

## RE-CONCEPTUALIZING REGULATION, RESPONSIBILITY AND LAW

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Regulation, broadly defined, can include any effort by the government to control and direct behaviour of individuals or agencies. In this sense all law is regulatory in nature. But the common meaning of the concept of regulation captures the more narrowly focused economic aspects of governmental direction. Thus typically the literature on regulation canvasses the arguments about the desirability or otherwise of state regulation of economic activities, the benefits or drawbacks of the market as the determinant of economic relations, and various empirical studies informed by these diverse perspectives. A consistent feature of this literature is the lack of agreement about whether regulation or even deregulation of sectors of economy is a good or bad thing. Moreover, empirical studies in one form or another chronicle how regulation is not achieving the intended aims. An important issue, therefore, becomes whether the enterprise of regulation is inherently incapable of guiding individuals' and agencies' behaviour in a manner that broader public interest is pursued.<sup>1</sup> I will explore this issue about the capacity of law to pursue fairness but will first argue that there is a need to focus on another meaning of regulation.

There has been a change in the meaning of regulation, in part initiated by the change in theoretical moves towards post-structural analyses. It is in this latter sense of the concept that I wish to make my argument. I rely on Alan Hunt's conceptualization of law, governance and regulation.<sup>2</sup> Briefly, he has argued that the liberal legal theory makes the twin assumptions about the autonomy of law and law as a system of rules and then strives to keep law and politics separate through the doctrine of the separation of powers. However, this model was suited to dealing with issues of limiting authority of the state when state was seen as the sole source of power, whereas Foucault has amply established in contemporary societies power is everywhere and the state does not have the monopoly of power. One implication of this shift in the understanding of power is that, instead of government, now the focus of analyses is governance; that is, instead of the institutions of the state it is

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<sup>1</sup> For an informative overview of the literature, see Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (2007); see also Colin Scott (ed), *Regulation* (2003).

<sup>2</sup> Alan Hunt 'Law as a Constitutive Mode of Regulation' in *Explorations in Law and Society: Towards a Constitutive Theory of Law* (1993) 301.

the processes of governance that yield answers to contemporary concerns. He goes on to say that central to this conception of 'governance' is the idea that government is one among many institutions engaged in the process of governing and among other things the distinction between state and civil society is rendered problematic.

While Foucault thought of law as state law or imperative command, Hunt argues that law should be conceived as a complex of varied forms through which governance takes place. Thus, instead of thinking of law, as did Austin who equated it with the model of criminal law, or as Hart and Dworkin whose conception of law gave priority to the model of private law, it is possible to think of law as regulation in the first instance as public law. That is, in contemporary societies extensive areas of social life are made subject to regulatory intervention. But it is equally important to extend our understanding of public law beyond the activities of the sovereign state. In this extended meaning of 'public' would be included the regulatory activities, not only of the territorial state but also those of quasi-state institutions, professional and institutional agencies and economic agencies.

In this way it is possible to engage with the debates in legal scholarship about the proliferation of regulation and the supposed consequent replacement of 'autonomous laws' with 'bureaucratic regulation'. Rather than bemoaning these developments as somehow undermining the true import of legal regulation, it is an opportunity to recognize legal pluralism in operation. Law operates not only through state institutions but also in myriad other sites and through a multiplicity of actors. In this conception of law and governance, neither the importance of the connection between state and law nor the presence of law as regulation in multiple forms is under-emphasized. Instead such a conceptualization allows for a focus on the connections between state, law and power by conceiving the process of governance to a large extent happening through regulation. This concept of regulation, however, is broader than the legalistic usage of 'regulatory law', which means law directed at nongovernmental economic agencies. Instead regulation should be understood as deployment of specific knowledges present in legal or quasi-legal forms of intervention in social practices.<sup>3</sup>

