essays compared to those for other assessments reveal marginal benefits to student learning when using essays.[257] Indeed, one-off essays that are given at the end of

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[249] Ibid.

[250] Ibid.

[251] Acting Head of School, fem, 3rd Generation law school, as quoted in Thornton (n 248).

[252] Thornton (n 137).

[253] Ibid.

[254] Ibid.

[255] Ibid.

[256] Ibid.

[257] Steven Hartwell and Sherry L Hartwell, 'Teaching Law: Some Things Socrates Did Not Try' (1990) 40(4) *Journal of Legal Education* 509.

semester might actually be detrimental to students, as they are unlikely to pay attention to the feedback they receive after the semester is over.[258] For essays to be effective, they should be spread over multiple occasions throughout the semester—in which case, the cost of time becomes insurmountable. Students are also highly resistant to reading and receiving feedback on essays, which highlights that a response to an individual student's needs must be carefully managed.[259] There is no guarantee that students will read the feedback offered, which is, again, why multiple rounds of essays are more effective—they incentivise learning.[260]

Despite popular belief, essays might not be the most effective method for critically engaging students. This is especially true for one-off essays that do not allow students the possibility to improve over time. However, when essays are used to their full potential, they can empower students to think about the law, its origin, purpose and effect. The best essay questions can prompt students to think for themselves, and they allow students to think critically about the subject matter (in this case, the law).

5) Reflective Tasks

When head of the Toronto Law School, Kennedy suggested that students should pay attention to 'what really happens' and the reality of law.[261] In brief, they should be aware of what the courts do and how it affects real people.[262] The effect of law on society has historically been undervalued in the law curriculum. Properly understanding the law in this way requires a reflection on how the law psychologically affects real people, how it influences society and how it causes an emotional toll on real lawyers. This requires a detachment from the case method approach of hypotheticals and an engagement with the law as a real phenomenon (i.e., it has real consequences in the real world). The best way to do this is through reflective learning.

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[258] Ibid.

[259] Gibbs (n 17).

[260] Ibid.

[261] RCB Risk, 'My Continuing Legal Education' (2005) 55 *University of Toronto Law Journal* 326.

[262] Ibid.

Reflective learning involves prompting students to reflect on their own biases, pre-judgments and experiences.[263] In law schools, reflective learning can help students move beyond 'surface learning' to a deeper understanding of the law.[264] Students can become more conscious of their own way of perceiving the law, and they thus become more 'critically reflective' of legal realities.[265] Over time, reflective learning can help students become 'life-long learners'—that is, they can continue learning and thinking critically about law after they graduate.[266] However, this can only occur in an environment in which students can challenge their own conceptions and those of their professors, so that 'they can construct their own knowledge framework'.[267] Reflective learning must also occur throughout the curriculum (rather than as one-off subjects) to be effective.[268] If reflective learning appears in only one or two subjects, then students will be resistant to it, as they will find it irrelevant to the rest of their studies.[269]

Reflective learning in law schools is best integrated across all subjects via various assessment tasks, including reflective statements, journals, peer and self-reflection and reflections on clinical legal placements.

a) Reflective Statements and Journals

Students can be asked to reflect on the law they have learned in class and present a reflective statement about the law, their emotional response to the law and the law's effect on society.[270] They can be asked about specific laws and cases or more generally about the enforcement of law, the cost of law and other topics. If seeking guidance, students should be asked to reflect on the most critical aspect of what they

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[263] Ronald Barnett, *Improving Higher Education* (Open University Press, 1992) 198.

[264] Karen Hinett, *Developing Reflective Practice in Legal Education*, ed Tracey Varnava (Centre for Legal Education, 2002) i.

[265] Anne Brockbank and Ian McGill, *Facilitating Reflective Learning in Higher Education* (Open University Press, 1998) 73.

[266] Hinett (n 264) 9.

[267] Marlene le Brun and Carol Bond, 'Law Teaching Reconceptualised' (1995) 6(1) *Legal Education Review*.

[268] Brockbank and McGill (n 265) 104.

[269] Ibid.

[270] Hinett (n 264) 12.

have learned.[271] This could include how the law emotionally affects a particular party, client or the students themselves, or what the role of the lawyer is in a case.

A reflective statement is less about obtaining a 'correct' answer and more about documenting one's emotions. For example, when reflecting on the emotional effect of law on the parties to a case, students should be encouraged to empathise and place themselves into the shoes of the victim or defendant.[272] This involves students engaging with their emotions, morals and values, which is usually discouraged in law schools, even though it takes learning to a more 'real' plane of meaning (i.e., learning that is critically engaged with society).[273] It is important that law students learn empathy, in the sense that they must empathise with future clients. However, it is also more generally important, as reflection helps build and create interpersonal dynamics (i.e., understanding how people relate to each other, talk to each other and empathise with each other).[274] Reflection thus not only makes law students better students but also better people.

This point leads to reflective statements that concern the lawyer's role and students' feelings about that role. One way to persuade students to reflect on the lawyer's role is to provide them with 'moral dilemmas that practicing lawyers face' daily.[275] Writing a reflective statement on the dilemma, students would be able to engage with their own opinion of how they would act in that specific situation (this is discussed in greater detail below under the 'Simulations' subsection). It has been argued that 'the best lawyers are guided by a strong moral compass'.[276] One way of obtaining this moral compass is by reflecting on the ethical and professional role that one will serve in their working life. University is the best time for this reflection, as it involves a time before working life has even begun.

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[271] Georgina Ledvinka, 'Reflection and Assessment in Clinical Legal Education: Do You See What I See?' (2006) 9 *Journal of Clinical Legal Education* 41.

[272] Joshua D Rosenberg, 'Teaching Empathy in Law School' (2002) 36 *University of San Francisco Law Review* 637.

[273] Ibid.

[274] Ibid 656–7.

[275] Lisa G Lerman, 'Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals' (1998) 39(2) *William & Mary Law Review* 461.

[276] Rosenberg (n 272) 1.

However, a one-off reflective statement in class is insufficient for creating a deeper reflective process. A proper reflective statement typically requires students to 'grapple with an issue, share it with others' and come to a new understanding.[277] This requires a lengthier deliberative process or a longer thought process about the intended task. Multiple reflective statements over time or a reflective journal, as suggested below, might be a more effective method.[278]

This is when long-term reflective journals emerge. Instead of receiving a one-off reflective task, students can be asked to write reflective journals about the law and their experiences learning the law.[279] These multiple tasks allow students to analyse their opinions or emotions, as well as how these two aspects change over time.[280] The format of these long-form reflections is not necessarily important, as they can be 'learning journals, logs [or] diaries, structured or unstructured'.[281] What is important is that students engage in a deliberative reflection process over time and learn something from these multiple entries.[282]

CALD has proposed the following example of a reflective task:[283]

> Complete 250-word weekly reflective narrative writing tasks related to lecture/tutorial materials such as:
>
> - law in context, or
> - specific skills displayed in performance of a task such as writing/group work/study skills, or
> - practical legal knowledge (substantive law and procedures) and write an answer to tutorial problem.

[277] Brockbank and McGill (n 265) 101.

[278] Ibid.

[279] Hinett (n 264) 11; David A Kolb, *Experiential Learning: Experience as a Source of Learning and Development* (Englewood Cliffs, 1984).

[280] Hinett (n 264) 11; Kolb (n 279).

[281] Ledvinka (n 271) 37.

[282] Hinett (n 264) 11; Kolb (n 279).

[283] Susanne Owen and Gary Davis, *Some Innovations in Assessment in Legal Education* (Council of Australian Law Deans, 2009) 15.

This example focuses mainly on professional skills, but a similar reflection exercise can be applied more generally to a student's emotional impressions about the law itself. One area in which this is pertinent is in controversial or emotionally charged areas of law. Students might want to reflect on their emotional reactions to politically charged legal issues, cases and legal technicalities, as well as whether they consider the outcome of a case just (this will be discussed in further detail below). These opinions can shift across a semester or a three-year degree, and students can thus understand their own positions, biases and prejudices regarding the law.

b) Peer and Self-Reflection

One of the most difficult aspects of reflective tasks is that they need to be free from judgement. To reflect honestly, students must feel 'free to say things which might otherwise appear stupid or "un-cool"'.[284] This might include an emotional reaction to a case or law, a novel idea about the role of a lawyer and others. This requires the right sort of environment in class, one that is 'conducive to quality discussion'.[285] In this sense, the typical assessment as marked by a tutor or professor might not be the best approach to reflection. Instead, students could be asked to assess their own work or that of their peers.

Peer reflection and self-reflection are similar to a typical reflective statement, but the students mark their assessments instead.[286] In a peer reflection, students 'can compare notes with each other, learning how different people can reflect on the same law or the same experience in a different way'.[287] This can deepen the reflection process beyond what students can do as individuals.[288] In contrast, self-reflection offers students the benefit of anonymity to reflect on their own experiences and mark themselves on the quality of that reflection.[289] Self-reflection is an essential life skill

[284] Ledvinka (n 271) 37.

[285] Ibid.

[286] Ibid.

[287] Brockbank and McGill (n 265) 101; Kolb (n 279).

[288] Brockbank and McGill (n 265) 101; Kolb (n 279).

[289] Ledvinka (n 271) 37.

that helps students find 'creative responses to complex problems'.[290] Whether through self or peer reflection, the task can benefit from repetition—whether it allows the students themselves to track their own changes of opinion over time or the class to understand shifting attitudes to the law and the role of the lawyer over time.[291]

Self-reflection is most useful for topics that are emotionally charged and difficult to discuss in the wider classroom environment.[292] For example, rape law has historically been avoided by tutors and professors in law school out of a general discomfort with discussing the topic.[293] It is feared that students might have been victims of sexual assault and that they might be 'triggered' with flashbacks due to the discussions.[294] The rise of 'trigger warnings' in places such as Oxford Law School has partly addressed this concern.[295] A trigger warning denotes when a warning is noticed before a discussion when it is understood that a certain topic might make students uncomfortable.[296] At Oxford Law School, students are given trigger warnings prior to discussions about rape law and sexual consent.[297] It may be argued that these topics are unsuitable for a classroom discussion—in which case, self-reflection offers an escape; it allows students to reflect on a topic by themselves in a non-confrontational manner. Students can be asked to reflect on rape laws and other emotionally charged issues at home, through assigned reading and self-assessment, while they discuss less distressing topics in class.

Another way to assess peer and self-reflection is through clinical legal education. Students who work in legal clinics during their time in law school can be asked to reflect on their experiences at the clinic.[298] This can involve asking themselves and

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[290] Robert Bocking Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (The University of North Carolina Press, 1983) 35, 41.

[291] Ibid.

[292] Ledvinka (n 271) 37.

[293] Ibid.

[294] Anna Belgiorno-Nettis, 'Student Perspectives on Talking About Sexual Assault in Australian Law Classes' (2017) 27(1) *Legal Education Review* 8.

[295] Aftab Ali, 'Oxford University Law Students Being Issued with "Trigger Warnings" Before Lectures', *Independent* (online at 10 May 2016) <https://www.independent.co.uk/student/news/oxford-university-law-students-being-issued-with-trigger-warnings-before-lectures-a7022311.html>.

[296] Ibid.

[297] Ibid.

[298] Hinett (n 264) 6; Ledvinka (n 271) 37.

others questions about their role in the clinic and how the law affects and emotionally influences their clients.[299] Clinical legal education supports this reflective process more than regular class due to the firsthand nature of students encountering the legal system in practice. Group discussion can also occur with other students who are completing similar legal clinic placements. Comparative group discussions about clinical legal education experiences can reveal new insights that students would not have encountered otherwise, and students can have opportunities for social bonding over shared lived experiences.[300] In terms of assessment, students can be asked to create reflective journals for their experiences with clinical legal education, in which they reflect on how their attitudes to law, the role of the lawyer and their clients have changed during the placement period.[301]

The limitation of the clinical legal education approach is typically the same everywhere: the small number of students involved. Even in law schools with established legal clinics, very few students are selected to participate in the program.[302] These students are also frequently selected due to specific criteria that make them non-representative of the student body.[303] Therefore, although it might be the best outlet for peer and self-reflection, clinical legal education provides only a limited opportunity for engaging the student body.

6) Law Reform Tasks

Instead of accepting the law's authority at face value, law students should rigorously critique cases, statutes and legal norms.[304] Having properly engaged in legal critiques, students can then proceed to pose new law reform measures in class. According to Kennedy, 'We must turn out graduates in law with a courage to criticise what is

[299] Hinett (n 264) 6; Ledvinka (n 271) 37.

[300] Hinett (n 264) 6.

[301] Ibid 12.

[302] 'Sunderland Student Law Clinic', *University of Sunderland* (Web Page) <https://www.sunderland.ac.uk/study/law/law-clinic/>; 'Meet the Students Helping Local People with Legal Problems' (Web Page, 2018) <https://www.sussex.ac.uk/about/community/community-features/law-clinics>.

[303] 'Sunderland Student Law Clinic' (n 302); 'Meet the Students Helping Local People with Legal Problems' (n 302).

[304] Kennedy (n 5).

accepted'.[305] If this is not accomplished, then corrupt, unjust and immoral laws will continue to exist—and they will remain uncontested by those who have the relevant knowledge of the legal system: graduate lawyers.[306]

To engage in law reform, students could confront questions in class regarding current laws, such as: Is the law effective? Does the law measure up to its social aims? Is the law just? Students should then be asked to create new legislative proposals, either in groups or in the form of a mock legislative assembly that debates the proposed changes.[307] Not only would this empower students to think critically about the law, it would also teach students significant lessons about the law-making process. Instead of regarding the law as passive or divine, students will learn that the law is flawed but salvageable and that it can change.

It is worth responding to a common objection at this point. Opponents of teaching law reform in class typically argue that the law should only be criticised by students after they know the law.[308] However, this approach is counterproductive. If law can only be criticised by students who have learned the law, then legal education becomes a system of reinforcing 'an uncritical, authoritarian acceptance of law as a series of rules' while students are learning them.[309] By the time that students reach their final year (when traditionalists regard critiques to be acceptable), the 'ideological groundwork has been done', and the students are already resistant to the idea of critiquing the law.[310] After spending so many years accepting the law at face value, students would find it difficult to suddenly understand how to critique it.[311] Further, law faculties tend to treat law reform as an optional extra that is not essential to

[305] Ibid.

[306] Ibid.

[307] Harold D Lasswell and Myres S McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52(2) *The Yale Law Journal* 203, 210; Wade Channell, 'Making a Difference: The Role of the LLM in Policy Formulation and Reform' (Web Page, 2013) <https://www.law.pitt.edu/sites/default/files/cile/roundtablepapers/cileLLMChannell.pdf&gt>.

[308] Johnstone (n 23) 17, 21.

[309] Ibid.

[310] Ibid.

[311] Ibid.

student learning.[312] For this reason, it is vital that students learn how to critique the law throughout their degree as they learn it, as well as how to propose law reform.

There are three essential questions for students to ask when critiquing a specific law: Is the law effective? Does the law match its social aims? Is the law just?

a) Is the Law Effective?

According to Justice Halsbury: 'Every lawyer must acknowledge that the law is not always logical at all'.[313] With this claim, he is highlighting that the law has defects and flaws, and that it can act in a manner that defies logic.[314] When students ask whether a law is effective, they are asking whether it matches its logical intention. In statutory interpretation, this is often linked to the notion of legislative intent: that the people who created a law have a logical intention of how that law should work in practice.[315] Poorly worded or badly framed legislation will not achieve the intended effect, and it could result in illogical or inconsistent outcomes. This section does not focus on the political aims of a statute (e.g., reducing poverty, ending crime) but on a stricter practical consideration of whether the law works. The Law Society of Western Australia provided clear guidance in this regard by presenting a list that indicates what features make a law effective (as supported by other cited sources).[316] According to this list, an effective law is:

1. known to the public
2. acceptable in the community
3. able to be enforced
4. stable
5. able to be changed

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[312] Ibid.

[313] *Quinn v Leathem* (1901) AC 495, 506.

[314] Ibid.

[315] Jacob Baker, 'Statutory Interpretation and Parliamentary Intention' (1993) 52(3) *The Cambridge Law Journal*; Philip Sales, 'Use of Language in Legislation' (2019) 40 *Statute Law Review* 1.

[316] The Law Society of Western Australia, 'Characteristics of an Effective Law' (2015); Anthony Allott, 'The Effectiveness of Laws' (1981) 15(2) *Valparaiso University Law Review*; Nicolae Razvan Bujdoui, 'The Validity and Effectiveness of Law' (2015) 8(1) *Bulletin of the Transilvania University of Brasov*; Alan Macfarlane, 'What Makes Law Effective?' (Times Higher Education Supplement, April 2005) <http://www.alanmacfarlane.com/TEXTS/law_effective.pdf>.

6. applied consistently
7. able to resolve disputes.

Although this list is not comprehensive, it provides an effective starting point for the intended discussion. The first two list items (known to the public and acceptable to the community) relate to the rule of law and the notion that the law should be understood and reinforced by community consensus.[317] Although ignorance is no excuse in the law, it is important for the public to know what punishments exist for breaking the law.[318] The second two points (able to be enforced and stable) relate to the nature of law as a rule that must govern society.[319] A law that is unenforceable is essentially not a law at all. The last three points relate to the nature of law as a part of our democracy—as something that can be changed by consensus, be applied under the rule of law and help resolve conflict.[320]

A law that fails all the above points can be called ineffective. It is this kind of law that requires the most reform and revision. As a technical point, changing laws that are not effective is not law reform so much as law revision.[321] According to the Commonwealth Secretariat, 'Law reform is about substance, while law reform is about form'.[322] In critiquing whether or not the law is effective, students consider the form of the law and ask questions about wording, structure, framing and intent. This is different from a typical law reform task, which would involve considering how to change the substance of the law (e.g., from a high tax rate to a low tax rate or from one kind of regulation to another). The task for students in law revision is to modify the law so that it can achieve its original objective.[323] This is closer to the role of a judge when judging statutory interpretation and parliamentary intent than it is to a

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[317] Tom Bingham, 'The Accessibility of the Law' in Tom Bingham, *The Rule of Law* (Penguin, 2011); *Canadian Broadcasting Corp. v New Brunswick* [1991] 3 SCR 459 ('*Canadian Broadcasting Corp. v New Brunswick*'); *Vancouver Sun (Re)* [2004] 2 SCR 332 ('*Vancouver Sun (Re)*').

[318] Bingham (n 317); *Canadian Broadcasting Corp. v New Brunswick* (n 317); *Vancouver Sun (Re)* (n 317).

[319] Documentation Center of Cambodia, 'Building Democracy in Cambodia through Legal Education Witnessing Justice 30 Years Later' in *ECCC: A Model to Help Ensure that the Rule of Law Prevails* (28–30 April 2013) 4.

[320] Bingham (n 317); *Canadian Broadcasting Corp. v New Brunswick* (n 317); *Vancouver Sun* (*Re*) (n 317).

[321] Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform* (Commonwealth Secretariat, 2017) 12.

[322] Ibid.

[323] Ibid.

politician who proposes a new law.[324] The latter will be discussed in greater detail below.

b) Does the Law Match Its Social Aims?

