INTRODUCTORY ESSAY

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For a number of reasons legal education provides one of the great ironies of academic and professional life in Australia. There is no doubt that lawyers have done very well in the deregulated economies of the West, and Australia is no exception to this trend. The material attraction of the law is such that admission requirements to enter law schools are among the toughest of all the options available in tertiary education. Historically, the law and its practitioners have been seen as conservative forces in Australia. Given this conservative heritage and the considerable financial rewards open to lawyers one would expect legal education to be a quiet backwater in the academic world; as, indeed, it has been for most of its history in Australia. Yet there is little doubt that law faculties are those places in academia which are in greatest ferment. The media interest in Macquarie University Law School is probably unmatched in the history of Australian tertiary education[1]; and even in the prestigious and long established law schools at the Universities of Sydney and Melbourne it is clear that the days of unquestioned and peaceful acceptance of established practices and beliefs are over. When a NSW Court of Appeal judge expostulates at a public function that students at Macquarie are taught sexual techniques and that one prominent academic at the Sydney Law School is a communist with no knowledge of law, it is clear that something is up in the world

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1 For an analysis of some of the media coverage, see Boehringer, *"In One Corner, Representing" ... The Media, Legal Education and University Governance in the Shadow of Pearce and Dawkins,* in CROSSROADS: HIGHER EDUCATION AND THE LEFT TODAY 284 (S. Job, M. Hartwig and R. Sharp eds. Left Alliance 1990).

of legal education. The present issue of the Australian Journal of Law and Society enters, with trepidation, into this world.

To write on legal education seems both easy and difficult. One only has to peruse the professional journals, or read the ramblings of some professional commentators, to realise that almost anyone interested in the law has a strongly held view on how law schools should operate. More serious reflections on legal education, whilst displaying care and concern, have not always advanced insights. For example, a recent article by John Wade, written for overseas readers and aimed at giving them an account of the current state of legal education in Australia, rarely moves beyond the anecdotal.[2] Despite this Wade's experiences and thoughts are useful because he clearly identifies the disquiet and unease (or angst) suffered by students and teachers in Australian law schools. He points out that many law teachers are unhappy with their work, are often worried by the content and method of teaching in their law schools and are unhappy about the direction in which most of their students are aiming - to life in the corporate law firm. He convincingly describes the ability of many students to avoid the scholarly part of their education in preference to acquiring the social skills and contacts necessary for their future careers. He laments the low esteem in which academics are held by many students and argues that it is unlikely that law teachers have an important role to play in shaping the personalities, hopes and desires of their students. Notwithstanding these considerable concerns he ends his article on a positive note.

> A litany of bleak comments may lead us, however, to miss the strengths of current activities within law schools. Law schools continue to achieve the modest goals of giving their already talented students the skills of rule manipulation, legal research, and opinion writing, an understanding of legal terminology, and conflicting values, interests, and rules in some areas of substantive law.[3]

At no stage does the writer recognise that the 'positive' features outlined are the subject of vigorous debate both as to their relevance or sufficiency as 'education' and to the very possibility of some of them, rule manipulation, for example, being a form of knowledge. In other words, he recognises there is something wrong but cannot go further than this.

Wade's response to what he sees as the sorry state of the relationship between academics and the profession and the generally low status accorded to scholars by students (and practitioners) is to suggest that there should not be a problem, since practitioners and academics could and should meet and discuss law. This would result in both sides discovering that there is no essential difference in what they do.[4] Wade does not seem aware of the possibility that there is, indeed, a fundamental difference between university teaching and scholarship and the world of profes-

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2 *See* Wade, *Legal Education in Australia - Anomie, Angst and Excellence*, 39 J. OF LEGAL EDUC. 189 (1989).
3 *Id.* at 202.
4 *Id.* at 194-5.

sional legal practice. It may well be that the difficult relations he reports have arisen because the easy and traditional deference accorded to senior practitioners, especially in the judiciary and the bar, by university law teachers is now being withheld, with the result that practitioners have reacted by claiming that teaching standards have fallen and that 'real' lawyers are not found in academia.