I wish to explore this conception of regulation further in order to argue that, whether law is conceptualized as rules only or a complex 'deployment of specific knowledges', it is still the case that law provides collective guides to behaviour whether of individuals or agencies and institutions. Just as legal rules need to be interpreted, so too regulatory knowledges have to be created and deployed and this remains true whether one is arguing for regulation or deregulation. It is, therefore, important that the aspiration for making law just should be a widely acknowledged responsibility. While the creation of knowledge or judicial reasoning is supposedly not an intentional and subjective activity, it is nevertheless true that the role of human agency cannot be denied in either case. The extensive literature on the nature of judicial reasoning and the effort to make judges remain within their

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<sup>3</sup> See also Cass Sunstein, *After the Regulatory State: Reconceiving the Regulatory State* (1990).

allocated sphere of authority is testimony to the power of the individual judges to interpret (or make) rules in creative ways.<sup>4</sup> The same can be said of discourse creation.

If individuals are implicated in constructing ideas about legal regulation then it is imperative to examine how these ideas are created, normalized and deployed. When different discourses on regulation in various ways try to identify whether the exercise of power is fair, just or desirable in some other sense, it is just another manifestation of the perennial concern of legal theory about the legitimacy of legal authority. A broader definition of regulation, as discussed above, can allow a shift of focus from specific regulatory programs to the wider issue of how all law may become non-arbitrary, fair and just. Therefore, the central issue I wish to address is whether law can be expected to be just and fair in a substantive sense. I rely on post-structural ideas about knowledge but extend them in a significant way.

The post-structural conception of knowledge as constituted allows me to argue that the responsibility for making law non-arbitrary, fair and just rests on everyone of the agents – lawyers, judges, legislators, regulators or those regulated. In order to develop this argument, however, two strands of post-structural theory must be differentiated. The main strand that says that all knowledge is constituted enables a critique of the dominant positivist legal theory that portrays law as objective and neutral. Once the constitutive theory of knowledge is accepted then consequences flowing from choosing to adopt certain ideas must also be the responsibility of the thinkers. As contemporary positivist legal theory<sup>5</sup> does not allow for pinning the responsibility for the consequences of ideas on the thinkers, it needs to be deconstructed and replaced with alternative views about Law.

Such alternative views become plausible if the link between the power of making certain ideas appear authoritative and the consequences flowing from the acceptance of those ideas could be articulated. One way of making this link is to focus on the responsibility of all thinkers and actors for their choice of ideas. The choice of ideas is undoubtedly an exercise of power as it leads to specific consequences. Therefore, the choice should carry with itself the responsibility of each of the thinkers/actors to make the rules just and fair. The insight of post-structural theory that all knowledge is constituted makes the choice of ideas a central feature of all theories, including theories of law. Thinkers who portray law as objective, neutral or principled must explain why they choose this conception of law when it does not achieve a just and fair society. So too, when another strand of post-structural theory insists that meaning is always transitory and, therefore, any definite conceptualization of justice and consequent politics is problematic, the

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<sup>4</sup> For an introduction to these debates see Jeffrey Goldsworthy and Tom Campbell (eds), *Legal Interpretation in Democratic States* (2002).

<sup>5</sup> My argument is primarily addressed to the implications of positivist theory in Law. The reason for this being that, even though critical theories of law abound, legal positivism continues to be the dominant paradigm of legal thinking. Critical theories of law remain marginal and are yet to replace the dominant views about law.

authors of these theories are also making a choice. These choices are even more problematic as post-structural theories, which make a politics of change impossible, are in a strange way replicating the nexus between power and knowledge they were meant to expose.

However, post-structural theory does not have to be relativistic. Its central insight about the connection between power and knowledge can and should be extended to link up with the responsibility for knowledge as well. One way of making explicit this connection is to link the responsibility of thinkers to the consequences flowing from their ideas. I will develop this argument in the specific context of education as the site for training independent and critical thinkers who can reclaim the possibility of aspiring for transformation of the status quo. This argument will be illustrated with the help of a specific example of reconceiving legal education.