The second avenue through which to approach law reform is to prompt students to consider a law's social aims and whether the law matches those social aims. Kennedy suggested that legislators frequently fail to achieve the social aims they seek because they ignore the unintended consequences of the law and the various 'social implications' of the law they are drafting.[325] According to Kennedy, it is up to law students to correct the legislator through a critique of the law.[326] If the legislator has failed to achieve a social aim, then the critical law student must ask how the aim can be achieved with law reform. Kennedy outlined this idea as follows:

> We take each concept, each rule, and we bring it, not before a court of justice but before the court of social purposes and we ask how far it is serving society. Here the student comes full force … and here he sinks or swims.[327]

Students are tested not on whether they know the law, but on whether the law matches its social purposes; it is at this point that they can pass or fail in terms of the marks they will receive as their assessment. With this style of assessment, Kennedy was heavily inspired by Roscoe Pound, the Dean of Harvard Law School from 1916 to 1936.[328] Pound was a firm believer in the 'social aims' approach to law reform. For Pound, the primary social aim was the satisfaction of 'human needs' or 'wants'.[329] This was a modified utilitarian view, similar to Jeremy Bentham's utility view.[330] However, Bentham valued happiness or desire, while Pound valued human 'interests', which was a more pragmatic and measurable phenomenon.[331] Bentham might ask what kind of law would make us happy, while Pound would ask whether the law was

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[324] Baker (n 315); Sales (n 315).

[325] Kennedy (n 9) 26.

[326] Ibid.

[327] Kennedy (n 5) 101.

[328] Friedland (n 50) 167.

[329] Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale University Press, 1922) 40–7.

[330] William L Grossman, 'The Legal Philosophy of Roscoe Pound' (1935) 44 *Yale Law Journal* 608.

[331] Ibid 609.

serving the interests of humans and meeting our needs and desires. If the law failed this precipitous test, then it would require reform to realign itself with this social aim. Pound admitted that it is difficult to satisfy 'infinite human needs' with a finite system of law.[332] However, the aim of law is to as successfully as possible satisfy as many of humanity's needs as possible.[333] 'Social' in this sense signifies the satisfying of society to create the optimal conditions for human flourishing. What constitutes a 'human need' is contestable, and it is worth noting that these terms are sometimes vague and difficult to determine. It could be that different students would offer different human needs when asked to define the term. In classes on law reform, it would be up to the students to consider what 'human interests' and 'human needs' a law is failing to satisfy.[334] Professors do not need to dictate exact definitions of this for students, as it can be part of the exercise.

Justice Cardozo, another source of inspiration for Kennedy, offered guidance regarding how the law can change to meet social aims (once those aims were identified). Cardozo posited that there was a danger to believing that the law was static and unchangeable with regard to the social demands of its time.[335] He had a malleable view of precedent, stating that 'when the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history, and bend custom in the pursuit of other and larger ends'.[336] The law is 'nothing absolute', and 'all is fluid and changeable. There is an endless "becoming"' when it comes to law and the legal system, which matches social aims that shift and change over time.[337] Cardozo closely mirrored the Greek philosopher, Heraclitus, who believed that everything was in a constant state of flux—so much so that 'you could

[332] Pound (n 329) 160.

[333] Ibid.

[334] Pound (n 329) 40–7.

[335] Benjamin Cardozo, as quoted in Queency Pereira, 'Benjamin Cardozo's Opinion on the Judicial Process' (2014) 16.

[336] Ibid.

[337] Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 28.

not step twice into the same river'.[338] The law is also regarding as being in a state of flux, in which it is never to be the same law twice over the course of time.

The task of a law reformer in a state of flux is to understand that the law must change in accordance with social change. Law reforms can thus be proposed accordingly. For students, this signifies that they must understand the social mores of their own time, and they must place the law within that context to discover if it needs to be changed to fit new social aims that did not exist before.

One method for teaching students about the social aims of law is through in-class discussions. At the University of San Francisco, Joshua Rosenberg learned this the hard way. At first, he attempted to teach his classes by lecturing students about various social aims that were attributable to classic black-letter law courses.[339] For example, in 'tax courses [he] tried to convince [students] that its wrong to overtax the poor and undertax the wealthy; in contracts classes [he] stressed that it's important to enter into contracts in good faith'.[340] The problem with this approach was that it was too one-sided. By his own reckoning, students became disengaged when they encountered lectures about the morality of the legal system.[341]

It is more important to have a two-sided discussion, in which students themselves can think about a particular law's social aim. If a class is framed based on 'a commitment to transformation, renewal and justice', then students themselves can provide the content of what is to be transformed, renewed and made just.[342] Students can be introduced to a problem (e.g., 'entrenched hierarchies of power'), but it is up to the students themselves to question whether equality is a proper social aim, whether power is for everyone or whether specific law apportions power unfairly.[343] In brief, it is not enough to simply provide answers to students; a critically engaged law course allows students to think about the answers for themselves.

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[338] Plato, *Cratylus*, as quoted in Stanford Center for the Study of Language and Information, *The Stanford Encyclopedia of Philosophy* (2019) Heraclitus [xx] <https://plato.stanford.edu/entries/heraclitus/#Flu>.

[339] Rosenberg (n 272) 1.

[340] Ibid.

[341] Ibid 10.

[342] Modiri (n 174).

[343] Ibid.

It is worth responding to a common objection at this point. The opponents of teaching the social aims of law often highlight that some laws are private and aimed at private purposes, not public ones. In this case, the social aim of law is considered irrelevant. This is flawed in two respects. First, all law, even private law, is made through a public process—whether that process is by legislative action or judicial decisions.[344] Therefore, all law is governed by the public interest.[345] Second, private law, which governs the relationships between individuals, ultimately governs the relationships between humans in a society. The law of tort pertains to individual wrongdoing, but it also pertains to establishing a public insurance system that benefits the greatest number of people.[346] Rules of private conduct, conducted en masse, become rules of public conduct. In this sense, it can be stated that 'all law is public law'.[347] Therefore, all law should be measured by the public and the social aims that it serves. Consequently, all forms of law are susceptible to the kind of sustained critique that is required in a law reform class that teaches the social aims of law.

c) Is the Law Just?

A final avenue through which to approach law reform is to prompt students to consider the content of law and whether the law is just. On this topic, John Rawls suggested that 'laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust'.[348] Some argue that, again, it is up to law students to correct the legislator's unjust provisions by critiquing the law in class.[349] If the legislator has failed to achieve a just law, then the critical law student must ask how justice can be achieved through law reform. For example, consider how a law might allow for the keeping of slaves. The law might be well written and easily enforceable, and it could meet the necessary criteria items (as listed in Subsection 6a);

[344] Weinrib (n 144) 412.

[345] Ibid.

[346] Gerhard Wagner, 'Tort Law and Liability Insurance' (2006) 31(2) *The Geneva Papers on Risk and Insurance* 277–80.

[347] Weinrib (n 144) 412.

[348] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 3.

[349] Kennedy (n 9) 26.

nevertheless, the law will be unjust.[350] The task of a law student in a law reform class is to thus ask whether the law is nevertheless unjust, regardless of how effective it is.

Unfortunately, the concept of justice is sidelined in most current law schools.[351] As Weinrib expressed it: 'Students are not encouraged to even ponder, let alone develop arguments' regarding whether the laws they study are just.[352] Questions of justice are 'routinely marginalized or discouraged' in the curriculum.[353] Students are not meant to suggest alternative laws. Law professors do not even ask students whether the law they are learning is substantively just, nor whether a statutory interpretation is just, nor whether a law 'offends a student's [own] sense of justice' on a personal level.[354] Instead, students are expected to approach the law in a cold, detached manner and separate their ideals of justice from their study of the law. This process can breed a sense of immorality and cognitive dissonance. As law student Xavier Sanchez described:

> The attitude that surprised me the most during my first semester was the dismissal of the idea that as law students we were to be concerned about fairness and justice … So when my professors told me, maybe only half-seriously, that we don't do justice here at law school, they were referring to the idea that the student should view the law as the bad man … The bad man does not care that the law is just, but he is interested in what the law means to his material circumstances.[355]

If law school prompts students to regard the law 'as the bad man', then it follows that law graduates might become bad people in society. A common perception of the general public is that all lawyers should be concerned with the notion of justice in society.[356] However, a crucial question can be asked: how can lawyers be concerned about justice, fairness and morality if they are never introduced to the notions in their legal training?

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[350] Rawls (n 348).

[351] West (n 144) 1185.

[352] Ibid.

[353] Ibid.

[354] Ibid 1446.

[355] Xavier Sanchez, 'Doing Justice' (Web Page, 16 February 2012) *Law in Contemporary Society* <http://moglen.law.columbia.edu/twiki/bin/view/LawContempSoc/XavierSanchezFirstPaper>.

[356] Ibid.

The current status quo exists despite the desire among the student body for core classes on justice and law reform. For example, a recent survey of Harvard Law students found that most students wanted classes that taught about justice.[357] Students were asked: 'Is it the responsibility of law schools to teach law students about justice?'[358] Most responded that it was.[359] One student responded that 'laws are meaningless without the concept of justice'.[360] Another expressed that 'the role of a law school is to enable its graduates to advance the causes of justice'.[361] In this view, students are meant to graduate as law reformers who can take their critical eyes to the laws they encounter. Far from regarding the law as permanently established, students should learn that the law can become just over time.[362] It then falls to the law schools to facilitate this process. According to Kennedy, 'We must breed a race of graduates in law able to utilise the spirit of law reform for the highest uses … a courage to criticize what is accepted, to construct what is necessary for new situations, new developments and new duties both at home and abroad'.[363]

To create a law reform class about justice, it is important to establish what justice actually signifies.[364] Many different theories of justice exist, which have emerged over the years. Broadly speaking, they can be categorised into four schools of thought: procedural justice, distributive justice, justice as capability or rights and justice as human needs. All these theories originate from leading philosophers and legal scholars, including Rawls and Dworkin (distributive justice), Nussbaum and Sen (justice as capability), Nozick (justice as rights) and Socrates and Pound (justice as human needs). Each of these theories will briefly be explored before the section turns to a discussion about how they can be used to critically analyse the law and promote

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[357] 'Real-Time Rotisserie Responses', *The Berkman Center for Internet & Society at Harvard Law School* (Web Page) <https://cyber.harvard.edu/eon/ei/justice-rot.html>.

[358] Ibid.

[359] Ibid.

[360] Ibid.

[361] Ibid.

[362] Kennedy (n 5) 101.

[363] Ibid.

[364] Sanchez (n 355).

law reform. These theories are complicated and have entire books written about them, so the following section will contain only brief summaries.

This thesis does not contend that students need to choose one version of justice from the following list; rather, it contends that students should consider various theories of justice before they decide whether a law is just or unjust.

i) Procedural Justice

Procedural justice can be distinguished from substantive justice (i.e., whether an outcome is just). For procedural justice, the fairness of the process is more important than that of the outcome.[365] Procedural justice will sometimes lead to a just outcome, but this is not always the case.[366] For example, in Australia, people have the right to a fair trial (something typically associated with procedural justice), but this does not guarantee a fair outcome once the trial is over.[367] A lack of evidence, a bad law or various other factors could lead to an unjust outcome, even if a defendant has the right to defend themselves appropriately.

Procedural justice is closely tied to the law's legitimacy. If the law is not procedurally just, then it typically lacks legitimacy in the eyes of people.[368] This is the primary reason why law that is not procedurally just requires reform. Confidence in the legal system and the judiciary is a central pillar of a secular, democratic society.[369] When processes such as trials, arrests and sentences are unjust, the law typically moves towards illegitimacy, authoritarianism and dictatorship.[370] Unjust procedures have been linked historically to authoritarian regimes in places such as the old Soviet

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[365] Stanford Center for the Study of Language and Information, *Stanford Encyclopedia of Philosophy* (2017) 2 Justice, '2.3 Procedural versus Substantive Justice' <https://plato.stanford.edu/entries/justice/#ProcVersSubsJust>.

[366] Rawls (n 348) 10–13.

[367] 'Fair Trial and Fair Hearing Rights', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Fairtrialandfairhearingrights.aspx>.

[368] Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283–8; Kristina Murphy, 'Procedural Justice and Its Role in Promoting Voluntary Compliance' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 43–58; Tom R Tyler, *Why People Obey the Law* (Yale, 1990) 3–8.

[369] Arthur Selwyn Miller, 'Public Confidence in the Judiciary: Some Notes and Reflections' (1970) 35 *Law and Contemporary Problems* 69, 71.

[370] Lawrence B Solum, 'Procedural Justice' (2004) 78 *California Law Review* 277.

Union, the Philippines and Indonesia.[371] Examples include secret trials, lack of due process, lack of appeals and lack of a fair hearing.[372] In places such as these, the public lose faith in the law itself and fear any engagement with legal authorities, including the police.[373] Eventually, this leads to a disengagement with the law and a lack of voluntary compliance with the law.[374] If this continues for long enough, then the law's illegitimacy can disintegrate into a state of civil disobedience and/or revolution.[375] Below is an example of procedural injustice:

> *'But how can I be under arrest? And how come it's like this?'*
>
> *'Now you're starting again,' said the policeman, dipping a piece of buttered bread in the honeypot. 'We don't answer questions like that.'*
>
> —*Franz Kafka*, The Trial.[376]

There are many factors that determine whether a law or legal system facilitates procedural justice. A non-exhaustive list includes factors such as transparency, efficiency, fairness, access to justice, due process, the right of appeal, the right to a hearing, neutrality and impartiality.[377] All these factors can be applied to the decision-making process of judges, the law itself and how people interact with the legal system through the courts, the police and other avenues. The pertinent question to ask is whether the process by which people access, use and are subject to the law is one that is procedurally just according to the above criteria. In a law reform class, these questions can be posed as a series of questions:

- Is the law transparent?

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[371] Jeffrey L Achtertof, 'A Grand Bloodbath: The Western Reaction to Joseph Stalin's 1930s Show Trials as Foreign Policy' (Thesis, University of North Carolina, 2007) 2–3; Perfecto Caparas, 'Right to Due Process of Law and Fair Trial: Issues and Challenges in the Philippines' (2000) *Asian Seminar on Fair Trial* 1–5; 'Why Indonesia Is So Bad at Lawmaking' (21 June 2018) *The Economist*.

[372] Achtertof (n 371); Caparas (n 371); 'Why Indonesia Is So Bad at Lawmaking' (n 371).

[373] Tyler (n 368).

[374] Murphy (n 368).

[375] Linn Haggqvist, 'Taking the Law into Your Own Hands: Violent Vigilantism in Post-War Societies' (Master's Thesis, Uppsala University, 2017) 60–2.

[376] Franz Kafka, *The Trial* (Penguin Books, 1925) 4.

[377] Nina Persak, 'Procedural Justice: Elements of Judicial Legitimacy and their Contemporary Challenges' (2016) 6(3) *Onati Socio-Legal Series* 754, 756; Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review* 30–1 <https://www.courtinnovation.org/sites/default/files/media/document/2018/Tyler%20-%20Procedural%20Justice%20and%20the%20Courts%20-%20Copy.pdf>.

- Is the law fair?
- Is the law efficient?
- Is the law accessible?
- Has there been due process?
- Is there a right to a hearing?
- Is there a right of appeal?
- Has the legal decision been made impartially?

This list is not exhaustive. However, it is a starting point for an analysis that examines whether a particular law, case or legal system is procedurally just or not. It is worth noting that even if the outcome of a law or case is regarded as just, then the law can still be viewed as procedurally unjust if the process itself was unjust or corrupted in some way.[378] The integrity of the justice system is more important than specific outcomes, and moreover, the common saying is accurate: a broken clock shows the right time twice a day.

ii) Distributive Justice

This thesis considers the wider version of distributive justice as advocated by Rawls and Dworkin. According to Rawls, laws should be created with the aim of ensuring equality by distributing income and wealth evenly across society to provide for equality of opportunity but not of outcome.[379] Rawls argued that law should be free from any inequalities unless they benefit those who are in the worst positions in society.[380] In his opinion, any law that does not accomplish this is considered unjust. He also contended that any unjust law should be 'reformed or abolished'.[381]

To determine whether a law is unjust, Rawls posed a thought experiment: the veil of ignorance.[382] The idea can be summarised as follows: imagine that someone is born in a room without knowing what gender they are, to what class they belong or any other

[378] Solum (n 370).

[379] Rawls (n 348) 3–8.

[380] Stanford Center for the Study of Language and Information, *Stanford Encyclopedia of Philosophy* (at 9 January 2017) John Rawls, '4. Justice as Fairness: Justice within a Liberal Society' [xx] <https://plato.stanford.edu/entries/rawls/#JusFaiJusWitLibSoc>.

[381] Rawls (n 348) 3.

[382] Ibid 118.

defining feature about them as a person.[383] When they leave the room, they will be born into the world in their actual circumstances—they will have a new class, gender and other traits. In that room, they must decide the rules and laws that will govern society.[384] According to Rawls, not knowing one's background or to what class one belongs will lead to a natural inclination for demanding equality of opportunity between all people; this is so that one can benefit even if one is ultimately poor and in a lower class, and so that one is not excessively punished if rich.[385] In short, the preference will be to advocate for equality of opportunity or the idea that we are judged by merit, not birth. The theory has since been replicated in scientific studies and experiments, though some reservations exist regarding whether the first step (taking yourself outside of your own background) can ever actually occur.[386]

According to Dworkin, the veil of ignorance includes various 'in-built' aspects of humanity that help certain people reach ahead once the competition starts—such as intelligence, memory and genetic capabilities beyond class, race and other qualities.[387] Therefore, instead of just giving people the same access to resources at the start of the competition (equality of opportunity), they should be given the same access to resources continuously (equality of outcome).[388] Continued equality must be ensured (or insured, according to Dworkin's logic) beyond the start of the competition through a continual redistribution of goods.[389]

Whether considering Dworkin or Rawls's theories, it is evident that the law can be analysed from the perspective of distributive justice, and it can be determined as just or unjust accordingly. There are two points to this analysis, which are taken from a rudimentary perspective:

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[383] Ibid.

[384] Ibid.

[385] Ibid.

[386] Schachar Kariv and William R Zame, 'Piercing the Veil of Ignorance' (Working Paper No 2009–06, University of California Berkeley: Center for Risk Management, September 2009).

[387] *Internet Encyclopedia of Philosophy*, 3 Equality of Resources, '3a Initial Resources' [xx]. <https://www.iep.utm.edu/dist-jus/#H3>.

[388] Ibid.

[389] Ibid.

- A law can be considered just if it ensures equality of opportunity and/or outcome between people according to the law.[390]
- Inequalities in law can only be justified if they benefit the weakest/lowest/poorest of society.[391]

Any statute or case can be analysed using this paradigm. This makes it a useful tool for students in a law reform class.

iii) Justice as Capability and/or Individual Rights

This subsection will consider the version of justice as capability, which was established by Nussbaum and Sen. As opposed to distributive justice, which is about distributing wealth and resources equally, justice as capability suggests that the law should ensure that people are capable of certain things.[392] According to Sen, distributing resources between people would never work because people are too different from one another.[393] For example, a man who cannot walk does not require greater access to certain walker-friendly resources (e.g., parks or running tracks).[394] Sen argued that instead of providing everyone with resources they might or might not need, society should ensure people's 'real or effective opportunities to do what they want to do and be who they want to be'.[395] In brief, justice should protect certain fundamental human capabilities and ensure certain freedoms.[396] Here, Sen suggested that 'people should have effective possibilities to shape their own life', and they should choose the capabilities that are important to them as individuals.[397] However, he did not specify what those capabilities were.

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[390] Rawls (n 348) 3.

[391] Rawls (n 348).

[392] Catherine Holst, 'Martha Nussbaum's Outcome-Oriented Theory of Justice: Philosophical Comments' (Working Paper No 16/2010, Arena: Centre for European Studies, University of Ohio, 2010) <https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2001-2010/2010/wp-16-10.pdf>.

[393] Ingrid Robeyns, 'Justice as Fairness and the Capability Approach' in Kaushik Basu and Ravi Kanbur (eds), *Arguments for a Better World: Essays in Honour of Armatya Sen* (Oxford Scholarship Online, 2008) vol 1.

[394] Ibid.

[395] Ibid.

[396] Holst (n 392).

[397] Robeyns (n 393).