Wade can almost be regarded as a barometer of the feelings of legal academics. One senses a deep unease and a dissatisfaction with the status quo but neither analysis nor cure is offered. In contrast, Charles Sampford's series of articles on legal education is impregnated with enthusiasm and optimism.[5] Give Sampford a free hand and he would confidently set about the task of creating (or re-creating) a law curriculum. It is not proposed to evaluate his effort on its own terms by entering into a discussion as to the relative merits of including particular aspects of the law as either core or optional subjects, or as to their proper place in a four year law course. This is not because such a task lacks merit. Indeed, the opposite is true; courses have to be arranged, and particular subject matters (and their interrelationships and order of study) have to be chosen and developed.

The problem with an approach like Sampford's lies in the notion of being given a free hand.[6] Any attempt to understand legal education in Australia cannot be based on an implicit belief that its history is unimportant. Our system of education has a particular history - craft based, heavily influenced by English ideas, firmly under the control of the legal profession, anti-intellectual in the way described by Atiyah,[7] provincial and dominated by part-time teachers. Those factors have shaped our university law schools and projected 'cures' or 'ideal curricula' which ignore them bear no relationship to the here and now. A law school 'created' according to the ideas of Sampford, however convincing his ideas are, would in reality turn out to be a pale copy of other mainstream law schools in Australia. Subjects might have different names and be studied in different years but, the essential factors which have shaped Australian legal education, although ignored, would inevitably work to control such a school. The old aphorism would hold true: those who ignore history are doomed to repeat it. As we will see below, it was an attempt to create an ideal law school without understanding the history of legal education in Australia which led to the "crisis" at Macquarie University.

Justice Gummow's recent foray provides yet another perspective on our topic.[8] He argues that several things have to be done to improve legal education. First, students have to be taught the techniques of statutory interpretation, these techniques to be found in the law reports. This would replace what he sees as an unhealthy concentration on case law (which, of course, is to be found in the law reports). Second, students should be given a thorough grounding in legal history, which

5 *See* Sampford, *Rethinking the Core Curriculum*, 12 ADELAIDE L.REV. 38 (1989); *see also* Sampford & Wood, *Theoretical Dimensions of Legal Education - a Response to the Pearce Report* 62 AUSTRALIAN L.J. 32 (1988).
6 The criticisms made here owe their origins to Angus Corbett.
7 *See* P. ATIYAH, PRAGMATISM AND THEORY IN ENGLISH LAW (Stevens 1987).
8 *See* Gummow, *Legal Education*, 11 SYDNEY L.R. 439 (1988).

means for him a sound grasp of the doctrinal development of rules of law. This would allow students to have a proper basis for deciding what the law "ought" to be. Thirdly, in order that students "be given the opportunity to obtain some degree of sophistication in their grasp of the complex of normative systems that together make up the legal structure", they ought to be exposed to the laws of more than one jurisdiction. Fourthly, students should have emphasised to them the doctrinal certainties in an area, as practice will involve such certainties rather than the unusual and uncertain beloved of many examiners. Fifthly, there should be no deprecation of "practical" subjects like taxation since they are as amenable to scholarly investigation as any of the other areas of law. Sixthly, he believes that law is best taught by those who have practiced. Finally, Gummow argues that students should be exposed to the decisions of jurisdictions other than Australia and the United Kingdom and emphasises, in particular, the vast potential offered by American case law.

Gummow's prescriptions have been outlined at length because it is rare to see such a confident and self assured piece of writing on any area of law.[9] It is evident that the judge suffers no uncertainties in his thinking on legal education and he is to be praised for his openness and forthrightness. However, certainty, while a virtue, is not the end of the story. As Henry Miller said of a friend:

> Grover Watrous was the personification of certainty. He may have been wrong, but he was certain.[10]

Gummow writes as if there are no alternatives to his understanding of law and legal education. No mention is made of the Legal Realist attack on formalism in legal reasoning, nor of more contemporary critiques by the Critical Legal Studies Movement, Feminist legal scholars or writers sympathetic to the Law and Economics school of thought.