The argument is developed in the following steps: the first part sets the context of this essay, which is the development of the post-structuralist insights about the nature of knowledge. After identifying the shortcomings of this 'cultural' turn in theory, I introduce in the second part the concept of responsibility into the analyses in order to change the focus of post-structural theory. The third part focuses on education as a site for creating self-reflective and responsible agents who would develop post-structural theory to encompass social justice. The last part develops an argument for redesigning Legal education as training for critical thinking. Critical thinkers would necessarily be ethical agents and in this way legal education can create the possibility of making social justice a concern of all legal actors. One way of making legal education as training for critical thinking is to mainstream theory in the curricula.

#### I POST-STRUCTURALIST INSIGHTS ABOUT THE NATURE OF KNOWLEDGE

A brief overview of the developments in post-modern and post-structural theory will serve as the context for my argument. Social sciences and humanities as disciplines of knowledge have worked with various conceptions of reality and its representation. The modes of thinking deriving their validity from the Enlightenment thought have, however, come under sustained challenge in the form of post-modern and post-structural critiques. While the terms post-modern and post-structural are used extensively, there is no necessary agreement about their meaning.

At the most general level, however, the post-modern turn in theory is a challenge to the certainties of the modernist way of theorizing. Modernity was an expression of the belief in the power of rational thinking and scientific method to reach the truth and make progress. It is this belief in the promise of progress that has been fundamentally shaken by the post-modernists.<sup>6</sup> Among other things post-modern

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<sup>6</sup> The most well known book in this area of course is Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trans, first published 1979, 1984 ed).

thought challenges the meta-narratives of modernist theories. One consequence of this focus is that if the social revolution of Marxism or progress of capitalism is not a realistic expectation, then it becomes problematic to conceptualize social change. For example, Lyotard says that the 'idea of progress as possible, probable or necessary' was rooted in the certainty that the development of knowledge and liberty would be beneficial for the humanity as a whole. However, after two centuries of such belief it is now obvious that this is not the case.<sup>7</sup> Unfortunately, the mere lack of belief in progress does not mean that the status quo is satisfactory or that the desire for better social arrangements is no longer valid, but I will return to this point later.

A parallel development in theory is what is described as post-structuralist thought. This is primarily a critique of empiricism that explains the subject as the source of all knowledge. Post-structuralist critique challenges the conception of the subject that is the source of all knowledge in modernist thought. Correspondingly, post-structuralists question the assumption that the human mind receives information from the outside world and organizes it into knowledge that is expressed unproblematically through language.<sup>8</sup> They are concerned, just as the earlier thinkers, with analyzing modern societies but with concepts that challenge the former conceptions of the self and society or the state. The two main threads in post-structural thought, respectively, focus on the texts and the power-knowledge nexus represented, respectively, in the works of Derrida and Foucault. While 'deconstruction' as a way of analyzing the construction of meaning is associated with Derrida, the discourse analysis and tracing of the genealogy of ideas is ascribed to Foucault.<sup>9</sup>

The sophistication of these theories does not permit a short and satisfactory summary but the central issue for my present purposes is that one of the main outcomes of the post-structuralist thought is to challenge the existence of a pre-constituted self. Post-structuralism challenges the central position of the individual subject in the Enlightenment thinking and shows it to be a product of discursive practices. Deconstruction, in particular, rejects the atomistic theories of meaning and suggests that all meaning is constructed and unstable, and is now a very popular way of theorizing. Derrida's anti-realist philosophy of language denies that any reality independent of discourse exists.<sup>10</sup> Even though text analyses started as a

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<sup>7</sup> Jean-François Lyotard, 'Defining the Postmodern' ICA Documents 4 (1985) 6, cited in Alex Callinicos, *Against Postmodernism: A Marxist Critique* (1989) at 10.

<sup>8</sup> For an overview see Raman Selden and Peter Widdowson, *A Reader's Guide to Contemporary Literary Theory* (3<sup>rd</sup> ed, 1993) 128.