Nussbaum provided a greater degree of guidance. Rather than allowing the individual to decide, she specified various capabilities that should be protected by the law: life, bodily health/integrity, the senses, imagination and thought, emotions, practical reason, affiliation, play, connection with nature and political and material control over one's own environment.[398] The aim should always be for 'equal freedom'—that is, the notion that, according to the law, people have capabilities that make them equal to others in society.[399] These capabilities must be firmly locked in the legal system. For example, if someone has freedom of speech today, then they keep it tomorrow.[400] This is why Nussbaum emphasised the importance of constitutional protections for capabilities; she linked a country's constitution to its freedom.[401]

There are some similarities with the idea of justice as human rights in international law—that is, the idea that justice is intended to protect the rights (legal, political, cultural and economic) of individuals and groups in society.[402] Instead of measuring justice according to resources or means, justice is measured based on whether the law protects those individual rights.[403] Under this rubric, law reform is necessary when an individual's rights are threatened due to the law, judges or legal institutions.[404] In a law reform class, students could ask questions such as:

- Does the law protect fundamental human capabilities?
- Does the law protect fundamental rights and/or human rights?

If the answer to both questions is no, then the law is clearly in need of reform.

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[398] Martha Nussbaum, *Frontiers of Justice: Disability, Nationality and Species Membership* (Harvard University Press, 2006) 76–8; Armatya Sen, 'Capabilities, Lists, and Public Reason: Continuing the Conversation' in Brina Agarwal, Jane Humphries and Ingrid Robeyns (eds), *Armatya Sen's Work and Ideas: A Gender Perspective* (Routledge, 2005) 335–8.

[399] Uniarts Helsinki, 'Professor Martha Nussbaum: Capabilities Approach and the Role of Public Services' (YouTube, 20 June 2016) 00:00:00–00:25:00 <https://www.youtube.com/watch?v=nBqfiPMIIBQ>.

[400] Ibid 00:00:00–00:28:00.

[401] Ibid.

[402] Ernst-Ulrich Petersmann, 'Theories of Justice, Human Rights and the Constitution of International Markets' (2003) *EUI Working Paper* 6.

[403] Asif Salahuddin, 'Robert Nozick's Entitlement Theory of Justice, Libertarian Rights and the Minimal State: A Critical Evaluation' (2018) 7(1) *Journal of Civil and Legal Sciences*; Robert Nozick, *Anarchy, State and Utopia* (Basic Books, 1974) 1–5.

[404] Salahuddin (n 403); Nozick (n 403).

iv) Justice as Human Needs

The final version of justice worth mentioning is the idea of justice as human needs. This thesis will explore the version of justice as human needs that was advocated by Socrates and Roscoe Pound. The Socratic ideal of justice in *The Republic* proposed the idea that justice sought to meet basic human necessities or needs to empower people to fulfil specific roles in society.[405] A just man is someone who fulfils his role in society and thereby attains virtue.[406] He does so by using personal resources to attain justice, wisdom and virtue.[407] A just society is one that encourages individuals to be just in the same manner.[408]

It is worth considering a related theory by Roscoe Pound. Pound believed that justice involved the satisfaction of human needs or wants.[409] This was a similar form of personal justice—or the idea that society must create laws with proper social aims so that it could best fulfil the individual's needs.[410] As established above, in classes on law reform, the students would decide to consider what 'human interests' and 'human needs' a law fails to align with.[411] Professors do not need not dictate exact definitions of 'need' for students, as this can be part of the exercise. Students could also consider, via Socrates, whether the laws that exist today enable individuals to be just, wise and virtuous by fulfilling basic human necessities.[412] It could be argued that unless basic needs, necessities and wants are met, humans cannot reach their full potential. Therefore, the law must help people reach this full potential by providing the basic necessities of life.

In a law reform class, students could be asked the following questions:

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[405] *Internet Encyclopedia of Philosophy*, 'Plato: The Republic' <https://www.iep.utm.edu/republic/> ('Plato: The Republic'); Costas Douzinas and Adam Gearey, *Critical Jurisprudence* (Hart Publishing, 2005) 36.

[406] 'Plato: The Republic' (n 405); Douzinas and Gearey (n 405); RW Hall, 'Justice and the Individual in the "Republic"' (1959) 4(2) *Phronesis* 6.

[407] 'Plato: The Republic' (n 405); Douzinas and Gearey (n 405); Hall (n 406).

[408] Hall (n 406).

[409] Pound (n 329).

[410] Ibid.

[411] Ibid.

[412] Hall (n 406); 'Plato: The Republic' (n 405) 36.

- Does the law fulfil basic human necessities?
- Does the law fulfil basic human needs?

Various social movements throughout history have sought to reform the law based on the idea of injustice.[413] Common examples include the civil rights movement, the gay rights movement and the feminist movement. These movements have emerged even in highly functioning Western democracies with highly effective legislators.[414] It can thus be concluded that every country requires lawyers to examine bad laws, and that law students, regardless of where they are, can be involved in this process.

d) Reform the Law

Critiquing the law alone is not enough. A true education requires the chance to build and to create anew. If something is critiqued as being untrue or failing in some way, then intellectualism requires that something should be posed in its place, something that is true and that might succeed.[415] After critiquing the law according to the criteria above—Is the law effective? Does the law match its social aims? Is the law just?—students should be empowered to suggest new law reforms, amendments or the abolition of existing law.

Law students are uniquely placed to play this role in society. Law graduates become some of 'the most influential policy-makers' who enter roles in government, business and politics.[416] They work as 'administrative lawyers, executive branch lawyers, legislative aides or legislators'.[417] Therefore, law schools are obliged to prepare law students for the role they will play in shaping the law and reforming it according to the social, political and economic demands of their time.[418] It might be argued that after graduation, 'Every lawyer should promote justice'.[419] To do so, they must ask

[413] Steven A Boutcher and Lynette J Chua, 'Introduction: Law, Social Movements and Mobilization across Contexts' (2018) 40(1) *Law & Policy* 1–5.

[414] Ibid.

[415] Reno (n 198) 1.

[416] Lasswell and Myres (n 307); Channell (n 307).

[417] West (n 144) 4789.

[418] Ibid.

[419] Steve Sheppard, 'Teach Justice' (2008) 43 *Harvard Civil Rights–Civil Liberties Law Review* 602.

questions about justice in class.[420] Law school is the primary opportunity to teach students that law must be reformed if it is to become an instrument 'in the service of mankind' rather than one for personal enrichment.[421] After graduating, students can take a leading role in this regard; they can develop new ways of thinking about the law, as well as new ideas and plans for how the law should work for society.[422]

New standards must be developed in all fields of human endeavour, which will align with the new social philosophy of the age. However, the legal technique and mastery necessary for coping with these new demands have been unable to keep pace with these theories.[423]

e) How Is Law Reform to Be Taught in a Law School?

One suggestion is to offer students an entire class on law reform, in which they enact the critique above before being assessed. Giroux suggested a research-heavy subject, in which students conduct critical research on a given law 'within the realm of social justice'.[424] This can be completed in a group before group members gather to collaborate on new law reform proposals.[425] Professors can facilitate this process through in-class discussions about 'the substantive justice of whatever piece of law is under review', along with discussions about the effectiveness and social aims of the law in question.[426] Law students could be asked in class to search the history of a specific law so that they could understand it in context; this could then inform their reform initiatives in a manner similar to a public policy debate.[427] Together, the class can discuss law reform proposals, as well as their merits and flaws, and reach a critical consensus.

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[420] Ibid.

[421] Kennedy (n 5).

[422] Ibid.

[423] Kennedy (n 9) 203, 221.

[424] Giroux (n 151) 9.

[425] Ibid.

[426] West (n 144) 2016.

[427] As discussed in a draft copy of Markus Dubber, 'Legal History as Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of Law' in Markus D Dubber and Christopher Tomlins (eds), *Oxford Handbook of Historical Legal Research* (Oxford University Press, 2018) 12.

Although this process might initially appear chaotic, it is important to remember that law schools already perform this process with regard to 'public policy' discussions.[428] Students are already allowed to propose new policy reasons for why a law might be ineffective or to investigate the policy behind a law.[429] As such, there is no reason why this cannot be extended within the broader themes of law reform and justice.[430]

Another way to teach law reform is to create a mock legislative assembly. In a mock legislative assembly, students act as politicians and legislators, who argue over proposed law reform and suggesting alternatives.[431] One such assembly existed at the first law school in the US (College of William and Mary) in Virginia.[432] Under the leadership of George Wythe, the college established a mock legislative assembly at the school, in which students debated legislative proposals, proposed amendments and law reform, and learned about legislative procedures,—all while Wythe acted 'as speaker of the house'.[433] He trained students to read further in government and public policy, which they then used in the assembly to argue over bills.[434] Students not only learned to propose laws; they also learned the procedures of government, law-making and legislating—all of which are crucial components for legal education.[435]

Finally, Giroux suggested an even more radical alternative: that law students be formed into committees to advise government regulatory bodies.[436] Paired with supervisory professors, students could form groups to 'engage in research and provide recommendations for actual legal reform'.[437] They could be assessed on the research component of their work while simultaneously providing a public service and

[428] West (n 144) 2016.

[429] Ibid.

[430] Ibid.

[431] William Edwin Hemphill, 'George Wythe, America's First Law Professor' (Master's Thesis, Emory University, 1933) 53.

[432] Ibid.

[433] Ibid.

[434] David M Douglas, 'Jefferson's Vision Fulfilled' (Winter 2010) *William & Mary Alumni Magazine* <http://law.wm.edu/about/ourhistory/index.php>.

[435] Ibid.

[436] Giroux (n 151) 9.

[437] Ibid.

engaging with the law-making bodies of government.[438] This is a 'clinical legal education' version of law reform—one that is both immensely practical and useful in terms of developing a student's conceptual understanding of how the law can change in response to specific political, legal and social forces.

7) Small Class Sizes

One essential component for any of the above liberal arts teaching methods is a small class size. Small classes are often directly compared to large 200 + person lecture halls—in which an image is posited with personal, individualised learning on one side and dehumanised, detached learning on the other.[439] The personal, small class approach is considered essential for a critical liberal arts education.[440] Professors who teach a small group of students can 'devote sufficient attention to each one so as to fully explore and develop his or her intellectual abilities'.[441] This can lead to acquiring knowledge and cognition that far exceeds what is achieved in traditional lecture halls.[442]

One example of this is Kennedy at the Toronto Law School. In the 1930s, Kennedy insisted on teaching a small class for his liberal arts curriculum in law.[443] He had 'few if any formal lectures', instead opting to work 'at problems in small groups with students'.[444] According to one of his students, classes would comprise '12 or 14' people, often in Kennedy's personal office.[445] Students would receive topics to work on for the next week, and then they would come a week later to present a paper to the class.[446] This paper was then criticised directly by Dean Kennedy, with both him and

[438] Ibid.

[439] Kennedy (n 5) 101.

[440] Ibid.

[441] Nicolette Rogers, 'Improving the Quality of Learning in Law Schools by Improving Student Assessment' (1993) 4(1) *Legal Education Review* 136; A Petter, 'A Closet within the House: Learning Objectives and the Law School Curriculum' in Neil Gold (ed), *Essays on Legal Education* (Buttersworth, 1982).

[442] Rogers (n 441); Petter (n 441).

[443] Kennedy (n 5) 101.

[444] Ibid.

[445] Goldwyn Arthur Martin, a former student of Kennedy and a famous criminal lawyer in Canada, as quoted in Friedland (n 198) 163.

[446] Friedland (n 50) 163.

the other students asking questions.[447] The students benefited 'enormously from the intellectual discussions that took place' in these small classes.[448] Indeed, they were the kind of discussions that are impossible to hold in large lecture halls. Kennedy also operated a law club once a month, 'at which an expert lawyer or jurist' presented a problem for an hour before holding a discussion with the students'.[449] This was not a club for academics or PhD students alone; it was open to all law students in the student body.[450] Guest speakers included Dean Roscoe Pound of Harvard, Professor Manley Hudson of Harvard, Owen Dixon (future Chief Justice of the High Court of Australia) and the lawyers JJ Robinette and Joseph Sedgwick.[451]

The similarities between Kennedy's approach to small classes and the approach of Oxford Law School were worth noting. Oxford has a long history of limiting its classes to one to three students for undergraduate tutorials, something that is unheard of at other universities.[452] Similar to Kennedy's method, students at Oxford wrote articles each week, which were then examined in tutorials by professors and other students.[453] Although the students have larger classes for seminars and lectures, the cohort of an entire LLM year group is only 50 students.[454] Only 42 per cent of Oxford students have one hour of class or more each week with over 100 other students in the class.[455] Small class sizes of this nature can significantly increase student satisfaction with their courses and reduce the feeling of alienation and isolation on campus.[456] However, for small classes to be effective, professors had to adopt teaching methods that suited that environment.[457] Merely lecturing to a smaller class is an ineffective

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[447] Ibid.

[448] 'Class of 1951', *University of Toronto Faculty of Law* (Web Page) <https://www.law.utoronto.ca/about/brief-history/class-1951>.

[449] Kennedy (n 5) 101.

[450] Ibid.

[451] Friedland (n 50) 207.

[452] Jonathan Price, 'Size Matters: Lessons Learned at Oxford', *Leiden Law Blog* (Blog Post, 14 February 2013) <https://leidenlawblog.nl/articles/size-matters-lessons-learned-at-oxford>.

[453] Ibid.

[454] 'University of Oxford—Faculty of Law', *LLM Guide* (Web Page, 2021) <https://llm-guide.com/schools/uk-ireland/uk/university-of-oxford-faculty-of-law>.

[455] Charlotte Freitag and Nick Hillman, *How Different Is Oxbridge* (Higher Education Policy Institute, 2018) 38.

[456] Ibid 30–6.

[457] Gary James Harfitt, 'Why "Small" Can Be Better: An Exploration of the Relationships between Class Size and Pedagogical Practices' (2012) 28(3) *Research Papers in Education* 1–5.

technique.[458] Personal, collaborative teaching styles can be the most rewarding in this environment, and they can most benefit students who want to think critically about their education. It is also worth noting that although such class sizes might be possible at Oxford and Cambridge, less prestigious universities struggle to reduce class sizes to below 30 (let alone to one to three students).[459]

A primary reason for large class sizes has been the implicit effects of the government's neoliberal policies on education. A core aspect of neoliberal philosophy is the privatisation of public assets into competitive markets.[460] In Australia, universities were transformed from public assets into markets of competition in the 1970s and 1980s due to significant cuts to government funding.[461] Within this new model, universities were forced to compete on the open market for students so that institutional costs could be supported (a new funding source), which led to a surge in the number of universities and students.[462] Without government funding, universities had no option but to rely on increased student debt funding. As more 'research' universities were created (some with 20,000 or more students), the 'gulf between academic staff and students' arguably increased, with fewer academics per head of students.[463] The number of law schools and law students has similarly increased in Australia since the 1970s and the advent of neoliberal philosophies in public policy.[464] The rising number of students in this paradigm might lead to larger class sizes if universities do not compensate with increased hiring of teaching staff.[465] The profit imperative to fit as many fee-paying students into a course as possible (even when a university lacks public funding) naturally leads to an expansion in the number of students per class.[466] In brief, the pressure that universities felt to seek new funding

[458] Ibid.

[459] Freitag and Hillman (n 455) 38–9.

[460] Rebecca Barrigos, 'The Neoliberal Transformation of Higher Education' [2013] (6) *Marxist Left Review* <https://marxistleftreview.org/articles/the-neoliberal-transformation-of-higher-education/>.

[461] Ibid.

[462] Ibid.

[463] William Twining, *Blackstone's Tower: The English Law School* (Stevens and Sons, 1994) 49.

[464] David Barker, *A History of Australian Legal Education* (The Federation Press, 2017) 99.

[465] For more on the link between neoliberalism and class size, see Susan Preston and Jordan Aslett, 'Resisting Neoliberalism from within the Academy: Subversion through an Activist Pedagogy' (2014) 33(4) *Social Work Education* 2–4.

[466] Ibid.

sources from more students and their lucrative student debts might lead to an imbalance of student–staff ratios and increased class sizes.

However, this trend is not inevitable, even in institutions that face vocational imperatives. In Australia, UNSW Law School has led the way in terms of achieving smaller class sizes. Classes in undergraduate law degrees typically seat between 30 and 44 students, and there is an increasing focus on limiting the number of large-scale lectures.[467] Conversely, Sydney Law School increased its class sizes from 40 to 70 in 2007, due to increased demands from students wanting to study law.[468] However, the increase in class size was condemned for limiting the amount of personal time that each student would have with his or her professor.[469] Ongoing tensions remain in Australia regarding class size and the effectiveness of teaching. For example, the University of Queensland cut their intake of new law students in 2017 to reduce class sizes from 235 to 185 students per year group.[470] According to the dean, this was to facilitate 'small group teaching' and a more personalised learning environment.[471] A similar claim was made by the dean of Notre Dame Law School, which has an average class size of 31 students.[472] The dean explained his reasoning as follows: 'An essential requirement of any lawyer is the ability to consider and explain an argument. This is a skill which is difficult to foster in huge lecture theatres overflowing with students.'[473]

Australian law schools are joining a broader, global movement towards reducing class size and encouraging 'interactive' forms of teaching.[474] In recent years, Harvard and Columbia Law Schools have reduced their year cohort sizes from 120 to 80

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[467] UNSW Law School, *Law Undergraduate Guide 2014* (UNSW Law School, 2014) 55.

[468] Hannah Edwards, 'It's Unjust M'lud! Law Classes Too Big', *The Sydney Morning Herald* (22 April 2007); Enoch Lau, 'Uproar over Law School Class Size Changes: A Perspective', *Nointrigue* (Blog Post, 4 May 2007) <http://www.nointrigue.com/blog/2007/05/04/uproar-over-law-school-class-size-changes-a-perspective/>.

[469] Edwards (n 468); Lau (n 468).

[470] Melissa Coade, 'Law School Makes "Significant" Cuts to Student Numbers', *Lawyers Weekly* (online at 31 July 2017) <https://www.lawyersweekly.com.au/careers/21591-law-school-makes-significant-cuts-to-student-numbers>.

[471] Ibid.

[472] Michael Quinlin, 'Message from the Dean', *Notre Dame School of Law* (Web Page, 2018).

[473] Ibid.

[474] Sturm and Guinier (n 15) 518.

students.[475] There is a broader push among various law schools in the US, including Vanderbilt, to reduce class sizes and focus on 'problem-orientated pedagogy' in small classes.[476] Some of these outcomes are intentional, while some have been due to various economic crises (and the student debt crisis in the US), which have made law schools a less-promising option for students; enrolments have decreased, which has correspondingly decreasing class size.[477] For example, the smaller classes in Connecticut Law Schools are forcing a renewed emphasis on experiential learning, practical learning and clinical legal education.[478]

However, the primary benefit of small class sizes is essentially what has been discussed above—it is the opportunity for in-class discussions and debate about the law. With smaller classes, students would be empowered to question the law more frequently, to pose objections and to critique legal norms.[479] The smaller the class, the freer student feel in expressing opinions, so that they receive feedback from the professor and to debate with other students in the class.[480]

8) Role-plays (Real and Virtual) in Law Schools

Another alternative method of teaching law is simulation or role-play—a teaching style that can enhance both critical thinking and a student's capacity for empathy.[481] A simulation or role-play is a class activity in which students act a given role in class. Law schools are brimming with simulation activities, including mock trials, treaty negotiations, model UN assemblies and mock legislative assemblies. Typically, role-plays and simulations have been used solely for the teaching of job-related skills.[482] For example, the Inns of Court in London held 'mock trials' as early as the fourteenth

[475] Ibid.

[476] Ibid.