The easy task of "learning" the law is held to be impossible by all these groups who, from their particular perspectives, argue that rules are not neutral entities but the expression of dominant visions of the world, gender or vested economic interests. To "understand" the rules one has to understand the forces which shaped them and this requires investigation outside the law reports. Judge Gummow, a long term, part-time academic, either does not grasp this or does not think these claims worthy of comment. This is not to say he should agree with anything written by representatives from the above schools of thought. That should go without saying. However, it should also go without saying that scholars should be aware of, and have a response to, developments in their field. All of the above schools of thought have numerous adherents in the U.S., Europe and Australasia and their writings, and the responses to them by "orthodox" scholars, are voluminous. There is no excuse for ignoring them.

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9 It is not surprising that another piece of writing with similar features is co-authored by Gummow. *See* R. MEAGHER, W. GUMMOW & J. LEHANE, EQUITY DOCTRINES & REMEDIES (Butterworths 1984).

10 H. MILLER, THE TROPIC OF CAPRICORN 159 (Panther Books 1966).

Gummow's failure to provide a considered response to these "unorthodox" scholars is lamentable but illuminating. His article is useful, not because of its contents but for its omissions. It is apparent that he *knows* what there is to know about law and that is that. Like the early opponents of the Copernican view of the solar system who rationalised their refusal to look through Galileo's telescope on the ground that if they saw something which contradicted their beliefs it would be because their eyes were deceiving them,[11] Gummow does not have to deal with "unorthodox" views because he knows they must be wrong. If any one thing can be said to explain the current "crisis" in legal education it is the manifestation of this attitude.

Perhaps an even more fundamental aspect of Gummow's view of legal education is that it be unambiguously a professional, legal education. For Gummow, one goes to law school to learn law, which then enables one to practice as a lawyer, that is, as a solicitor or barrister. Indeed, it appears that practice for Gummow means working in a large firm of solicitors.[12]

The first article in this issue takes up this very point. Patrick Kavanagh examines the history of legal education in New South Wales and the assumptions of those responsible for the regulatory regime now in existence. He sees two undesirable tendencies influencing the nature of law schools. First, and possibly strongest, is the traditional notion that law schools are essentially training colleges for solicitors and barristers. As we have seen, this is a view which for some does not even require defending, so natural does it appear. The second notion is instrumentalist and sees legal education as a tool to be used for the modernisation of society. Advocates of this view, it is argued, included the two founders of Macquarie Law School. They saw the role of the modern law school as the production of lawyers who can fulfil society's needs. Ultimately the two conceptions condemn legal education to a training role and implicitly, at least, do not conceive of the possibility of any intrinsic merit in a scholarly appreciation of the law. Kavanagh argues that we should wrench the university study of law away from such instrumentalist concerns and place legal scholarship and teaching back into the university tradition which assumes that knowledge, and the search for it, are important in themselves and not merely because they can directly contribute to perceived economic or technological aims.

It is this conception of legal education which explains the gulf between Kavanagh on the one hand and Gummow and Wade on the other. If one believes a law school is a training academy for budding practitioners it is almost inevitable that one will either espouse views similar to the judge or suffer intellectual angst like Wade. A fervent believer in "practical" legal education will want to teach in a fashion which will help a student turn into a lawyer. But, unless the curriculum is to become a four

11 *See* A. KOESTLER, THE SLEEPWALKERS : A VISION OF MAN'S CHANGING VISION OF THE UNIVERSE 374 (Penguin 1964).