<sup>9</sup> Jacques Derrida, *Of Grammatology* (Gayatri Spivak trans, first published 1967, 1976 ed); Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Colin Gordon ed, 1980). For an argument that post-structuralism is a development of modernism see Andreas Huyssen, 'Mapping the Postmodern' (1984) 33 *New German Critique* 5.

<sup>10</sup> One consequence of such theorizing is that, since the existing social arrangements are a product of discourse, they can be analyzed but cannot be judged. It follows that there is no measure of justice or desirable change and no politics of change is postulated. For a discussion of the possibility of resistance in the apartheid South Africa see the exchange between Derrida

trend in the discipline of literary criticism, it has spread gradually to all other disciplines.

In a somewhat different line of argument, Foucault challenges the assertion that the world is a collection of texts. Instead he articulates the nexus between knowledge and power and thus analyzes the creation of theoretical discourses as an expression of power (rather than discovering the truth). What constitutes accepted knowledge in any discipline is thus less dependent on it being 'true' and more a consequence of having the power to name it as 'truth'. It follows that the subject, rather than being autonomous, is as much constituted by discourse and disciplinary practices.<sup>11</sup> Foucault did argue that, since in addition to being constituted by power, everyone also exercises power and therefore every individual could resist disciplinary power. Although the possibility of resistance is thus acknowledged, it remains an underdeveloped possibility in his thought.

One consequence of such conceptualizations is that no systematic politics of change is feasible. Thus, when Lyotard says that we can no longer believe in the promise of progress or liberty, he stops well short of acknowledging the lived reality of deprivation and disadvantage for a vast proportion of humanity. Similarly Derrida's famous phrase that there is no reality outside of text and thus everything is a text somehow puts the grammatologist in the centre of the universe of meaning. There is no doubt an element of truth in this analysis but deconstruction by itself does not make oppression go away.<sup>12</sup> So too, even when Foucault provides the insight that the subject is simultaneously constituted by power and exercises power, he is nevertheless unable to explain or address the huge power disparities between the rich and the poor or the peoples of the global South and North. Most significantly it needs to be emphasized that the possibilities of 'becoming a self' are seriously circumscribed by the context and history of individuals. 'Most people's lives are still ... shaped by their lack of access to productive resources and their consequent need to sell their labour-power in order to live.'<sup>13</sup> Cornel West similarly criticizes both the followers of Derrida and Foucault who analyze relations of knowledge and power but remain silent on concrete ways in which people are empowered.<sup>14</sup> Postcolonial analyses are an important corrective to the excesses of post-modernism but on the whole postcolonial theory also fails to postulate a politics of change.<sup>15</sup>

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and McClintock and Nixon, all reprinted in Henry Louis Gates Jr (ed), *Race, Writing, and Difference* (1992).

<sup>11</sup> See, for example, Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, first published 1975, 1991 ed).

<sup>12</sup> For a discussion of the possibility of justice in deconstruction, see Jack M Balkin, 'Being Just with Deconstruction' (1994) 3 *Social and Legal Studies*, 393.

<sup>13</sup> Alex Callinicos, *Against Postmodernism: A Marxist Critique* (1989) 90.

<sup>14</sup> Cornel West, 'On Fox and Lears's The Culture of Consumption' in *Prophetic Fragments* (1988) 188.

<sup>15</sup> There is extensive literature in this genre but see, for example, Fawzia Afzal-Khan and Kalpana Seshadri-Crooks (eds), *The Pre-Occupation of Postcolonial Studies* (2000); Eve Darian-Smith and Peter Fitzpatrick (eds), *Laws of the Post-colonial* (1999); Leela Gandhi, *Postcolonial Theory: A Critical Introduction* (1998).

Since the dominant explanations are that no directed social change can be conceptualized, all that remains to be done is to deconstruct/analyze the extant situations.<sup>16</sup> There are of course exceptions to this deterministic trend in post-structural writing. In particular Zygmunt Bauman has written extensively on the issue of responsibility in post-modern theory.<sup>17</sup> And if post-structuralism is not to become an apology for the status quo this stream of thinking needs to be developed.