[477] Grace Merritt, 'Fewer Applications Mean Smaller Classes, More Experiential Learning at CT Law Schools', *The CT Mirror* (online at 25 October 2013) <https://ctmirror.org/2013/10/25/fewer-applications-mean-smaller-classes-more-experiential-learning-ct-law-schools/>.

[478] Ibid.

[479] Rogers (n 441); A Petter (n 441).

[480] Rogers (n 441); A Petter (n 441).

[481] Yvonne Marie Daly and Noelle Higgens, 'The Place and Efficacy of Simulations in Legal Education: A Preliminary Examination' (2011) 3(2) *All Ireland Journal of Teaching and Learning in Higher Education* 58.4.

[482] 'Why Teachers Should Use Simulations in Civic Education' (2006) 10 *Trainers Times* 1.

century to teach students the practical skills involved in litigation.[483] The College of William and Mary in Virginia held mock legislative assemblies in 1779 to teach students the practical skills of political governance.[484] Today, law schools worldwide are reaching beyond vocational skills training to experiment with using digital technology to create new, virtual simulations that teach non-technical skills. This includes using gamification, virtual reality and augmented reality.

This section contends that simulations should be used for their broader potential to teach students 'human-oriented' skills, which includes empathy and compassion. They also impart knowledge about the origin of law and the effects of law on society. This section partially argues that simulations are unique in their ability to engage students in the 'real-world' effect of law, unlike other, traditional teaching methods.

Historically, law schools have used simulations as a form of vocational skills training, and they have had little regard for their other potential uses. Simulations have generally been considered a means of prompting students to 'act out' the part of a lawyer at work.[485] For example, mock trials involve law students acting as an attorney for a defendant in a hypothetical, fictionalised case. Law simulations (like mock trials) have frequently been said to help students tackle real-world work-related problems.[486] For example, s student who acts the role of an attorney in a mock trial gains real-world knowledge of the practical skills involved in litigation: preparing for court, making arguments in court and posing objections to opposing counsel in court. They do so without posing any risks to clients or law firms.[487] Simulations are thus a safe way to practise and hone professional skills.[488] Indeed, 'simulations are employed to a greater extent in the vocational institutions where emphasis is placed

[483] Daly and Higgens (n 481).

[484] Hemphill (n 431).

[485] 'Why Teachers Should Use Simulations in Civic Education' (n 482).

[486] Ibid.

[487] Ibid.

[488] Susan Banki et al, *Social Justice Simulations: Social Justice Exercise Manual* (Australian Government Office for Learning and Teaching, 2016).

on advocacy, negotiation and arbitration skills' rather than on soft skills like communication or critical thinking.[489]

Little thought has been paid to the potential for simulations to go beyond vocational skills training to a more theoretical or abstract level—the bestowing of empathy, compassion or ethical integrity. The American Bar Association mandates that all US law schools offer 'one or more experiential courses', including a 'simulation course'.[490] Simulation courses are expected to teach students 'doctrine, theory, skills and legal ethics'.[491] The Australian Council for Educational Research suggested 'that experiential learning allows students to develop a better awareness of the workplace and how it relates to … academic learning'.[492] In each case, simulations are considered beneficial for training students for their future jobs.

In 2011, the Carnegie Report clarified that vocational skills training in law school is not enough.[493] Law students must also 'consider their professional identity and social and ethical values'.[494] The teaching of values can occur via simulated experiences of professional situations. Students could act a professional role in class and receive feedback from professors regarding how they enacted the role (either ethically or unethically).[495] Roleplaying in teams can prompt students to realise 'the need for trust and mutual respect [between colleagues] … aspects of professionalism that are rarely [seen] in the conventional legal curriculum'.[496]

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[489] Daly and Higgens (n 481) 58.8.

[490] As stated in Standard 303(a)(3) in American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools 2020–2021* (American Bar Association, 2020) 18 <https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-for-approval-of-law-schools.pdf>.

[491] Ibid 19.

[492] Peter Sankoff, 'Learning by Doing: The Benefits of Experiential Learning in Animals and the Law' (2017) 27(1) *Legal Education Review* 7.

[493] Ann Thanaraj, 'Evaluating the Potential of Virtual Simulations to Facilitate Professional Learning in Law: A Literature Review' (2016) 6(6) *World Journal of Education* 89.

[494] Ibid.

[495] 'Why Teachers Should Use Simulations in Civic Education' (n 482).

[496] Thanaraj (n 493) 94.

Simulations can also teach students to be 'reflective' about their professional role.[497] Students could be reflective not only about their own work but also for the role of the 'prosecutor, the defence and the judge' in the courtroom.[498] By roleplaying these three different parties, students can become more objective about how the different parties to a legal dispute interact. Accepting one role could encourage subjectivity and bias, but accepting multiple roles offers students a broader and clearer picture of how the legal system actually functions.

At their best, simulations can reach beyond critical thinking to raise questions about how law affects real people. In one relevant example, Professor Richard Ingleby created a simulation of marital disputes in family law. Students acted as parties to the marital dispute.[499] This helped them understand how family law affected real families. Ingleby's simulation highlighted 'the role of the legal profession in out-of-court activity'.[500] He further suggested that technical skills are important. But how should lawyers behave when they had to manage complicated emotional circumstances? How should lawyers comfort a client who is currently undergoing a difficult divorce? These tough, psychological questions are rarely answered in the traditional curriculum. One way to answer them is through simulated roleplaying.

Simulations can also help teach students about the role of law in broader society. According to the 2003 Carnegie Report, simulations 'are effective in developing students' civic and political knowledge, civic and political skills and civic attitudes'.[501] For example, by simulating the political process, law students can gain an understanding of the origin of law, the creation of law and the debates about law reform. This can heighten their civic and political knowledge, while also teaching them valuable skills of critical analysis and communication. As an example, a US simulation called *CityWorks* aimed to teach high school students their constitutional

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[497] Kelley Burton, FI Oprescu, Gwynn MacCarrick and PR Grainger, 'Enhancing the Reflective Practice of First Year Law Students Using Blended Learning Simulations in the USC Moot Court' in *Learning and Teaching Week Program Book* (2015) 13–14.

[498] Ibid.

[499] Richard Ingleby, 'Translation and the Divorce Lawyer: Stimulating the Law and Society Interface' (1989) 1(2) *Legal Education Review*.

[500] Ibid.

[501] 'Why Teachers Should Use Simulations in Civic Education' (n 482).

rights.[502] Researchers on the project initially found that high school students were bored by civics, which they felt was irrelevant to their lives.[503] However, by running a civics simulation, they managed to engage students in a form of 'participatory citizenship', which made students more interested in serving their community.[504] Projects like this could restore the idea of a lawyer as a 'public servant' who is there to uphold the law for society.

Any situation in which political parties agree to negotiate on the terms of a law or agreement can be turned into a class simulation, such as in the case of international law treaties.[505] By simulating a political process, students become aware that the process exists—and that it creates law. A treaty agreement can be acted in a classroom as a form of role-play, in which students observe how both sides of a negotiation use political and legal arguments to argue their side of the case.[506] The resultant legal document is revealed to be an outcome of the political process that became established in class. Law students learn that law has an origin, it can be changed and it can be reformed.

Simulations can also teach law students about social justice, empathy and compassion for another's point of view. Indeed, social justice 'simulations posit specific social justice problems, such as the detention of a political dissident or the introduction of regressive media laws'.[507] In a recent example, students in a law class learned about the real-world process of lobbying for law reform, with regard to self-determination in West Papua.[508] Law students played the role of stakeholders in the dispute. Exercises included tactical mapping, fishbowl interviews and lobbying/protesting.[509] Tactical mapping involved receiving a newspaper article and identifying local actors, discussing the nature of the actors' relationship and creating tactics that each group

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[502] Ibid 2.

[503] Joseph Kahne, *Bernadette Chi and Ellen Middaugh, 'CityWorks Evaluation Summary'* (Mills College, 2002) 3.

[504] 'Why Teachers Should Use Simulations in Civic Education' (n 482) 2.

[505] Rebecca Byrnes and Peter Lawrence, 'Bringing Diplomacy into the Classroom: Stimulating Student Engagement through a Simulated Treaty Negotiation' (2016) 26(1) *Legal Education Review* 25.

[506] Ibid.

[507] Banki et al (n 488) 1.

[508] Ibid 4–5.

[509] Ibid 5–6.

would try on specific stakeholders fishbowl interviews involved mock interviews about human rights violations. Role-play was used extensively in these tasks, allowing students to represent particular stakeholders to the legal crisis (e.g., NGO groups, government groups). Fake protests were conducted too, to emphasise the social element of law.[510] In no other law classroom would a student gain an understanding of so many stakeholders, how the law affects them and how they each individually seek law reform.

This process of placing students in a stakeholder's shoes best exemplifies how role-play builds empathy. In another relevant example, Horan and Taylor-Sands created a 'Litigation in Action' project—a simulated dispute resolution on DVD.[511] Students were separated into groups and shown a video clip on alternative dispute resolution theory.[512] They were then tasked with roleplaying a stakeholder in the dispute, including the 'client, lawyer and/or mediator'.[513] Students were demonstrated to be more lively in class than usual, after watching the video clips, including students who did not normally participate.[514] The interactive nature of the simulation made students interact with each other more socially.[515] Students ultimately gained a greater understanding of ADR and stakeholders and greater empathy for those undergoing the ADR process. This mitigated the usually 'dry' task of teaching civil procedure, and it taught students much more than technical knowledge alone.[516]

a) Virtual Learning Environments/Video Games as Simulation

A virtual simulation occurs in a virtual environment, on computers, online or in a video game. Examples include refugee, prison and courtroom simulations.[517] Virtual simulations seemingly have an even greater capacity than physical simulations for teaching empathy and compassion, as well as an understanding of how law affected

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[510] Ibid 7.

[511] Jaqueline Horan and Michelle Taylor-Sands, 'Bringing the Court and Mediation Room into the Classroom' (2008) 18(1) *Legal Education Review* 202.

[512] Ibid.

[513] Ibid 205.

[514] Ibid.

[515] Ibid.

[516] Ibid 197.

[517] *Against All Odds* (UNHCR, 2006) <https://www.unhcr.org/against-all-odds.html>.

society—because they draw students into the virtual body of a stakeholder. Virtual simulations have been shown to increase empathy towards outsider groups, such as refugees.[518] The immersive nature of new, virtual technologies—such as virtual reality and augmented reality—assist with this process.[519] By taking students outside their own bodies (visually, through audio and film), they allow students to speak, explore and act as someone else.[520] This gives students an understanding of how whomever they are embodying spends a day in his or her life.[521] In the case of a refugee, a divorcee or a criminal, this can be a very humbling experience; students have the chance to understand the human reality of law. This leads students to a greater capacity for empathy towards their future clients.

Historically, law schools 'have been slow to integrate new technology in the classroom'.[522] This is despite widespread studies by law academics regarding the benefits of new technology.[523] As early as the 1990s, law academics began researching the use of virtual environments for the teaching of law.[524] Sutherland, the inventor of computer graphics, foresaw the possibility of these kinds of simulations as early as 1963.[525] The advent of computers was intended to transform legal education so that it would move away from books and towards digital experiences.[526] Students were meant to become digital natives, who were plugged into a vast hoard of worldwide knowledge. Very few of these dreams and aspirations became a reality. Today, it is relatively rare for law schools to use virtual simulations.[527]

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[518] Nicola S Schutte and Emma J Stillinovic, *Facilitating Empathy through Virtual Reality* (Springer, 2017) 1–5.

[519] Ibid.

[520] Ibid.

[521] Ibid.

[522] Horan and Taylor-Sands (n 511) 201.

[523] Daly and Higgens (n 481) 58.2.

[524] Ibid.

[525] Jim Blascovich and Jeremy Bailenson, 'Immersive Virtual Environments and Education Simulations' in Steve Cohen et al (eds), *Virtual Decisions: Digital Simulations for Teaching Reasoning in the Social Sciences and Humanities* (Lawrence Earlbaum Associates Inc., 2005) 233.

[526] Ibid.

[527] Thanaraj (n 493) 89.

Concurrently, there is also a growing awareness regarding the capacity for virtual simulations to extend beyond the traditional curriculum.[528] Simulations are more engaging than traditional instructions through lectures, tutorials or rote learning.[529] They are experiential and allow students to feel the difficulties that lawyers face.[530] Simulations help test whether students have internalised knowledge from the classroom.[531] Role-plays can create exciting environments in which students feel more personally engaged with, and related to, the processes of legal decision-making, current legal issues or moral and ethical dilemmas.[532]

Few law schools have attempted to create virtual simulations—with the few that have doing so for vocational uses. In the 1990s, Paul Maharg was involved in an experimental virtual law world called 'SIMPLE',[533] which stands for 'SIMulated professional learning environment'.[534] The simulation placed students in the virtual world of 'Ardcalloch', a place filled with legal disputes and frustrated litigants.[535] Students were tasked with negotiating 'pre-litigation settlements', 'carry[ing] on legal research' and representing clients.[536] Experiences in SIMPLE were similar to those of a legal clinic, including that students were supervised by actual lawyers.[537]

Although SIMPLE was established as a vocational project (to teach students about being a lawyer), it had a significant side effect—it taught students how to be ethical.[538] Students learned the ethics involved in 'gathering and disclosing information relating to a client', and they gained experience in 'practice-based ethics'.[539] Additionally, in terms of 'values and attitudes', they simultaneously learned

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[528] 'Why Teachers Should Use Simulations in Civic Education' (n 482).

[529] Ibid.

[530] Sankoff (n 492) 6.

[531] 'Why Teachers Should Use Simulations in Civic Education' (n 482).

[532] Shawn Marie Boyne, 'Crisis in the Classroom: Using Simulations to Enhance Decision-Making Skills' (2012) 62(2) *Journal of Legal Education* 311, 4.

[533] Paul Maharg, 'Assessing Legal Professionalism in Simulations: The Case of SIMPLE' (2012) *OUC* 6.

[534] Ibid.

[535] Ibid.

[536] Ibid 10.

[537] Ibid.

[538] Ibid 12.

[539] Thanaraj (n 493) 94.

what it meant to be a solicitor in Scotland, simply by 'interacting with [virtual] clients [and] modelling themselves on their practitioner-tutors'.[540] Practical mentorship from lawyers on the exercise gave students important lessons in professionalism, courtesy and client service—all of which would be considered vital 'soft skills'.[541] The SIMPLE project revealed that virtual simulations can extend beyond vocational training towards the training of soft skills in law students.

In another relevant virtual simulation called 'PAJD', two online virtual law firms were established[542] in which students were tasked with acting as lawyers. They were introduced: 'Students were introduced to "practice activities" typical in legal firms such as meeting partners to discuss files and take instructions, and advising clients'.[543] However, students were not pushed beyond these simple, technical skills to attain higher, more abstract principles or values.

Video games provide a new platform for teaching law in terms of interactive virtual learning environments. Games differ from static teaching environments or digital websites because they require interaction to function. Games are a 'hermeneutic experience' that requires players to place themselves 'before the world, both in understanding the rules and forces' in the game and understanding how to respond to those rules and actions.[544] This is best explained through the example of Ace Attorney—a Japanese law game in which players play the role of a junior lawyer in court.[545] They gradually learn the rules of the game; players can learn both functional skills (e.g., how to object in a court case) and soft skills (e.g., how to talk to a client or a judge respectfully).[546]

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[540] Paul Maharg and Martin Owen, 'Simulations, Learning and the Metaverse: Changing Cultures in Legal Education' (2007) 1 *Journal of Information Law and Technology* 29.

[541] As stated in Standard 304(a) in American Bar Association (n 490).

[542] Linda Kam et al, 'Get Real! A Case Study of Authentic Learning Activities in Legal Education' (2012) 19(2) *Murdoch University Law Review* 17.

[543] Ibid.

[544] Branco et al, 'Games in the Environmental Context and Their Strategic Use for Environmental Education' (2013) 75(2) *Brazilian Journal of Biology* 115.

[545] Scott Beattie and Stephen Colbran, 'From Phoenix Wright to Atticus Finch: Legal Simulation Games as an Aid to Self-Represented Litigants' (Conference Paper, International World Wide Web Conference, 3–7 April 2017) 426 <http://papers.www2017.com.au.s3-website-ap-southeast-2.amazonaws.com/companion/p425.pdf>.

[546] Ibid.

Establishing win or loss conditions provides an interesting dynamic for any game developer designing law simulations. Would law students 'win' the game by behaving ethically and professionally, even if they lost the court case? Or should law students be trained to focus on the demands of their clients exclusively? Games naturally raise interesting questions about the nature of law itself and the role of the lawyer in court. Professional and ethical dilemmas can thus frequently become a core feature of any video game featuring litigation.

The exploration of a high-risk environment in a game (e.g., warzones, crime scenes) allows players to learn new skills they otherwise would not have learned in real life—due to inherent safety concerns. Games, like other simulations, can thus provide safe spaces for experimenting in areas of high-emotional vulnerability. Consequently, virtual simulations can be an 'essential tool in creating rich and situated problems' spaces compatible with deep and meaningful approaches to learning' and help resolve 'meaningful, real-world problems'.[547] Safety allows students to consider those 'meaningful' problems in closer detail, propose solutions and suggest possible avenues for law reform.

Certain law video games already exist and have been used by both law students and the public to understand the effect of law in action. Two examples include *Party for Your Rights*, 'an online game created to teach consumer rights and advocacy', and *Law Dojo*, 'a set of online games which tests knowledge of the law'.[548] The first game targets a general audience, while the second is mainly aimed at law students or aspiring law students.[549] Games like these aim to 'gamify' law by adding rewards, levels and interactivity to the task of learning. In *Law Dojo*, players progress through several different modules based on criminal law, legalese, evidence, constitutional law and other topics—unlocking new categories as they progress.[550] The creator of the game, Margaret Hagan, stated that 'she was tired of studying [law] in heavy, boring ways'.[551] This is a unique aspect of games: they can make learning fun. By

[547] Thanaraj (n 493).

[548] Beattie and Colbran (n 545).

[549] Ibid.

[550] 'Law Dojo', *Law Dojo* (App Website, 2017) <http://www.lawschooldojo.com/>.

[551] Ibid.

creating games like *Party for Your Rights* and *Law Dojo*, game designers have managed to offer learning about the law to the public in an accessible, easy to use app that ultimately helps the public understand the effect of law.

b) Creating Empathy—Building Simulations

It is worth considering whether existing virtual simulations in law schools are limited by their design—specifically, whether they are limited to the extent that they are not designed to teach empathy or the effect of law on society (but they teach vocational skills). If the true value of simulations (as has been argued above) is to encourage students to perceive a legal issue from someone else's shoes, then it is worth questioning what kind of simulation would achieve this goal.

First, various aspects of simulation design should be considered. Establishing a simulation requires addressing the type of course, the location and the activities that are to be undertaken.[552] In terms of the type of course, it is important to consider the course's length and its classes.[553] For the purpose of this subsection, a standard law class might be imagined as wishing to include empathy-building in a virtual simulation. To that end, it should be determined whether the simulation will be conducted in class or outside. If outside the class, law students would require access via learning management software, university websites and other factors. Online videos can be used to support the simulation—such as providing background information to students about the stakeholders and thus assisting in the empathy-building process.[554] If in the class, it might be best to divide students into groups to play the role of 'different stakeholders', in which they can learn through multiple viewpoints on the legal issue in play.[555] Collaborative learning of this kind can help students learn from each other and themselves.[556] It can also help deconstruct social isolation or 'cellular learning', which can become a problem in a hyper-competitive law school.[557] Instead of penalising students for 'colluding' on an assessment task,

[552] Maharg and Owen (n 540) 9.

[553] Ibid.

[554] Kam et al (n 542).

[555] Banki et al (488) 1.

[556] Maharg and Owen (n 540) 5.