12 *See* Gummow, *supra* note 7, at 441.

or five year exercise in drafting and office management, something has to be found to fill in the time. After all, it is undeniable that the best (and perhaps only) place one can learn to be a practitioner is in practice.[13] Thus teaching legal doctrine seems a good substitute. It does not matter that any practicing lawyer will gleefully explain that there is more to law than is found in the books. That, after all, can be picked up in practice. For those like Gummow, a law school is a place where the nuts and bolts can be taught, leaving the real skills and art to be acquired in the practice of law.

The emphasis on doctrine, taught through case law, gains impetus from another direction, ironically enough, it is from the scholarly tradition of the university. It is arguable that the legal profession, in the common law world at least, enlisted the aid of the university in its great professionalisation drive. A degree was necessary to give the legal profession a sophistication and status concomitant with its belief in itself as a profession. A degree which concentrated on the clerical and administrative aspects of legal practice might not have had enough credibility to confer upon the profession the desired academic status. A concentration on case law was bookish enough to appear genuinely academic, yet was 'practical' enough to satisfy the perceived demands for knowledge relevant to practice. The needs of legal academics were also catered for in this regime. University tradition required scholarship and this could never have been satisfied by learned treatises on the clerical and administrative duties which make up the bulk of a practicing lawyer's work. Writing lengthy tomes analysing and categorising (and occasionally criticising) judgments could pass muster as contributions to learning.

The tension in such an arrangement is always present. From the profession there is constant sniping about graduates who have no idea of the practical working of the legal system. (This is evident even in Gummow's otherwise relaxed description of legal education). On the other hand, those in legal academia who are desirous of participating in the scholarly life of the university are placed in an impossible situation. If they reject traditional legal scholarship as a fraud but accept the notion of professional legal education there is nowhere to turn. Except, of course, to angst, as does Wade. It may not be going too far to argue that this is the fundamental question in legal education in the common law world. Once the shackles of training for the profession are broken it is open for law schools to rejoin the academic world and begin the badly needed scholarly investigation of law. Unless they are broken, many law books will be written but very little will be added to our understanding of law.

What form would an unshackled law school take? Hilary Charlesworth provides one example in her article on a critical legal education. The Critical Legal Studies

13 *See, e.g.*, R. Meagher, *The Scope and Limitations of Legal Practice Courses : Should They Replace Pupillage?* (paper delivered to the 7th Commonwealth Law Conference, Hong Kong 1983).

(C.L.S.) movement is by now well known for its attacks on formalism in legal reasoning, its general advocacy of the indeterminacy of rules and what appears to many to be a nihilistic attitude to law and authority. Such has been the antipathy aroused amongst traditional legal scholars that demands for the expulsion, voluntary or otherwise, of C.L.S. scholars from law schools have been published.[14] Charlesworth shows that a law school curriculum could be built around the insights provided by this movement; one that would allow a more scholarly approach to the study of law. Paradoxically, such an approach would also provide better prepared graduates for the profession because they would have a sounder understanding and appreciation of law than is possible under case law dominated regimes. One searches in vain in the writings of traditional scholars, like Gummow, for any indication of such an alternative.

Whilst Charlesworth shows the promise of a Critical legal education, David Fraser is at pains to emphasise the distinctive features of that movement. He looks at the Legal Realist scholars of the twenties and thirties and argues that the deconstructive wing of that movement, having beliefs similar in many respects to the "nihilist", indeterminacy views of many C.L.S. scholars, was swamped by a more moderate group in legal education. He calls this second group reconstructive, because they were moved to save law from the "nihilists" by offering a richer, contextualised study. By doing so attention was drawn away from the realist identification of inherent and inevitable contradictions in legal rules. In other words, Fraser is arguing that the exciting and compelling part of Legal Realism ultimately withered away. This helps explain why the constant refrain that "we are all Realists now" is hollow. We can all be Realists because the version which triumphed was sanitised, with all the dangerous bits removed.

The fear which must haunt all C.L.S. scholars is the day when mainstream professors assert, "we are all crits now". David Fraser's article is a cry from the heart to maintain the message of the indeterminacy of law and politics in the face of those who would adopt the slogans but not the spirit of the new learning. The new attack on what is commonly called liberal legalism may succeed where Legal Realism failed because the real enemy is now being faced. When the scholars of the thirties were merely happy to show the indeterminacy of doctrine, they failed to recognise that this was also an attack on liberal political theory. After all, that political theory is based on a radical separation between law and politics, with a neutral and predictable legal system as a necessary concomitant. By attacking the neutrality of the legal system and not challenging the underlying political theory on which it was based the Realists gave the game away. If everyone accepted the political theory of liberalism - and hence the existence of a neutral, predictable legal system - claims of indeterminacy seemed an aberration. The natural response would be to argue that since the political theory underpinning their common endeavours

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14 *See, e.g.*, Carrington, *Of Law and the River* 34 J. OF LEGAL EDUC. 222 (1984). In Australia the lead for such demands has been taken by newspaper writers. Academics have made the call in private, or indirectly through the Pearce Report into legal education.

required neutrality and predictability in its legal system this, in fact, was what they had. C.L.S. scholars have faced this problem head on. They argue that the failings of liberal politics is the central problem of the crisis facing law. In other words, if liberalism is a failed political theory, there is no need to devote lifetimes to the task of showing the essential neutrality and determinacy of the legal system. This latter role has been the work of the more perceptive among traditional legal scholars since the 1930s.

For anyone interested in legal education or, indeed, university education generally, the events associated with the law school at Macquarie University must have been intriguing. Since its inception the School has grabbed attention. In the beginning this was due to the promise it gave of a new and fresh approach to law teaching. This continuing freshness and vitality is something which has been overshadowed by the increasing media attention given to the "troubles" in the School. Since the controversy which emerged in 1984 over the ultimately postponed appointment of the third professor, there has been fairly intense media coverage and interest in the affairs of the School. For sections of the media and for many traditional scholars, the picture presented is of a number of troublemakers (Marxist in flavour) who, with destructive intent, have been on a course to achieve ultimate domination of the school. In a perceptive essay Andrew Fraser analyses the happenings at the school, an analysis which provides a tool for understanding legal education in Australia, and not merely at North Ryde.

For Fraser the conflict at Macquarie has not been the product of "bad tempered and ill-mannered behaviour on the part of a dishonourable and dogmatic few". Rather, the School has witnessed from its inception a conflict between two ideals of academic civility. One, which he labels the republican model, aims at the creation of a self-governing community of scholars operating on the basis of political equality. It is this model which has had the support of newer and more progressive scholars. It is also the model which has never had access to the levels of power wielded by the professoriate. The second model he calls the aristocratic ideal. This "tradition of civility is rooted in the patterns of deference and the conventions of polite intercourse associated with the civil and political dominance of a patrician elite". It is this model which has figured strongly in Australian universities, and which animated the founding professor at Macquarie, Professor Nygh. Fraser also makes the point that the bar, bench and legal profession make up one of the last strongholds of this tradition.

Fraser argues that neither model has been able to establish itself on a secure institutional basis. From the beginning,the professoriate at Macquarie was unwilling to accept the notion of political equality as a necessary, and perhaps inevitable, consequence of the self professed aim of creating a new and modern law school. On the other hand, those who favoured the republican model lacked the formal levers of power and support from the University and elsewhere which would have enabled them to convert that ideal into a working system. It was this conflict between two radically different models which, for Fraser, was the cause of all the controversy and conflict at the School. He also argues that only the republican model would allow a rejuvenated and critical scholarship to take root and flourish at Macquarie.

Even a new university law school if dominated by the aristocratic ideal, would result in a poor imitation of the intellectually moribund law schools in the major long established universities.