[557] Ibid.

simulations can take advantage of how students like to collaborate. When collaborating, students realise 'the need for trust and mutual respect between team members and the value of community learning'.[558] These are additional values that stand them in good stead for their future workplaces.

In terms of location, a fictionalised world is preferred, one in which the possibility of students gaining empathy or understanding the law in practice is greatly enhanced.[559] This can include fictional locations, characters, transactions and conflicts or cases.[560] For example, students can walk in the shoes of a refugee, make an asylum seeker claim and be a wife in a divorce proceeding or a criminal facing time in prison. The important point is that students encounter situations they would not typically encounter or they face situations that are common among legal clients. Empathy-building between lawyer and client in this way can occur hypothetically before students embark on a real journey with real clients.[561] Finally, in terms of activities, simulations generally focus on solving a legal problem in some manner while engaging in a communicative practice.

Simulations (specifically virtual simulations) can be time-consuming to create. Various law lecturers have stated that simulations 'were very time consuming' in terms of creating them, finding the relevant problems and preparing additional material and traditional materials.[562] This is a legitimate concern in the short term. However, in the long term, it is worth considering that simulations can be re-used indefinitely.[563] They can also be modified and/or adapted for future years and other relevant courses.[564]

Law schools can use simulations to teach students about the human effect of law, enhancing their capacity for empathy and compassion. This can balance the otherwise dry and detached perspective of law that students encounter in the rest of the law

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[558] Thanaraj (n 493) 94.

[559] Maharg (n 533).

[560] Ibid.

[561] Banki et al (n 488) 1.

[562] Daly and Higgens (n 481) 58.13.

[563] Ibid.

[564] Ibid.

school curriculum. Virtual simulations can extend beyond physical simulations by placing students in the shoes of a future client, in which they would speak, act and react as that person in a virtual world. This prepares students for the soft skills that are necessary in the business environment, including communication skills, critical thinking skills and the professional capacity for empathy. The skill of empathy-building has historically been ignored in traditional simulation activities. However, it is worth considering how simulations are uniquely suited to teaching empathy.

Conclusion

As outlined in the previous subsections, an alternative curriculum can be used in Australian law schools to help reorient students towards a broader liberal arts education in law. New assessments can help students gain a 'human' training in law; they allow students to engage in cases and statutes beyond the black-letter law approach, with an emotional and personal perspective. The benefits of different forms of assessment are too numerous to mention, but the core benefits as established in Section 2 of this part include teaching empathy, compassion, critical thinking and reflection. With these soft skills, law students can approach graduation with a clearer perspective on the role they can play in the world. They are not only employees who are trained in technical skills, but citizens who are endowed with the responsibility to critique, refine and reform the law.

The curriculum examined in this section draws inspiration from the scholarship of WPM Kennedy. Kennedy's vision for a liberal arts education in law is extensively required today, and it can only be accomplished by changing the assessment tasks themselves. This would allow students to approach assessments as something more than a technical skill or jobs-training program; they would be fundamental to who the students are as human beings. The assessments listed in this section accomplish this: critical thinking tasks and essays, reflection tasks, law reform tasks, small class group discussions and other class discussions and simulations. In each assessment, the task extends students beyond the normal boundaries of 'respectable' discussions in the law classroom; students learn to engage with higher-order, intellectual skills. Kennedy's law school taught students to connect with the political and social forces underpinning the legal system. It is possible that by embracing his methods, law schools today can teach students about the important relationships between law and society, law and

politics and the political and social forces that shape the legal order. Without such teaching, there is a risk that graduates will continue to emerge from law school as ‘legal monks’ who are incapable of understanding the role they are to play in wider society.

However, that wider role is paramount. Law graduates are the only trained professionals with a knowledge of the law, so it is up to them to provide the moral, justice and fairness framework of our legal system, as well as to advocate for changes to the law and hold the government accountable in a secular democratic country such as Australia. Much can be learned from the new US experience in legal education, including the experimentations with new assessment tasks, the creation of experimental virtual simulations and the adoption of the humanities into law schools—in which law is finally taught as the basic humanities subject, upon which other subjects are built.

By providing students with a broader liberal arts style training, legal education can shift away from the dominance of both legal positivism and neoliberal values. Students can learn that the market is not the sole determinant of their success, nor the only valuable aspect of their intended profession; instead, they can understand that the law deserves to be critiqued and questioned. The assessments listed above also humanise the study of law for students, allowing them to meld their moral intuition, critical thinking and broader ethical framework with their study of the legal system. Under this new curriculum, students will not have to split themselves into two (the detached lawyer; the concerned citizen) but meld their personal and public selves into a unified democratic citizen.

Section 3: Core Subjects and a New Law Curriculum

Significantly changing legal education in Australia would potentially require discarding the Priestley Eleven subject requirements for a more refined and shorter list of core subjects.[1] The Priestley Eleven currently act as a 'dead hand' on curriculum reform, and they prevent law schools from innovating and experimenting with new subject choices for students.[2] Heavy with black-letter law subjects, the Priestley Eleven might prevent students from properly contextualising the law, given its relation to the humanities and social sciences.

The Productivity Commission has argued that the Priestley Eleven provide a 'strong base knowledge of the law [but] limit the flexibility of universities to compete and innovate'.[3] Without the flexibility of adapting new core and compulsory subjects, every law school begins to mirror the dominant, corporate model of teaching the law. Universities would need to move beyond the Priestley Eleven (and the accompanying black-letter law focus) if they want to provide students with a more holistic or contextualised education in law and a greater variety of possible law schools.

This section argues that the Priestley Eleven should either be abolished or substantially reduced to four or five compulsory subjects. In this regard, this thesis contends that Australia can learn from the UK model of six compulsory subjects and the US model of no official core subjects (although there is an informal list).[4] Foreign jurisdictions have demonstrated that a low number of core subjects allows for a greater degree of experimentation for the law deans in designing the curriculum and innovating subject offerings. With fewer compulsory subjects, law deans could tailor subject choices towards different law school experiences, which would create a social justice agenda, a clinical education agenda or the simple provision of more elective options for students. Reducing the Priestley Eleven would trigger a new era of subject

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[1] Misa Han, 'University No "Trade School" for Lawyers' (23 October 2014) *Financial Review* <http://www.afr.com/news/policy/education/university-no-trade-school-for-lawyers-20141023-11awap>; Cf Charles JG Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (The Federation Press, 1999) 137–8.

[2] Han (n 1); Sampford, Blencowe and Condlin (n 1).

[3] Han (n 1).

[4] Bar Standards Board and Solicitors Regulation Authority, *Academic Stage Handbook* (Bar Standards Board and Solicitors Regulation Authority, 2014) 18 <https://www.sra.org.uk/globalassets/documents/students/academic-stage/academic-stage-handbook.pdf?version=4a1ac3>.

experimentation in Australian law schools, allowing all law schools to offer a broader range of subjects to students and thereby greater flexibility to law deans, administration and professors.

Towards the end of this section, this thesis will argue in favour of various subjects that could replace the Priestley Eleven as optional electives under a new liberal arts theoretical model. These subjects would include humanities subjects that are sorely lacking from the current law school curriculum, including law and politics, legal history and legal philosophy. In each case, this thesis will argue that a liberal arts education (based on humanities subjects) can help contextualise the law for students and allow them to understand from where the law originates and how it affects their society. Without a proper understanding of the context of law, law students will remain unprepared for the broad diversity of graduate careers they will enter. Further, they will remain incapable of understanding the law as a field of study, unable to explain the proper context of legal rules and decisions, and incapable of successfully entering into the myriad job options available to them after graduation.

1) Downsizing the Priestley Eleven

With the basic assumption that the Priestley Eleven should be abolished or radically downsized, a discussion can be started regarding which Priestley Eleven subjects should be targeted.

First, law schools should consider the question raised by the 2015 LACC meeting, which asked 'whether the following areas of knowledge continue to be fundamental threshold knowledge for all entry-level lawyers: Civil Procedure, Company Law, Evidence, Ethics and Professional Responsibility'.[5] This question was asked partly because these subjects are already partially or entirely covered by the PLT Competency Standards, so they are thus already taught to students during their PLT placement.[6] It is necessary to avoid duplicate teaching of the same materials and ensure that only relevant subjects are compulsory. Further, abolishing these four subjects could significantly open the curriculum to much-needed reform. However, it

[5] Law Admissions Consultative Committee, Review of Academic Requirements for Admission to the Legal Profession (2015) 5.

[6] Ibid 5–7.

must be noted that abolishing ‘Ethics’ and ‘Professional Responsibility’ would omit the only core subject that explicitly teaches a broader view about the role of the lawyer in society. It is thus possible that only three of these subjects could be abolished.

Following this, several remaining subjects can be paired, as has already occurred in some Australian law schools in the past. For example, historically, torts and contracts have frequently been taught in a single introductory course, with the option of a further elective in subsequent years if students wished to undertake it. The same can be said of ‘Administrative Law’ and ‘Constitutional Law’. Pairing these subjects can significantly reduce the number of core units in the curriculum while not sacrificing content. Notably, the list of Priestley Eleven subjects becomes considerably shorter after adopting the recommendations suggested above.

This can be viewed visually below:

- Administrative Law and Federal and State Constitutional Law
- Contracts and Torts
- Criminal Law and Procedure
- Equity (including Trusts)
- Property
- Ethics and Professional Responsibility
- ~~Civil Procedure~~
- ~~Company Law~~
- ~~Evidence~~

This shorter list of six core subjects reflects the status quo in the UK and other European jurisdictions, in which a tighter, more refined subject list is offered.

In other jurisdictions, fewer subjects have allowed for a greater amount of flexibility and uniqueness to each law school’s curriculum. In Canada, the Law Society of Upper Canada originally ‘prescribed eleven mandatory’ subjects for students of law.[78] This

[7] Taskforce on the Canadian Common Law Degree, *Consultation Paper* (Federation of Law Societies of Canada, 2008) 10–11.

[8] Ibid.

was reduced from ‘eleven to seven’ in 1969, following a petition from several law deans who argued that too many compulsory subjects limited the independence of law schools.[9] No compulsory subjects exist in the US, but law schools are required to teach ‘substantive and procedural law’.[10] This results in a fairly standard first year offering across law schools, with some room for experimentation allowed.[11]

The status quo in the UK, US and Canada involves law schools having the freedom to set their own curriculum, with less direct control from the profession or industry bodies. This allows law schools to cater their programs to all students rather than just to the 50 per cent of students who will enter the legal profession after graduation. It also signifies that law schools can adopt a less-vocational, skills-based focus and teach the theory and philosophy behind law.

A shorter list of core units would allow the core areas of black-letter law to be taught, but it would also allow the time and room for students to extend beyond black-letter subjects into advanced studies or elective units that are non–black letter in nature.

2) Alternative Subject List

One step further to reducing the Priestley Eleven is to suggest some elective units that could replace the discarded units. In this case, non–black letter elective units in law can be added, which would allow students to expand their studies with different thinking methods. These subjects do not need to be compulsory, but they could become standardised elective offerings in law schools for students who require a more theoretical framework in their studies.

A list of these subjects is offered below:

- Administrative Law and Federal and State Constitutional Law
- Contracts and Torts
- Criminal Law and Procedure
- Equity (including Trusts)

[9] Ibid.

[10] As stated in Standard 302(a) in American Bar Association, *ABA Standards and Rules of Procedure for Approval of Law Schools (2015–2016)* (American Bar Association, 2015).

[11] Ibid.

- Property
- **Political Philosophy**
- **History**
- **Philosophy**
- **Critical Thinking**
- **Enforcement**

The benefit of this new list is that it adds necessary components to the law degree that do not exist in the current curriculum, and they all help contextualise the law. Although broad in scope, subjects such as philosophy, history and critical thinking can be specifically taught in relation to the law. Political philosophy would explain the origin of the law (in political processes). History would discuss the history of unjust law or periods during which the law has failed or helped humanity (e.g., the eras of slavery and the apartheid). A general philosophy course can help students question what they are being taught. If this course were combined with critical thinking (the ability to analyse the motivations, biases and agendas that underlie an argument), then students would be taught the real Socratic method, and they would learn how to question the law, judges and their own opinions. Empowered by critical thinking, students would be able to judge whether a law was good or bad, as well as suggest potential law reform.

These subjects could be created as elective units, which would allow students to choose them if desired; alternatively, they could be offered in conjunction with black-letter law units. With a reduced list of compulsory subjects, elective units could be taken as early as first year, with some of these subjects (e.g., political philosophy and critical thinking) serving as great introductory courses that help frame students' understanding of law as they start their degree.

The remainder of this section seeks to justify each of these subjects in turn. It will question why the new subjects should be added and what they offer the student of law.

a) Politics

There are several reasons why law students should learn about the political nature of law. First, a political understanding of law helps students understand the origin and purposes of statute law. Second, by learning politics, students can understand the social context of law. Third, learning politics allows students to gain a greater understanding of the process involved in creating law. Finally, students will gain a greater understanding of how judges can act as political actors, which will be discussed in further detail below.

When he created the first US law school, Thomas Jefferson argued that law students should learn law and politics together.[12] In Jefferson's words: 'Every political measure will forever have an intimate connection with the laws of the land'.[13] This is because so much of modern law is statute law, and it is thus directly created by politicians. Never was this more apparent than in the fledgling American Republic. In the early 1800s, law graduates frequently became politicians who shaped the laws of their own country. Jefferson himself possessed firsthand knowledge of being both a student of law and a creator of law as a politician—and, eventually, as an executive when he became president. The political nature of law in this case seems clear: politicians create, change and amend the law, and all law—at least statute law—is thus inherently political.

In some law schools, students are said to 'not learn anything about the causal relation between politics and law'.[14] To achieve this, the law schools have prioritised the teaching of case law above legislation (with the exception of corporations law), which diminishes the significance of legislation and its political nature.[15] By teaching case law, law schools can pretend that *all* law is apolitical.[16] Case law can be portrayed as

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[12] Letter from Thomas Jefferson to Thomas Mann Randolph Jr, 6 July 1787, as quoted in Thomas Jefferson, *Memoir, Correspondence and Miscellanies from the Papers of Thomas Jefferson* (F. Carr and Co., 1829) vol 1, 181.

[13] Ibid.

[14] Robin West, *Teaching Law: Justice, Politics, and the Demands of Professionalism* (Kindle eBook, Cambridge University Press, 2014) 2707.

[15] Edward Rubin, 'What's Wrong with Langdell's Method' (2007) 60(2) *Vanderbilt Law Review* 610; Sheppard (n 50) 610; Tamara Walsh, 'Putting Justice Back into Legal Education' (2008) 17(1) *Legal Education Review* 127–8; Michael Robertson et al (eds), *The Ethics Project in Legal Education* (Routledge, 2011) [8.3.3].

[16] Rubin (n 15).

objective, reasonable and fair, without any political agenda.[17] Politicians can be diminished as side-players who are irrelevant to the main concentration of law in casebooks. Students can be taught an 'imagined order' in which judges are always objective and apolitical, and case law is superior to statute law.[18]

Of course, this is considered a legal fiction. A proper understanding of law includes understanding the political nature of law—that is, knowing how all law is political and how it has political and social origins.[19] Properly understanding the law also includes understanding the dominant role of statute law and its political origins and purposes. Much can be gained here from reflecting on the CLS movement. Specifically, the CLS movement aimed to challenge the 'law's ideological neutrality' by revealing that all law was political.[20] The core subjects of law school have long hidden an unseen ideological agenda of hierarchy, status and class; 'property rights are understood to confer power … contractual bargaining is never truly equal'.[21]

Students of law should learn from where the law originates, why it exists and whose interest it serves. For example, law schools should teach that statute law originates from the government, that case law originates from the problems of society and the 'community standards' that are observed by a judge, and that changes to the constitution arise from political processes.[22]

Last, it should be stated that to teach law as politics is not necessarily the same as teaching law progressively or conservatively; simply, it is to reveal the political context in which the law is created. Political education can be apolitical. As Max Weber suggested, teaching can occur without political indoctrination, and even politics should be taught logically and objectively.[23] However, there is an ongoing

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[17] Robert Post and Reva Siegel, 'Questioning Justice: Law and Politics in Judicial Confirmation Hearings' (2006) 115(38) *Yale Law Journal* 49.

[18] Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999) 2, 9.

[19] West (n 14) 2718.

[20] Sally E Hadden and Alfred L Brophy (eds), *A Companion to American Legal History* (Wiley-Blackwell, 2013) 463.

[21] Guyora Binder, 'Critical Legal Studies' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, 2nd ed, 2010) 268.

[22] Michael D Bayles, 'Law and Politics' in Wade L Robison (ed), *The Legal Essays of Michael Bayles* (Springer, 2002).

[23] Max Weber, 'Science as a Vocation' (Speech, Lecture at Munich University, 1917) 6–8.

debate regarding whether this kind of critically detached, unbiased education is possible. It could be that the law cannot be taught without a political bias (a 'hidden curriculum' of politics) that the legal educator imparts in his or her class as a core functioning of legal content that offers political outcomes.[24] For example, Lucy Maxwell called legal education a 'value laden enterprise' in which the choices of lecturers, down to the jokes they tell in class, influence student learning.[25] In 1985, at the height of the CLS movement, Susan E Keller (a second year Harvard Law Student) argued, 'I haven't been in a law school class without a political slant. You can't teach law neutrally'.[26] It is beyond the scope of this thesis to answer this question directly; however, it will note that the discussion is ongoing and important.

i) Enhancing an Understanding of Legislation

Law schools can teach students politics to help them gain a better understanding of legislation. Statute law is political in origin, and it can only be understood through an understanding of the political process of government. Waldron suggested that 'everyone knows that argument in Congress [or Parliament] is explicitly and unashamedly political'.[27] The process of creating statute law is 'unashamedly political' because it involves politicians acting in the political process for political purposes.[28] Law is created by the 'machinations of the legislative branch'.[29]

A statute is created by Parliament through the negotiation of various political parties, each pursuing its own political agenda.[30] Politicians make law reform proposals at regular intervals during the lead-up to national elections.[31] Theoretically, the public

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[24] Karl E Klare, 'The Law School Curriculum in the 1980s: What's Left?' (1982) 32 *Journal of Legal Education* 336.

[25] She also cites the direct link between teaching administrative law and the related topics of 'power' and 'politics'; Lucy Maxwell, 'How to Develop Law Students' Critical Awareness? Change the Language of Legal Education' (2012) 22(1) *Legal Education Review*.

[26] 'Radicalism and the Law' (18 April 1985) *The Harvard Crimson* <https://www.thecrimson.com/article/1985/4/18/radicalism-and-the-law-pmost-reserved/>.

[27] Waldron (n 18) 7.

[28] Ibid.

[29] West (n 14) 2639.

[30] Miro Cerar, 'The Relationship between Law and Politics' (2009) 15(1) *Annual Survey of International and Comparative Law* 19–20; West (n 14) 2639.

[31] As can be observed in 'Coalition Wins Federal Election' in 'Carbon Tax: A Timeline of Its Tortuous History in Australia', *ABC News* (online at 17 July 2014) <http://www.abc.net.au/news/2014-07-10/carbon-tax-timeline/5569118>.

votes on these law reform proposals on election day. Once elected, a political party (with a majority in Parliament) essentially has the ultimate power to either keep or break their promises.[32] Australia's system empowers majority governments with supreme 'law-making authority': a statute can be changed by another statute, a case law can be overridden by an act of Parliament, and the constitution can be changed by a referendum that is triggered by the Executive branch (though this rarely occurs).[33] In this way, all law is subject to parliamentary rule, and all law is subject to politics.[34] Indeed, case law taught in law schools only remains in effect at the whim of the Parliament, so it is a diminutive form of law.[35] Sir Edward Coke summarised this argument as follows:

> [The Parliament] hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible determinations, ecclesiastical or temporal, civil, military, maritime or criminal.[36]

To properly understand the law, students must be taught how the Parliament and politics shape and influence the law.[37] More than ever, statute law plays an increasingly dominant role over case law in Australian society. It is essential to teach students that statute law can override case law in most common-law countries.[38] This means that the Parliament (and politics) can influence any law.[39] Therefore, in this context, it does not make sense to teach students 'nothing—quite literally nothing—about the legislative' in the current law curriculum.[40]

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[32] 'The Australian Legal System' in *Introduction to Business Law* (Oxford University Press, Unpublished) 7 <http://lib.oup.com.au/he/samples/ciro_LAB4e_sample.pdf>.

[33] Ibid; Martin H Redish, *The Federal Courts in the Political Order* (Carolina Academic Press, 1991) 9; Waldron (n 18) 7; Michael Zander, *The Law Making Process* (Cambridge University Press, 6th ed, 2004) 1.

[34] Redish (n 33); Zander (n 33).

[35] Redish (n 33); Zander (n 33).

[36] Edward Coke, as quoted in Luther Stearns Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States* (Little Brown and Company, 1856) 278.

[37] Gerald E Frug, 'A Critical Theory of Law' (1989) 1(1) *Legal Education Review* 43.

[38] Waldron (n 18) 7; Woodrow Wilson, *The State* (D.C. Heath and Co, 1889) 615; Zander (n 33).

[39] Waldron (n 18) 7.

[40] West (n 14) 2705.

Students might also understand the political nature of statute law to know from where it came and what bias lies within it (from judges, lawyers or professors).[41] The Langdell model of legal education liked to present the law as objective. Conversely, statute law tends to reflect the bias of its creators. It specifically reflects the political party that created it—revealing a progressive, centrist or conservative leaning. Friedrich Hayek argued that law derives from the same 'common aim' of a parliament: the removal of 'all sources of discontent among the people'.[42] However, political parties remove discontent in different ways (e.g., progressives by social welfare, conservatives by tax cuts). To understand statute law properly is to understand these political agendas behind the law.

Finally, law students might be taught the politics of law to understand why the law is subject to change.[43] Historically, law schools have been slow to respond to changing laws and unable to handle law reform. Cases were considered static and immovable. Revealing the truth about legal change was the foundational point of the legal realist movement.[44] The legal realists suggested that all law is 'living' rather than static or immoveable.[45] The law changes over time in response to changing political pressures on society, including the social forces that emerge from society.[46] Social pressures push the government to change the law, and in this way, all law is political. Typically, a social norm would arise in society (e.g., the acceptance of gay marriage), and then it would become a law enacted by the government.[47] Social habits and customs frequently form a primary source of law.[48] As habits and society change, so too does the law. All law derives from the changing nature that is inherent in the political process itself; it fluctuates and changes according to the type, form and power of the government, as well as the changing nature of the people under its care.[49]

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[41] Frug (n 37).

[42] Friedrich Hayek, *Law, Legislation and Liberty* (Routledge, 1973) 136.

[43] Waldron (n 18) 36.

[44] Friedrich Kessler, 'Arthur Linton Corbin' (1969) 78(4) *Yale Law Journal* 521.

[45] Ibid.

[46] Ibid.

[47] David Nelken, 'Eugene Ehrlich, Living Law and Plural Legalities' (2008) 9 *Theoretical Inquiries in Law* 453.

[48] Wilson (n 38) 611.

[49] Cerar (n 30) 19.

From the politics of law, students can learn why law differs from country to country. The laws of Australia are different from those of the US because the Australian people are different from the American people. The laws of a country reflect the people that live in that country, their social habits and practices, their political opinions and the form of government in charge.[50] As Woodrow Wilson suggested, 'There is no universal law, but for each nation a law of its own which bears evident marks of having been developed along with the national character'.[51]

ii) Political Judges

Even when teaching case law, law schools must be careful to teach how politics can interfere with a judge's reasoning. A judge's reasoning typically reflects his or her political context. On the one hand, a judge can advocate for a particular community sentiment; conversely, the judge might actively pursue a political agenda by becoming an 'activist judge'.

First, it is useful to question whether a judge can be objective at all. Nietzsche argued that 'pure reason' or pure 'objectivity' does not exist.[52] Everything that people observe and know is observed and known from their own perspectives.[53] Everything people 'know' comes from their subjective experience of the world around them.[54] The CLS movement argued in a similar vein that all judicial decisions emerge from a judge's social and political context—from his or her lifestyle, upbringing and privilege.[55] A judge 'does not turn a blind eye to the world outside the courtroom', but instead draws the outside world into the court to assist in the decision-making process.[56] In this way, judges are a reflection of their social, economic and political circumstances.

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[50] Wilson (n 38) 621.

[51] Ibid.

[52] Friedrich Nietzsche, 'What Is the Meaning of Ascetic Ideals?' in Friedrich Nietzsche, *On the Genealogy of Morals*, ed Walter Kaufman (Vintage Books, 1989) 119.

[53] Ibid.

[54] Ibid.

[55] Hilary Charlesworth, 'Critical Legal Studies' (1988) 5 *Australian Journal of Law and Society* 27–8.

[56] Justice Anthony Mason, 'The Courts and Public Opinion' (Speech, the National Institute of Government and Law, 20 March 2002) <http://www.austlii.edu.au/au/journals/NSWBarAssocNews/2002/11.pdf>.

Students must understand how judges can reflect their social and political context when they decide a case. Specifically, judges frequently decide cases on the basis of the views of the community; they can enforce community standards and sentiments in court.[57] References to modernity, community standards, community views and other concepts (which frequently occurs throughout case law) are not references to some abstract objective standards, but a reflection of the community itself; it is a zeitgeist that the judge is reflecting.[58] For example, when NSW Justice Heilpern declared that the word 'fuck' no longer constituted offensive language, he did so based on public opinion shifting away from conservative views on language.[59] Justice Heilpern referred to his own experience outside the court, of hearing the word frequently yelled on train station platforms.[60] The basis of his decision was that people could yell 'fuck' at a train station without anyone turning around in response. This clearly reflected the social context of Justice Heilpern's life. To use another example, when the US Supreme Court legalised gay marriage, it did so on the basis of community sentiment shifting towards a more progressive agenda (i.e., an acceptance of a new definition of 'equality').[61]

When the views of society affect a judicial decision in this way, it cannot be said that a judge is acting apolitically or objectively.[62] Instead, judges are revealed to be acting within the bounds of their social and political community.[63] Given that judges can act politically, it is not enough for law students to learn cases without political context. Instead, they should be taught the political origin of those cases, as well as the social mores that those cases reflect.

In some cases, judges might reach beyond community values to directly enforce the will of Parliament. In the UK, judges can 'consult the record of parliamentary debate'

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[57] Justice Murray Gleeson, 'Public Confidence in the Courts' (Speech, National Judicial College of Australia, 9 February 2007) 8; Jeffrey Goldsworthy, *The Sovereignty of Parliament* (Clarendon Press, 1999) 239.

[58] Mason (n 56); Goldsworthy (n 57).

[59] *Police v Dunn* (Dubbo Local Court, Heilpern D, 27 August 2009).

[60] Ibid.

[61] Molly Ball, 'How Gay Marriage Became a Constitutional Right' (1 July 2015) *The Atlantic* <https://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/>.

[62] For example, see *R v Swaffield* (1998) 192 CLR 159.

[63] Wilson (n 38) 620.

to assist in their judgement.[64] The court can look to 'clear statements made in Parliament concerning the purpose of legislation … as a guide'.[65] By referring to parliamentary statements, judges can act as enforcers of the Parliament's mandate. The judiciary is thereby involved in trying to understand the political context in which the law is created. Even more so, the judiciary are expected to enforce political viewpoints in the interpretation of statutes. They might do so by considering the literal meaning of the words of a statute or by referencing the 'mischief' that the statute wished to resolve in the community.[66] Chief Justice Gleeson suggested that 'legislation and the common law are not separate and independent sources of law. They exist in a symbiotic relationship.'[67]

It is important for students to understand this symbiotic relationship; they should understand that judges interpret legislation, which is created by politicians in a political process. Cases cannot neatly be separated from statute law, nor can they be separated from political actors.

Judges might reach beyond reflecting their political context and become judicial activists. So-called 'activist' judges use their political opinions to determine a case's outcome based purely on political terms.[68] Students should be trained to spot these judges and question whether it is objective to decide on a political basis in this manner. That judicial activists exist undermines the claim that all judges are independent and objective actors. Activist judges might ignore precedent they dislike or pursue one line of reasoning in an illogical manner or their own ideology.[69] For example, a large-scale study of US Federal Appeals Courts from 1995 to 2004 found 'strong evidence of ideological voting' in judges appointed by one political party or

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[64] *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3 ('*Pepper (Inspector of Taxes) v Hart*'); Waldron (n 18) 25.

[65] *Pepper (Inspector Taxes) v Hart*; Charlotte Littleboy and Richard Kelly, 'Pepper v Hart' (Standard Note SN/PC/392, House of Commons Library, 22 June 2005) 2 <https://commonslibrary.parliament.uk/research-briefings/sn00392/#fullreport>; Waldron (n 18) 25.

[66] Goldsworthy (n 57) 144–5, 149.

[67] *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 532 [31], as quoted in Justice John Middleton, 'Statutory Interpretation—Mostly Common Sense?' (Speech, Melbourne University Law Review Annual Lecture, 14 April 2016) <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-middleton/middleton-j-20160414#_ftn2>.

[68] Benjamin A Neil, 'Activist Judge—It Means Different Things to Different People' (2017) <http://www.aabri.com/LV2010Manuscripts/LV10032.pdf>.

[69] Ibid.

another.[70] In the US Supreme Court, judges frequently declare themselves 'liberal or conservative'.[71] Although individual cases reveal no impression of ideological voting, the decisions made over a long period indicate a trend towards a political bias, when judges declare their own bias up front.[72]

When testing for a liberal bias, the same study found that 'Democrat appointees [were] far more likely to vote in the stereotypically liberal direction than Republican appointees'.[73] For example, in affirmative action cases, Democrat-appointed judges voted in favour of affirmative action 75 per cent of the time, as compared to Republican-appointed judges at 47 per cent.[74] In regard to environmental policies, Republican-appointed judges voted against 60 per cent of the time, as compared to Democrat-appointed judges at 24 per cent of the time. The political affiliation of the judges on judicial panels had clearly influenced their 'judicial decisions'.[75]

An argument can be made here regarding whether judges act consciously or subconsciously when promoting their own bias. According to CLS scholar Duncan Kennedy, judicial bias is 'half-conscious'.[76] Judges are consciously aware that legal rules are ideological and political; conversely, they 'plow' on regardless, acting as if 'everything were fine'.[77] By adopting the rational and objective language of legalese, judges can fool themselves into a form of wilful blindness.[78] Judges frequently do this by 'couching' their bias in legal wording and by referring to higher principles, human rights treaties or 'policy questions'—all of which are a call to the specific social and political values of the society in which they live.[79] A judge can sound objective when

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[70] Cass R Sunstein et al, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Brookings, 2006) 19–25.

[71] Lee Epstein et al, 'Ideological Drift among Supreme Court Justices: Who, When and How Important?' (2007) 101(4) *Northwestern Law Review* 1–5.

[72] Ibid.

[73] Sunstein et al (n 70).

[74] Ibid 24.

[75] Ibid 19–21.

[76] 'Book Notes: Duncan Kennedy's Stiff Knees' (1998) 111(7) *Harvard Law Review* 2118–20.

[77] Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press, 2002) 190.

[78] Ibid.

[79] Epstein et al (n 71).

talking about the higher principles of Western society; however, realistically, they are outlining a political point that supports their own political perspective.

Conservative judges have traditionally maintained the doctrine of 'originalism'—which involves avoiding references to higher principles and modern social context altogether.[80] For example, conservative legal philosopher Jeffery Goldsworthy claimed that a judge's duty 'is to declare the law as enacted in the constitution'.[81] The constitution 'pre-exists judicial interpretation of it', so the role of the judge is thus to defend the original interpretation of the constitution from reactionary critics.[82] However, even if this viewpoint is adopted, the original documents that were relied upon—the constitutions, statutes and regulations—were initially created by politicians for a political purpose. It is impossible to escape the political nature of law itself when even our founding documents are politically motivated.

b) History

In the 1950s, several Australian law schools taught legal history as a first year subject—although the quality of this teaching could be quite poor.[83] The subject involved the study of legal institutions, such as the rise of the Chancery Courts of Equity in England.[84] However, over time, the study of legal history became less popular.[85] Government reports began asking what the purpose was for studying legal history, with some even concluding that there was no purpose.[86]

With the increasingly vocational outlook of law schools in Australia in the 1990s, subjects like legal history were cut and replaced by the Priestley Eleven.[87] By 2008,

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[80] Keith E Whittington, 'Is Originalism Too Conservative?' (2011) 34(1) *Harvard Journal of Law and Public Policy* 31–3.

[81] Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1 <http://www.austlii.edu.au/au/journals/FedLRev/1997/1.pdf>; Jeffrey Goldsworthy and BW Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (Cambridge University Press, 2011) 1–5.

[82] Goldsworthy and Miller (n 81) 1.

[83] Michael Kirby, 'Legal History: Teaching Legal History in Australia—Decline and Fall?' (2009) 13(1) *Legal History* 6.

[84] Ibid.

[85] 'The Pearce Report'—Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (AGPS, 1987), as quoted in Kirby (n 83) 7–9.

[86] Ibid.

[87] Kirby (n 83) 1, 7.

only one out of 31 Australian law schools taught legal history as a compulsory first year course.[88] Discarding legal history as a compulsory subject decreased the early theoretical focus of law schools; it deprived students of an important opportunity to contextualise their studies at the start of their degree.[89] The lack of history also made students less critical about long-standing legal institutions; students did not know how those institutions were developed over time, nor of any inherent flaws they might have had at their inception or subsequently.

This section argues that legal history plays an important role in contextualising the law, in turning the law student's mind to a sharper form of critical thinking, and in helping students learn from past mistakes to imagine successful law reform in the future. This thesis does not argue for a traditional legal history to be taught in law schools (a history of legal institutions), but rather for a broader teaching of the history of law itself—including when the law has promoted injustices and wrongs. A proper history of law would teach students about when the law has been considered good and bad in society. It would thus allow students to critically examine current laws as they exist today.

i) The History of Unjust Law

The common idea of history can be summarised by the phrase 'history repeats itself' or the variation 'we must learn from the lessons of history'. These phrases do not adequately express the full utility of the study of history. History not only awakens one's sense of wrongdoing in the past, it also inspires people with stories of success. History teaches both failures and successes, as well as trials, tribulations and jubilation. It also helps contrast the current system with the systems that came before it, allowing people to break free from the constraints of believing that the world has always permanently been as perceived. Instead, history will allow people to perceive the world as an organic structure, a tree of infinite branches that spread outwards throughout time—which reveals everything, even the simplest of tasks, that was accomplished differently at a different point along the timeline.

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[88] William Ford, 'Table of the Offering of Legal History Courses at Australian Law Schools' (2008), as quoted in Kirby (n 83) 9–10.

[89] Kirby (n 83) 7.

In law schools, history can serve various purposes. First, it can teach students when the law has failed in the past and when the law has caused injustices or the destruction of the rights of certain groups (e.g., disadvantaged minorities).[90] In history, students can discover the various mistakes of the law, and they can try to avoid the 'repetition of [these] historical mistakes'.[91] Law can reveal the 'hiccups' that occurred along the way to legal efficiency. Legal history can reveal errors of judgement made by judges, Parliament and society by enforcing unjust laws, slavery and the suppression of women or Indigenous populations.[92] This prevents the common 'tendency of students to take what they are encountering for granted, as though it was inevitable and inexorable'.[93] If the law is taught as if it were 'complete', then students would not understand how it came to be how it is today or whether any alternative was possible.[94] Indeed, 'Some lawyers … teach so that students understand the injustices of our legal system and become motivated to reform the law'.[95]

Along with certain injustices, legal history can also reveal success stories—times when judges, Parliament and society rose above legal prejudices. On this topic, the message of legal realists is important. If law reflects social values, then the study of legal history can reveal how positive social values effected legal change over time.[96] The cause of these effects is the interaction of social movements with the law, which substantially changes the history of legal norms. Reflecting on this 'evolution' of law can help students perceive behind the law they are learning in class.[97] It can help them understand and question the law's basis in society and its changeability in the face of various social forces:[98]

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[90] Roscoe Pound, *The Evolution of Legal Education: An Inaugural Lecture Delivered September 19, 1903* (Thomson Gale, 2004) 15; Kirby (n 83) 13.

[91] Kirby (n 83) 13.

[92] Ibid.

[93] Christian G Fritz, 'Teaching Legal History in the First Year Curriculum' (2013) 53(4) *American Journal of Legal History* 380.

[94] Douglas E Abrams, 'Teaching Legal History in the Age of Practical Legal Education' (2013) 53 *American Journal of Legal History* 485.

[95] Anne MacDuff, 'Deep Learning, Critical Thinking and Teaching Law Reform' (2005) 15(1) Legal Education Review 125.

[96] Fritz (n 93) 380–1.

[97] Ibid.

[98] Ibid.

> Not to grasp this is … to fall into a particular kind of error, namely the belief that human nature is static, that its essential properties are the same everywhere and at all times, that it is governed by unvarying natural laws whether they are conceived in theological or materialistic terms … [that] rational men, in all ages and countries, must always demand the same unfaltering satisfactions of the same unfaltering basic needs.[99]

In contrast, the study of legal history allows students to question what the law is by observing what it was through the lens of what it could be. Students can learn how far law has served 'social ends, and how far it failed to do so'.[100] Legal history acts like all social sciences, as it allows students to 'question values—by testing traditions that build up over centuries and millennia'.[101] Using their knowledge, students can question laws that currently exist, including questioning whether they 'should continue to apply'.[102] Knowledge of the past offers imaginatively new solutions because a knowledge of history 'suggests possibilities of action' that would not have otherwise occurred to the student.[103] In brief, a legal problem can be resolved in far more ways historically then it can with the handful of solutions evident today.[104] As a practical point, this can help future lawyers manage clients; when lawyers require novel and creative solutions to legal problems that do not immediately come to mind, they might be found in the history books.[105]

Finally, legal history can teach students how 'our collective assumptions, some going back to the nation's founding, continue to drive decisions about law and policy'.[106] Without a clear knowledge of history, students will not know from where original

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[99] Isaiah Berlin, 'The Two Concepts of Liberty' in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969) 15.

[100] WPM Kennedy, 'Law as a Social Science' (1934) 3 *The South Africa Law Journal* 100.

[101] David Armitage and Jo Guldi, 'The Role of History in a Society Affected by Short-Termism' (2 October 2014) *Aeon Magazine* <https://aeon.co/essays/the-role-of-history-in-a-society-afflicted-by-short-termism>.

[102] Joanne Fedler and Ilze Olckers, *Ideological Virgins and Other Myths: Six Principles for Legal Revisioning* (2001), as quoted in Lesley A Greenbaum, 'Foundations of South African Law: Teaching Legal History from a Thematic Perspective' (2003) 9 *Fundamina* 95.

[103] Bertrand Russel, 'On History' in Bertrand Russel, *The Basic Writings of Bertrand Russell* (Routledge, 2010) 503.

[104] Ibid.

[105] Robert M Jarvis, 'Legal History: Teaching Skills Practicing Lawyers Need' (2013) 53 *American Journal of Legal History* 498–9.