An analysis along the lines suggested by Andrew Fraser helps us understand the vehemence, the almost desperate nature of the response of traditionalists within Macquarie and outside, to any moves for change in legal education. Those traditionalists saw law essentially as a system of rules and legal education as essentially the explication of those rules. But this was not a considered position. It was, instead, an article of faith closely tied to their positions in life and to their beliefs as to social ordering. They were in a position similar to the believers of Ptolemaic orthodoxy. Not only was belief in the centrality of the earth in relation to the heavens central to their intellectual lives, it was part and parcel of their social and political lives as well. It was *obvious* that the sun circled around the earth. In a like fashion the orthodoxy in legal scholarship was that the law was a system of rules. This too, was *obvious*. So obvious that anyone suggesting otherwise must have an ulterior motive, plainly political and to be resisted at all costs. Thus the myth of the Marxist troublemakers was born. The blind assurance of the sleepwalker, to use Arthur Koestler's wonderful image,[15] is the necessary precondition for the working of this inevitable categorisation of enemies of the status quo. Gummow's article is a clear example of this attitude and shows that an understanding of legal education must include study of the politics of learning.

In a recent review essay John Henry Schlegel, a noted historian of American legal education, argued that a richer and more complex history of legal education requires the examination of the history of institutions, the law schools, and of the participants in them. Without a detailed understanding of the interactions, the particular debates at particular times and places, Schlegel feels that a significant dimension is missing in our attempts at intellectual history.[16]

The final section of this issue is devoted to a selection of documents, observations and memoranda circulated in Macquarie Law School in the first years of its existence. The essential debates, especially those between Peter Nygh and Andrew Fraser, place in sharp contrast the two differing visions of legal education around which the controversy at Macquarie has centred.

As the first memoranda show it is quite clear that after only a few years of its establishment the Law School had become too unruly for its first "head". Nygh, by this stage, had arrived at a conception of a law school which was rigidly professional and anti-intellectual, as that concept is defined by Atiyah. Fraser, by contrast, argued strongly for the integrity of the academic mission of a law school, even if this ran counter to prevailing beliefs in the profession, the judiciary or society generally. At this stage it is appropriate to recall Sampford's vision of a law school. It becomes easy in the light of Nygh's memoranda to understand that change as suggested by

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15 *See* KOESTLER, *supra* note 10.
16 *See* Schlegel, *The Ten Thousand Dollar Question*, 41 STAN. L. REV. 435 (1989).

Sampford would either result in cosmetic alterations or, if real change was attempted, serious and bitter confrontation. The latter, of course, was to happen at Macquarie. In the memoranda *Knowing the Law* and *When are problems really problems*? Fraser offered a cogent refutation of the notion that it is possible to know the law by learning the 'basic principles'. These were written in the context of a continuing attempt by orthodox scholars at Macquarie to change the curriculum to inject more 'real law' into the law course. Fraser's memorandum *Drift or Mastery?* is an illustration of the frustration suffered by those who not only believed in the School as a community of scholars based on political equality, but were also intent on the implementation of this form of public life in the School. Fraser here writes of his experience in a School staff selection committee. In a debate which was to re-surface during the Headship of Denis Ong, the differing political visions of the professoriate and those who, for shorthand reasons, might be called the republicans, is clearly defined. For the professors, committees of the School were merely advisory, to help the professors in their various determinations. For the others, these committees represented the School, therefore denying the professors any other than a persuasive role.

The final selection of Law School memoranda is taken from a Law School seminar on legal education held in 1979. The contrast between Fraser on the one hand and Professor John Peden and Associate Professor Andrew Lang on the other is sharp indeed. It is doubtful if the essential intellectual dispute at Macquarie which, in many senses, was being fought for the benefit of university legal education throughout Australia, has been better described.

Our documentary section also contains early critiques of the University of New South Wales Law School and the College of Law. These documents are included to give readers a sense of the then contemporary developments in other legal education institutions. The final document considered, "An Argument for a Contemporary Legal Education" is a revised version of part of a submission by a number of progressive scholars to the 1985 University Committee to Review the School of Law. An introduction to this version has been prepared by one of its authors, Gill Boehringer.