[106] Molly Selvin, 'The History of Contemporary Law and Policy' (2013) 53(4) *The American Journal of Legal History* 503.

legal decisions were made or why they were decided.[107] Students who are critical of the historical origins of legal norms can also benefit from a well-rounded, in-depth discussion of this history and the 'impact' that these decisions and rules have had over time.[108]

ii) Methods

There are many ways to teach legal history in law schools. Legal history is sometimes treated as a 'skills course', and it is taught as if students would become legal historians.[109] Such a class involves the discovery of primary documents—'ship logs, birth and death certificates, maps, military and church records'—all to solve some legal problem.[110] In a skills course, legal history tends to be taught via a casebook, in which students learn past cases and how legal principles have evolved through cases over time (e.g., the evolution of contract law from the 1800s to the present).[111] However, legal history can equally be taught via an essay or creative task, in which students choose their own topic and write about the critical development of law over time.[112] This kind of task possesses an important critical element: it allows students to propose how the law was just or unjust, as well as propose various measures for reform.[113]

Another way to teach legal history is by way of a 'moot court'. In some ways, this can be considered a legal simulation task in which historical arguments are revised for the modern age.[114] In one relevant example, a tutor uses 'timed arguments' in which students argue their side of a case as a historical moot occurring at some distant

[107] Ibid 504–5.

[108] Ibid 503.

[109] Jarvis (n 105).

[110] Ibid.

[111] Ibid 499.

[112] Ibid 412.

[113] Ibid.

[114] Howard Bromberg, 'Teaching Legal History through Legal Skills' (2013) 53(4) *American Journal of Legal History* 489.

period in time.[115] In this task, students can act as questioners and litigants, while the tutor acts as a judge who provides competing and novel perspectives.[116]

As a final example, legal history can be taught through the history of legal education itself. A course could be constructed in a similar way to this thesis, in which it teaches the development of legal education from the Inns of Court in London to the Langdell case method.[117] From this history, students would learn: 'Where did the pedagogy for the legal education they are experiencing come from?' They could thus more easily and critically examine the education they are receiving.[118] In learning the history of legal education, students can similarly seek to change it, to make it more alike to a particular period in time or to resuscitate a teaching method that has been lost in history books.[119]

In all these methods, legal history can critically engage law students through a deeper and more contextual understanding of their discipline. In addressing the concern above that legal history might have no purpose in a law school today, one suggestion could be to pair compulsory first year subject in legal history with the teaching of statute law, in which the political science behind the creation of statutes is emphasised. Teaching legal history in this manner would solve three core deficiencies in the current curriculum: a lack of statute law, a lack of legal history and a lack of political science.

c) Philosophy

Law schools in common-law countries such as the US used to teach legal philosophy in introductory courses and lectures.[120] This was accomplished as a contextual background to a subject, often by referencing the philosophical theory of natural law.[121] The theory of natural law—developed in part by Aristotle and Aquinas—

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[115] Ibid.

[116] Ibid.

[117] Fritz (n 93) 382.

[118] Ibid.

[119] Ibid.

[120] Roscoe Pound, *Social Control through Law (*Archon Books, 1968) 4.

[121] Ibid.

presumed that all law had a 'moral [and] spiritual basis', if it did not come directly from God.[122] Aristotle believed that all law came from nature and that natural law was applicable 'in all communities'.[123] Aquinas believed that all law came from the 'nature of human beings' and that God or was human made.[124] By teaching natural law, law schools could introduce students to the notion that law had emerged from a philosophical foundation.

Despite its religious nature, natural law raised several secular philosophical questions about the law itself, including questions about right and wrong, justice and injustice and morality and immorality.[125] Natural law theory taught students to question why the law existed.[126] Students could question whether a law was just or unjust or they could question the law by referring to its philosophical foundations. Students typically learned that 'an unjust law is no law at all'.[127] Martin Luther King Jr stated as much when he served a term of imprisonment:

> How does one determine when a law is just or unjust? A just law is a man-made code that squares with the moral law, or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law.[128]

According to Martin Luther King Jr, a law must 'square' with its philosophical foundations to be just. Breaking the law would be justified if the law moved away from these ideals.[129] Further, breaking an unjust law would be justified because the

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[122] Simona Vieru, 'Aristotle's Influence on the Natural Law Theory of St Thomas Aquinas' (2010) 1 *The Western Australian Jurist* 117.

[123] Ibid.

[124] Thomas Aquinas, 'Divine Law, Natural Law, Positive Law' *Summa Theologiae* (1225) 362 <http://faculty.fordham.edu/klima/Blackwell-proofs/MP_C45.pdf>.

[125] Pound (n 120).

[126] Kent Greenawalt, 'How Persuasive Is Natural Law Theory' (2000) 75(5) *Notre Dame Law Review* 1650.

[127] St Augustine, as quoted in Martin Luther King Jr's letter from Birmingham Jail, 16 April 1963, 3 <https://web.cn.edu/kwheeler/documents/Letter_Birmingham_Jail.pdf> ('Letter from Birmingham Jail'); Greenawalt (n 126) 1651.

[128] 'Letter from Birmingham Jail' (n 127).

[129] Ibid.

breaking of law would serve a higher, natural law.[130] In this way, all law was subject to higher principles or guidelines that went beyond human action.

As society became more secular, natural law theory went out of favour in law schools in common-law countries—and with it, most of the teachings of legal philosophy, aside from a few elective courses.[131] Instead of rationalising that natural law was just one branch of legal philosophy, writers like Langdell and Kelsen insisted that all philosophy (aside from legal positivism) should follow suit and be excluded from the curriculum.[132] Law students were thus taught that law's authority was self-evident, that the creator of the law was not to be questioned and that law was to be enforced regardless of its character.[133] In this way, the spiritual doctrine of natural law was replaced by the spiritual doctrine of legal positivism.[134]

The philosophy of law is much more complicated than the original teaching of natural law would suggest. Questions of justice and injustice, right and wrong and morality and immorality have numerous potential solutions from numerous schools of philosophical thought.[135] Thinkers from various schools of thought—including Foucault, Nietzsche, Aquinas and Aristotle—had much to say about whether a potential law is just or unjust.[136] In the same way, philosophers have much to say about what the law actually is, from where it originates and how it should be enforced in society.[137] Courses can comprise readings to this end, prompting intellectual inquiry in the classroom.[138] Nim Razook proposed an 'Introduction to Law and Legal Reasoning' subject that could consider the philosophical foundation of legal concepts

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[130] Ibid.

[131] Daniel Mirabella, 'The Death and Resurrection of Natural Law' (2011) 2 *The Western Australian Jurist* 253; Csaba Varga, 'The Philosophy of Teaching Legal Philosophy in Hungary' [2009] (2) *Iustum Aequum Salutare* 165.

[132] 'The Pure Theory of Law' (n 116); Kelsen (n 116); Robert P George, 'Kelsen and Aquinas on the Natural-Law Doctrine' (2000) 75(5) *Notre Dame Law Review* 1626; Brian Bix, 'On the Dividing Line between Natural Law and Legal Positivism' (2000) 75(5) *Notre Dame Law Review* 1615.

[133] John Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995), as quoted in Bix (n 132) 1626.

[134] Mirabella (n 131).

[135] Varga (n 131) 170.

[136] Ibid.

[137] Tomasso Pavone, 'Philosophy of Law Outline', *Princeton University* (Web Page, 2015) <https://scholar.princeton.edu/sites/default/files/tpavone/files/philosophy_of_law_outline.pdf>.

[138] Ibid.

and thereby promote a student's 'general education'.[139] Teaching both theoretical and philosophical questions of law would extend well beyond the current law school curriculum, and it would address issues of purpose and perspective in law.

Restoring philosophy to the current law school curriculum would have three main benefits. First, teaching philosophy would allow law students to understand 'why they should do what they are told to do'.[140] Legal philosophy reveals from where the law originates and, more importantly, why it exists or why it should be enforced.[141] Instead of blindly learning the legal principles in cases, students could engage with the actual purpose of law: examining whether a law was just or unjust, fair or unfair or moral or immoral.[142] Second, the teaching of philosophy would draw to law students with a 'fresh cultural perspective'.[143] They would effectively have the ability to step outside themselves and observe the larger picture of the law, as well as escape their 'narrow and limited worldviews'.[144] Finally, the teaching of philosophy would allow students to question what they are being taught on philosophical grounds. Just as Martin Luther King Jr argued above, students could be empowered to question whether a law is just or unjust by using the fundamental principles of philosophy, rational thinking and critical thought.[145]

i) Law and Literature

Some academics have suggested that the conceptual basis of law should be discovered through the teaching of law and literature, in which philosophical issues would be revealed through literary texts.[146] Novels, short stories and plays are easily digestible materials that allow students to consider 'the place of justice in the legal system'.[147]

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[139] Nim Razook 'Leviathans, Critical Thinking, and Legal Philosophy: A Proposal for a General Education Legal Studies Course' (2003) 21(1) *Journal of Legal Studies Education* 1–3.

[140] Arthur Clutton-Brock, *The Ultimate Belief* (E.P. Dutton and Company, 1916) 21.

[141] Varga (n 131) 170.

[142] Claire McCusker, 'Between Natural Law and Legal Positivism: Plato's Minos and the Nature of Law' (2010) 22(1) *Yale Journal of Law & the Humanities* 88–91.

[143] James R Elkins, 'A Humanistic Perspective in Legal Education' (1983) 62(3) *Nebraska Law Review* 498–9.

[144] Ibid.

[145] 'Letter from Birmingham Jail' (n 127).

[146] Simon Stern, 'Literary Evidence and Legal Aesthetics' in Austin Sarat, Catherine O Frank and Matthew Anderson (eds), *Teaching Law and Literature* (Modern Language Association, 2011) 244–5.

[147] Ibid 246.

Literature offers students a 'moral education' that can support the students acquiring a vocational knowledge[148] Students also learn 'a capacity for empathy' regarding others, which can help them sympathise with future clients and prevent them from becoming disconnected from society.[149]

For example, a course on law and literature at Harvard Law School includes texts such as Kafka's *The Trial* and Shakespeare's *Merchant of Venice* and *Hamlet*, in addition to short stories by Tolstoy and Chekhov.[150] Each of these texts has something to say about justice, injustice and the enforcement of law on society. Writers like Kafka and Shakespeare typically provide the emotional background behind the law through 'imaginative moral stories'.[151] Such stories 'transcend any limited instrumental goals of legal education as professional training'.[152] Professor Simon Stern of the University of Toronto described his own law and literature course and the questions that he asks his classes:

> [Focusing] on two problems that have … occupied literary thinkers: the problem of criminal responsibility and literature's ability to document human thought and motives, and the question of privacy in criminal law, tort law and fiction.[153]

Basic black-letter law subjects like torts and contracts gain an important psychological dimension when they are read through literature.[154] A dry contractual case is revealed to have a fundamentally human motive: the pursuance of a personal dream or ambition or the reflection of human emotions of love, regret, anger and sadness. Fundamentally, literature allows law to be regarded as something that affects humanity rather than an abstract entity that acts upon hypothetical clients.

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[148] Ibid.

[149] Ibid.

[150] 'Course Catalog: Law and Literature', *Harvard Law School* (Web Page, 2021) <http://hls.harvard.edu/academics/curriculum/catalog/index.html?o=65681>.

[151] Elkins (n 143) 501.

[152] Ibid.

[153] Simon Stern, 'Law & Literature: Draft Syllabus' (Online Document, 8 November 2008) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297690>.

[154] Ibid; Elkins (n 143) 501.

Although common in the US, law and literature programs have 'only recently been adopted by Australian law schools'.[155] Typically, law schools teach them as an elective, much like the broader humanities subjects, which places it in a subservient position in the curriculum. For example, at UTS Law School, law and literature are taught as an elective that aims to offer students a chance to 'examine literary and legal responses to violence and trauma'.[156] This thematic approach to law and literature is common. Melbourne Law School teaches a similar course focusing on the 'professional challenges of law' that are observed through novels.[157] In either case, law and literature courses offer students the possibility to 'explore the distinction between moral neatness and legal certainty'.[158]

For example, is it moral for Shylock to demand a pound of flesh in Shakespeare's *Merchant of Venice*, for his debtor's failure to satisfy a debt?[159] If it is legal (in that time) but immoral (in effect), what right does the law have to enforce this immoral act? Can the law always enforce immoral actions, or should such laws be changed? Is the last-minute intervention from a female lawyer (an example of law rectifying for its own inadequacy) or a justification for law reform?

Such questions are extremely rare in the classic case method and problem question method, due to its strict application of law to facts. However, they reveal a unique teaching opportunity if pursued. Part of the allure of law and literature classes is the ease with which they provide students 'critical skills of analysis, research, communication and critical thinking'—skills that are said to form the broad part of a future career.[160] If law schools embrace the use of texts to explore legal thought, then this would have a significant ramification on the tone and scope of legal education.

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[155] Vince Chadwick, 'It's Law but Strictly by the Book', *Sydney Morning Herald* (online at 1 November 2011) <http://www.smh.com.au/national/education/its-law-but-strictly-by-the-book-20111031-1mrxd.html>.

[156] 'Handbook 2021: 76902 Law and Literature' *UTS* (Web Page, 2021) <http://handbook.uts.edu.au/subjects/76902.html>.

[157] 'Law and Literature (LAWS50121)', *The University of Melbourne* (Web Page) <https://handbook.unimelb.edu.au/2017/subjects/laws50121/>.

[158] Chadwick (n 155).

[159] William Shakespeare, *The Merchant of Venice*, ed Cedric Watts (Wordsworth Classics, 2000) 92.

[160] 'Handbook 2021: 76902 Law and Literature' (n 156).

Although the 'main purpose of a law school' might be to 'produce lawyers'. lawyers are also citizens'; they thus require this broader, general style of education to fit their unique role in society.[161]

d) Critical Thinking

In 1997 a US law professor wrote that 'law students today appear disinterested' in criticising the law.[162] Since then, the rise of the neoliberal legal education model has driven law students to focus on the use of law as a set of rules to be 'memorized, manipulated and applied' rather than 'explored, discussed, critiqued, and perhaps challenged'.[163] Law schools remain wedded to a vocational teaching of law based on the Langdelian model, and they lack the expansive nature of a truly critical liberal arts education.[164]

Critical thinking in legal education can be defined as:

> Disciplined reasoning about a legal statement, claim, argument, decision, rule or action, beginning with an accurate and detailed interpretation, progressing through a perceptive and thorough analysis and an appropriate, rigorous and balanced evaluation, and concluding with an original, persuasive and ingenious synthesis.[165]

Critical thinking is the ability to question what is being taught with a reflective and critical eye to agendas, biases or contrary viewpoints.[166] To be critical is to avoid an uncritical acceptance of what is taught, as well as to avoid the simple rote memorisation of factual information.[167] Critical thinking here can be contrasted with

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[161] Martha Nussbaum, 'Cultivating Humanity in Legal Education' (2003) 70 *University of Chicago Law Review* 271.

[162] Jeremy Cooper and Louise G Trubek (eds.) Educating for Justice: Social Values and Legal Education (Dartmouth, 1997) 26.

[163] Douglas J Goodman and Susan S Silbey, 'Defending Liberal Education from the Law' in Austin Sarat (ed), *Law in the Liberal Arts* (Cornell University Press, 2005) 17.

[164] Ibid.

[165] Nick James and Kelley Burton, 'Measuring the Critical Thinking Skills of Law Students Using a Whole-of-Curriculum Approach' (2017) 27(1) *Legal Education Review* 1.

[166] Kelley Burton and Judith McNamara, 'Assessing Reflection Skills in Law Using Criterion' (2009) 19(1) *Legal Education Review* 171, 172; Cynthia G Hawkins-León, 'The Socratic Method–Problem Method Dichotomy: The Debate over Teaching Method Continues' [1998] (1) *Brigham Young University Education and Law Journal* 14.

[167] Burton and McNamara (n 166) 172.

'surface learning', which 'emphasises the ability to memorise and list information'.[168] When compared, critical thinking is a deeper form of learning that involves reflection.[169]

According to the official 'qualifications framework', law students are not merely at university to learn facts, theories or technical skills alone; they are there to learn how to think independently about their subject matter (in this case, the law).[170] To become a professional lawyer is to understand the law well enough that one has an informed, personal opinion on it. Law schools should be in the business of creating independent thinkers who have achieved this ability to think for themselves, reject 'subordination to mere authority' and free themselves from bias or prejudice.[171] In the words of Justice Edelman: 'The primary aim of a law degree ought to be to teach students how to think. The goal ought to be to teach students to think about how the law operates and how its constituent parts tie together'.[172]

In law schools, critical thinking could involve an active criticism of legal institutions, laws and judges, including an admission of what is 'fallacious' in their reasoning and a pursuit of a personal opinion regarding what the law ought to be.[173]

Critical thinking poses several distinct benefits to 'law students … employers and for the wider community'.[174] First, and most importantly, critical thinking can offer students a greater 'understanding of legal doctrine'.[175] Second, critical thinking can help students identify the 'benefits and flaws' of a doctrine, and thereby the potential places for law reform.[176] When students learn to question the law, they also learn the

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[168] MacDuff (n 95) 126; Karen Hinett, *Developing Reflective Practice in Legal Education*, ed Tracey Varnava (Centre for Legal Education, 2002) 1–5.

[169] Hinett (n 168).

[170] James and Burton (n 165); Robert Morant, as quoted in Lord Atkin, 'Law as an Educational Subject' (1932) 27 *Journal of the Society of Public Teachers of Law* 28.

[171] James Louis Montrose, 'Law, Science and the Humanities' (1957) 4 *Journal of the Society of Public Teachers of Law* 62–3.

[172] James Edelman, 'The Role of Specialized Legal Knowledge' (Speech, Council of Australian Law Deans, 22 March 2012) 1.

[173] Justice Meagher, as quoted in Damien Freeman, *Roddy's Folly: R.P. Meagher, Art Lover and Lawyer* (Connor Court Publishing, 2012) 221.

[174] James and Burton (n 165).

[175] Ibid.

[176] Ibid.

law's agenda and whether it can change.[177] In this way, critical thinking engages students' creative imagination and perception of how the law relates to their own ideals of philosophy and sociology.[178] Finally, critical thinking allows students to admit their own flaws in logic and understand when something they say is faulty or incorrect.[179]

This notion of admitting one's own faults is ancient, deriving from Socrates, Confucius and, more recently, John Stuart Mill.[180] As an ancient Greek philosopher, Socrates believed that authority figures should constantly be questioned to ensure that those who called themselves 'wise were actually as wise as they claimed'.[181] Institutions and authority figures that are taken for granted as having knowledge (e.g., the law and politicians) were revealed to have flaws and deficiencies when they were questioned.[182]

Socrates believed that someone who was truly wise would admit their own deficiencies and understand the deficiencies in others.[183] Confucius believed the same, that the wise man is someone who knows the limits of their own ignorance.[184] In an educational setting, Confucian or Socratic critical thinking would require the constant questioning of authority or what Foucault termed the 'permanent critique' of the status quo.[185] Lecturers, institutions and factual content would all be examined by critical students who will search to find what is and is not true. The students' ability to consider all points of view, open themselves to criticism, admit their faults and correct what was faulty are all essential aspects of critical thinking.[186] As John Stuart Mill expressed:

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[177] Burton and McNamara (n 166) 173.

[178] Montrose (n 171) 61, as quoted in G Boehringer (et al), 'An Argument for Contemporary Legal Education' (1988) 5 *Australian Journal of Law and Society* 102.

[179] John Stuart Mill, *On Liberty* (Ticknor and Fields, 1863) 42.

[180] Ibid; Confucius, *The Works of Confucius*, ed Joshua Marshman (Mission Press, 1809) 115.

[181] 'Maieutics' in Plato, *Theaetetus*, tr R Waterfield (Penguin, 1987) 25–9.

[182] Ibid.

[183] Ibid.

[184] Confucius (n 180).

[185] John McGowan, *Postmodernism and Its Critics* (Cornell University Press, 1991) 138.

[186] Mill (n 179).

> In the case of any person whose judgment is really deserving of confidence, how has it become so? Because he has kept his mind open to criticism of his opinions and conduct. Because it has been his practice to listen to all that could be said against him; to profit by as much of it as was just, and expound to himself, and upon occasion to others, the fallacy of what was fallacious.[187]

Understanding what is wrong in one's own thinking and in the thinking of one's teachers and institutions is to gain an independent state of mind.[188] A critical view of education thus helps students form their own perspective on the world. The best method for encouraging students to think critically is to prompt them to question everything they are taught.[189] This could involve encouraging students to ask questions in class about the laws they are learning, about legal institutions or about any presumed assumptions regarding how the law ought to operate in society. Failing this, students can be asked questions that prompt them to consider a deeper analysis of the law and its systems.

The Canadian law professor, Harry Arthurs, used this technique in his classes. He asked various critical law questions aimed at positioning the 'rules in a broader context'.[190] This kind of critical questioning prevents students from passively absorbing legal content, and it prompts them to engage with that content actively.[191] Examples of such questions are cited below:

> Do the rules create new norms or codify existing ones developed originally without the law? Why do we have those rules and not others? Who benefits from the rules, and who is disadvantaged? Why are the rules interpreted in one way and not another? Do the rules matter at all?[192]

These questions tend to find the unasked assumptions that hid behind the legal order—specifically that assumption that the law is objective, that it benefits everyone and that all laws matter. Arthurs's method involves confronting students directly with

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[187] Ibid.

[188] Ibid.

[189] Ibid.

[190] David J Doorey, 'Harry and the Steelworker: Teaching Labor Law to Non-Lawyers' (2008) 14 *Canadian Labour and Employment Law Journal* 109.

[191] Ibid.

[192] Ibid.

questions about law that deconstruct these assumptions.[193] To this end, Arthurs has remarked on his teaching method as so: 'Law ought to be understood by and subject to the critical scrutiny of as many people as possible'.[194]

At least three Australian academics have emphasised the necessity for critical thinking to be spread throughout the entire law school curriculum.[195] Ardill suggested that 'critique must be embedded throughout the curriculum with a proper introduction during first year and then appropriately reinforced'.[196] Without an entire curriculum approach, students might become disengaged from the critique of law or they might regard the critique of law as superfluous to the central aim of law school (to learn law and apply it to a set of facts).[197]

e) Enforcement

Instead of simply learning and scientifically applying the law, law students should be directly confronted in class with the moral, philosophical and sociological effects of law on society, including how the law has been enforced in the past. Students should be directly confronted with questions such as 'why do you think the law is the way it is?' and 'how do you think the law affects people in real life?', which practically address the effects and inherent problems involved in creating, obeying and enforcing the law.[198]

Lecturers can provide context to the law in a way that allows students to see the issue from the perspective of other 'voices' that are not typically heard in the classroom (e.g., Indigenous, migrants).[199] This ensures that what law students learn is 'relevant'

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[193] Harry W Arthurs and Consultative Group on Research and Education in Law, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Social Sciences and Humanities Research Council of Canada, 1983) 48.

[194] Ibid.

[195] James and Burton (n 165); Allan Ardill, 'Critique in Legal Education: Another Journey' (2017) 26(1) *Legal Education Review* 139.

[196] Ardill (n 195).

[197] Ibid.

[198] For an example, see 'Freedom of Information Legislation: Obscuring the Normative Quality of the Law' in Lucy Maxwell, 'How to Develop Law Students' Critical Awareness? Change the Language of Legal Education' (2012) 22(1) *Legal Education Review* 99.

[199] Patricia Easteal, 'Teaching About the Nexus between Law and Society: From Pedagogy to Andragogy' (2008) 18(1–2) *Legal Education Review* 163, 166.

to the real world, as how the law has been enforced in various groups in society (and the consequent effects) has been revealed.[200] By questioning the enforcement of law, students can 'develop intellectual insights' into how the law operates in practice.[201] This can help them develop their own independent 'standards of justice, of effectiveness, by which legal outcomes and doctrines may be judged'.[202]

Similar questions should be asked—those with a view towards critical thinking. Role-plays or class skits can be used to portray realities of how the law affects various parties, in which students can play the part of a 'loser' or 'winner' of the legal system or case.[203] Examples of such role-plays already exist in the areas of civil procedure, matrimonial disputes and dispute resolution and mediation, in which innovative lecturers create legal simulations that enliven such content for students.[204] In contrast, the 'mere regurgitation off acts' should not be an option.[205] Actual intellectual engagement should be encouraged.[206]

A course on the enforcement of law can also provide 'a general view of legal ends and aims, with the specific purpose of purging the student's mind entirely of the dangerous tendency to consider law a study of unrelated duties and rights'.[207] Instead, students can gain the ability to 'habitually … consider … the social advantages on which the law must be justified'.[208] Further, they can become more hesitant about simply applying legal principles.[209] By observing how law affects society, students can 'see that really they were taking sides upon debatable and often burning

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[200] Ibid.

[201] Arthurs and Consultative Group on Research and Education in Law (n 193) 49.

[202] Ibid.

[203] Easteal (n 199) 168–70.

[204] Jacqueline Horan and Michelle Taylor-Sands, 'Bringing the Court and Mediation Room into the Classroom' (2008) 18(1) *Legal Education Review* 201; Richard Ingleby, 'Translation and the Divorce Lawyer: Simulating the Law and Society Interface' (1989) 1(2) *Legal Education Review*.

[205] Easteal (n 199) 168–70.

[206] Ibid.

[207] Kennedy (n 100).

[208] Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 468.

[209] Ibid.

questions' in their black-letter law classes.[210] It is often the case that what at first seemed objective was, in reality, subjective and deeply political.

Burton and McNamara asserted that law students should extend beyond critiquing the enforcement of law and consider whether the law 'can be improved'.[211] Instead of simply applying the law, law students can be offered the chance to challenge the existing law by prompting questions of law reform before writing down such suggestions. Such a task could come in the form of an essay or other critical thinking tool.[212]

Law students should not be allowed to 'stand aside' and wait for a legal argument to reach its conclusion. They should be actively engaged in the public debate of the latest issues of law.[213] This attributes a new purpose to students, in which they are intrinsically engaged in their surrounding community rather than in the current role as abstract arbiters of hypothetical disputes. Just as Justice Kirby was engaged in the fight for gay rights in the 1980s, law students today should be openly involved in questioning outdated legal norms that defy basic principles of justice, fairness and morality.[214] Such questions should be enhanced by a consideration of the law's prior historical context, as well as of how law has been enforced in the past—specifically in the most crucial areas in which basic rights and duties have been changed or challenged.

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[210] Ibid.

[211] Burton and McNamara (n 166).

[212] Margaret Thornton, 'The Market Comes to Law School', *The Australian* (online at 13 September 2011) <http://www.theaustralian.com.au/higher-education/opinion/the-market-comes-to-law-school/story-e6frgcko-1226134877209>.

[213] Ibid.

[214] 'Now History Will be the Judge', *Sydney Morning Herald* (online at 31 January 2009) <http://www.smh.com.au/articles/2009/01/30/1232818725589.html?page=fullpage>.

Conclusion

Law schools in Australia are at a crossroads. They can continue as they have been during the last century, in which they teach law as a vocation and pursue profits over principles, private practice over public purpose and graduate attributes over intrinsic human values. They can continue to sideline their students' moral, ethical and critical perspectives by moving these perspectives outside the scope of the curriculum. They can continue to teach law as apolitical through black-letter assessments that turn the hearts and minds of students away from social justice. They can continue teaching law through the case method and ignore new and alternative ways of understanding the law in context. They can continue to train students for their place in the hierarchy, while dismissing concerns about inequality, the disadvantaged and the poor. They can continue to ignore pertinent critiques about the law's injustices on issues of race, gender, class and sexuality.

Alternatively, they can turn in a new direction, break away from the neoliberal agenda of the present day and adopt a liberal arts curriculum that places the law in its proper context. This thesis has argued for a liberal arts law school curriculum in Australia—one that is centred on a critical approach to legal education, in which students learn the law's origin, intent and effect on society. The proposed curriculum combines ideas of teaching law from history and from modern innovation, along with education theory, humanities education and critiques from past and present law students. Specifically, this thesis proposes new and alternative teaching methods, assessments and subjects that differ from traditional recommendations in their scope and breadth. This thesis is ultimately an attempt to transform the rhetoric regarding subversive legal education into an actionable plan.

A true liberal arts curriculum in law would teach students to think for themselves, develop their critical and analytical skills, their sense of justice and injustice, their ability to propose law reform and their hard and soft transferable skills. Specifically, the curriculum would contextualise the study of law in a broader study of politics, history, civics, psychology and philosophy by preparing students to become well-rounded citizens in the broad range of jobs they will obtain after graduation.

Achieving this vision requires significant changes to law schools, such as discarding the current compulsory subjects (the Priestley Eleven) in favour of electives and/or humanities subjects. The curriculum also requires an overhaul in its content, assessment methods and modes of measuring outcomes. Legal principles should be contextualised in class through philosophical questions about the law. Finally, the Socratic method should be reversed, in which it allows students to ask questions of their professors, judges and the law itself. These recommendations will now be covered in greater detail, including a discussion regarding their means of implementation.

Recommendation 1: Abolish OR Substantially Reduce the Priestley Eleven

Any significant change to legal education in Australia would require the Priestley Eleven subject requirements to be discarded in favour of a more refined and shorter list of core subjects.[215] The Priestley Eleven currently act as a 'dead hand' on curriculum reform that prevents law schools from innovating and experimenting with new subject choices for students.[216] Heavy with black-letter law subjects, the Priestley Eleven prevent students from properly contextualising the law, given its relation to the humanities and social sciences.[217] Despite objections to the contrary, current law schools do not 'experiment' within the framework of the Priestley Eleven. The evidence demonstrates that most law schools teach the subjects as individual units (as 11 units throughout a law degree).[218] One-off experimentations in which the subjects were merged, such as that of Macquarie Law School in the 1970s, have been met with harsh resistance.[219]

As a starting point, LACC's own 2015 observations can be implemented, by reducing subjects that already appear in PLT training courses at graduation, such as civil

[215] Han (n 1); Cf Sampford, Blencowe and Condlin (n 1).

[216] Han (n 1); Cf Sampford, Blencowe and Condlin (n 1).

[217] Han (n 1); Cf Sampford, Blencowe and Condlin (n 1).

[218] Richard Johnstone and Sumitra Vignaendra, 'Learning Outcomes and Curriculum Developments in Law' (Report, Australian Universities Teaching Committee, 2003) 93 <http://www.cald.asn.au/docs/autc_2003_johnstone-vignaendra.pdf>.

[219] PE Nygh, 'Memorandum to: Law School Staff', as quoted in Gill H Boehringer, 'Historical Documents' (1988–1999) 5 *Australian Journal of Law & Society* 57.

procedure, company law, ethics and evidence.[220] After this, subjects can be paired in traditional pairings, such as contracts and torts and administrative law and constitutional law. The results are expressed in the following list of five subjects:

- **Administrative Law and Constitutional Law**
- **Contracts and Torts**
- Criminal Law and Procedure
- Equity
- Property
- ~~Civil Procedure~~
- ~~Company Law~~
- ~~Ethics~~
- ~~Evidence~~

Recommendation 2: Create New, Humanities-Based Electives

One step beyond abolishing the Priestley Eleven is suggesting the addition of a few elective units that can augment the traditional leftover subjects. In this case, the elective law units could be of a non–black letter nature, and they could allow students to contextualise their study of law within the broader humanities. This builds on the broader conclusions that were reached above—that law should be linked to politics, history and philosophy, including specific subjects in critical thinking and the effect of law on society (titled 'enforcement of law'). Instead of simply learning the law scientifically, law students should be directly confronted in class with the moral, philosophical and sociological effects of law on society, including with the knowledge of how the law has been enforced in the past (unjustly or otherwise; titled 'History of Laws'):

- Administrative Law and Constitutional Law
- Contracts and Torts
- Criminal Law and Procedure
- Equity

[220] 'Review of Academic Requirements for Admission to the Legal Profession' (2015) 5.

- Property
- **Political Philosophy**
- **History of Laws**
- **Legal Philosophy**
- **Critical Thinking**
- **Enforcement of Law**

Recommendation 3: Teach the Law in Context

Existing subjects could also move the distance in terms of teaching law in context. Law schools should move away from the concept of 'pure law', or the teaching of law as an isolated discipline, and towards an interdisciplinary education. In practical terms, this signifies that subjects such as contracts and torts need to show the political and historical origin of the law in class, in addition to how that law affected society. This can be linked to current events that affect the social fabric of the nation. From the research above, class discussions are an excellent method for facilitating this kind of learning.[221]

Recommendation 4: Abolish OR Amend the Case Method

The case method teaches students to separate their own innate sense of morality and ethics from the law and the outcomes of legal cases.[222] Instead of simply forcing students to learn and apply the law, they should be empowered to question the law.[223] This could be accomplished by abolishing the case method entirely and replacing it with critically engaging essays and reflective tasks. Conversely, the case method could be sustained if a third, follow-up question is added to every case problem: what is the effect of this decision on the individuals concerned and society? Extending the case method in this manner would force students to reconcile with how law has been enforced on society, as well as with the psychological toll of legal decisions and the long-term ramifications of legal injustices.

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[221] 'Critical Analysis for Law Students', *Critical Analysis for Law Students* (Web Page) <http://individual.utoronto.ca/dubber/CALreading.html>.

[222] Walsh (n 15) 15.

[223] Ibid.

Recommendation 5: Reverse the Socratic Method

In a truly Socratic law school, students would be instructed to ask questions to those in authority instead of answering them. Nothing would be beyond a student's questioning, especially in terms of claims of authority or expertise alone. Students would be empowered to question the wisdom of professors, judges, politicians and the law itself, and they would learn how to unpack the hidden values, ideological motivations and the philosophical foundations of legal principles. By questioning the origins of law, students would learn to refine their critical thinking and analytical skills in a manner that Langdell himself intended to teach, though never fully achieved.

Recommendation 6: Reduce Class Sizes to 15 or Fewer

The personal small class approach is considered essential for a critical and liberal education.[224] Limiting classes to 15 students or fewer would greatly facilitate class discussions, boost student learning and allow for critically engaged and in-depth teaching that extends beyond surface-level absorption.[225] This would effectively signify abolishing 200 + person lectures, leading to the opposite outcomes of passive absorption, uncritical learning and disengagement.[226]

Recommendation 7: Introduce Critical Thinking Assessments

Critical thinking can be assessed in class through critical questions about the implications of a law, a student's view of the law or the different ways of perceiving a law (e.g., a statute, case or political decision).[227] Critical thinking assessments should encourage students to challenge 'assumed wisdom' about a specific law, the motivation for the law and who benefits or loses from the law.[228]

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[224] Kennedy (n 100) 101.

[225] Ibid.

[226] Jonathan Price, 'Size Matters: Lessons Learned at Oxford', *Leiden Law Blog* (Blog Post, 14 February 2013) <https://leidenlawblog.nl/articles/size-matters-lessons-learned-at-oxford>.

[227] Benson R Snyder, *The Hidden Curriculum* (MIT Press, 1971) 50, 62–3.

[228] Lucas Lixinski, 'Critical Thinking in Legal Education: What? Why? How?', *Law School Vibe* (Blog Post, 23 November 2016) <https://lawschoolvibe.wordpress.com/2016/11/23/critical-thinking-in-legal-education-what-why-how-by-lucas-lixinski/>.

Questions asked to students could include:[229]

- Why is the law this way?
- Who stands to gain? Who loses?
- What does the law as is, miss?
- What are its blind spots?
- What do other people do when they face similar legal problems, and why? Can we learn lessons there?
- When was this case decided?
- What was the broader context of this case?
- What was the court/law-maker trying to say between the lines?
- Who is the court/law-maker? (White, male, property owner)?
- What is this legal statement/assertion/rule a reaction to?
- How does the private affect the public (and vice versa)?

Recommendation 8: Introduce Reflective Thinking Assessments

Students can be asked to present a reflective statement on the law they have learned in class and their emotional responses to the law and how it affects society.[230] They can be asked to reflect on specific cases that have been covered in class or more generally about the enforcement of the law or the costs and benefits of the law on certain parties or individuals.[231] This could include how the law emotionally affects the students or their clients or the role of the lawyer in a more general sense. It might also be possible for reflections to be contained in an ongoing journal or diary. That way, students can track their opinions and reactions to the content they are learning in law school—which empowers themselves to stand at a distance and gain a critically reflective eye.

Recommendation 9: Introduce Law Reform Assessments

Students can be given the chance to propose, write and collaborate on law reform proposals in class. The law reform assessment could be both rigorous and

[229] Ibid.

[230] Hinett (n 168) 12.

[231] Georgina Ledvinka, 'Reflection and Assessment in Clinical Legal Education: Do You See What I See?' (2006) 9 *Journal of Clinical Legal Education* 41.

comprehensive. Students could begin with a broad-ranging critique of a current law that is seen as ineffective in some way:

- Questions could be asked regarding whether the law is effective, in line with it being known to the public, acceptable in the community, able to be enforced, stable, able to be changed, applied consistently and able to resolve disputes.[232]
- Questions could be asked regarding whether the law is living up to its social aims, in line with it benefiting the public, serving people's wants or needs, serving the need of a democratic society or in some way keeping up with changing social standards.[233]
- Questions could be asked regarding procedural justice, and whether the law is fair, transparent, efficient, accessible, impartial, with a right to due process, a hearing and an appeal.[234]
- Questions could be asked regarding distributive justice, whether the law ensures equal opportunity and/or outcome between people under the law[235] and if inequalities benefit the weakest in society.[236]

Once the law is critiqued in such a way, students should have the chance to build and to create anew. Here, students should be empowered to suggest amendments, the abolition of the existing law or the introduction of a new law—that addresses the concerns raised by the questions asked above.

Recommendation 10: Introduce Role-play/Simulation/Gamification Assessments

Students can be given the opportunity to engage in simulations or role-plays in class. If necessary, this can be facilitated by gamification, virtual reality or traditional video gaming. Law schools already have simulation activities in the form of mock trials and treaty negotiations. However, these could be extended to include mock general assemblies, dispute resolution and informal sentencing practices, such as circle

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[232] The Law Society of Western Australia, 'Characteristics of an Effective Law' (2015).

[233] Kennedy (n 100).

[234] Tom R Tyler, 'Procedural Justice and the Courts' (2007) 44 *Court Review* 30–1 <https://www.courtinnovation.org/sites/default/files/media/document/2018/Tyler%20-%20Procedural%20Justice%20and%20the%20Courts%20-%20Copy.pdf>.

[235] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 3.

[236] Ibid.

sentencing. It may also be possible to bring in external activities, like Model United Nations, into law schools, to add a further extension of learning into the international arena.

These recommendations, taken together, would form a liberal arts curriculum that would fundamentally transform law schools in Australia. Far from teaching a vocational, neoliberal education in law, this new curriculum would help law schools challenge their students to think for themselves, think critically about the law and play an active role in their society. A broad education would facilitate students in the multitude of career paths they seek, but more essentially, train them for their role as democratic citizens, as moral agents and as instigators of law reform. It is this vision, this higher calling, which law schools should dedicate themselves to, moving beyond corporate profit and towards a focus on critical engagement, social justice and public advocacy. Australia needs an actively engaged legal community, and our law schools are in a prime position to deliver on this function.

Law schools have an opportunity here to change legal education for the better and give students the kind of education they deserve. One that empowers them rather than belittling them, one that challenges them rather than converts them, and one that seeks to reveal the true reality of law itself: its political, social, economic and historical nature. For much of their modern history, many law schools have remained conservative in instigating change and adapting to new styles of education. There is hope, however, in the voices of students and dissenting lecturers, in paving a new way forward.

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