However, the history of the development of post-structural theory is one of increasing disenchantment with the promise of utopia or even progress.<sup>18</sup> Yet mere challenge by theorists of the optimistic humanist belief in progress, however, does not mean that the need for emancipation or transformation has disappeared. This is true whether in the countries of the South or North, but the comparatively poorer societies of the South even more urgently need to find ways of creating equitable and just societies. It is undeniable that ideas are still the main way of justifying, questioning or legitimizing the contemporary social arrangements, whether at national or global levels.

Despite the deconstruction and archeology of knowledge emphasized by post-structuralists, it is still the case that the production of knowledge remains an elite activity in more than one way. And an unpleasant reality of the politics of production of knowledge is that what happens in the North scholarship is what counts as legitimate theory. That the Foucaults and Derridas of the world just happen to be situated in the comfortable academia of the North is not an accident. It should come as no surprise to anyone that their theories are not concerned with deprivation and disadvantage.<sup>19</sup> But the resulting double bind of the thinkers in the South requires some resolution; for example, they have to work with concepts that are not speaking to their concerns. The question, therefore, is what can be done about this state of theoretical knowledge so that social justice and emancipation once again become the concerns of all theorists? Even though this is a particularly pressing concern for scholars in the South, it is also relevant for those wanting to argue for social justice in the relatively affluent societies of the North. In neither case should this be the exclusive responsibility of the disadvantaged. Instead I wish to develop an argument for all theorists to take responsibility for the consequences flowing from their ideas.

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<sup>16</sup> In a slightly different context Hall and Taylor say that it is important to remind socialists that merely pointing out social contradictions does not mean that the world will collapse because of logical contradictions. See Samuel Hall and Charles Taylor, 'Then and Now' in Robin Archer et al (eds), *Out of Apathy: Voices of the Left Thirty Years On* (1989) 143.

<sup>17</sup> See his *Postmodern Ethics* (1993).

<sup>18</sup> The rise of post-structuralism is explained variously but many analyses point to the changing needs of late capitalism rather than a change in the mode of critique. See Krishan Kumar, *From Post-industrial to Post-Modern Society: New Theories of the Contemporary World* (2005).

<sup>19</sup> For a similar critique of Foucault from a feminist perspective see Sandra Bartky, 'Foucault, Femininity and the Modernisation of Patriarchal Power' in Irene Diamond and Lee Quinby (eds), *Feminism and Foucault* (1988) 16.

## II RESPONSIBLE AND SELF-REFLECTIVE POST-STRUCTURALIST THEORY

The starting point of creating responsible theory has to be an acknowledgement that every idea comes from a perspective.<sup>20</sup> Just as post-structuralism has well and truly deconstructed the idea of objective knowledge, so too it is time to shine a light on post-structural critique that is not self-reflexive. Most post-structural theory does not acknowledge the power and privilege of theorists who write out of theory any realistic possibility of directed social change. I rely on the argument of Hank Bromley in this regard that the intellectuals are situated in institutions of immense prestige and this situatedness must be acknowledged.<sup>21</sup> That is, all post-structural theorizing is happening in conditions of institutional privilege. But since such theorists do not have to write into their theories their own privileged position, they can eschew any responsibility for the existing status quo or for change. This is another way of being 'objective' that is, provide explanations of the social arrangements as if one could step out of those arrangements and be an observer. But what if it is not acceptable to one that the status quo is inevitable? How may one start conceptualizing differently and who must carry the responsibility for developing such thinking?

One way forward is to emphasize the agency and thus the responsibility of the thinker for the consequences that flow from her standpoint. This is a logical development of the idea that 'reality' or 'truth' is constructed by discourse. Discourse is not intentional but nevertheless demands agency of the participants, but at present this agency is under-theorized. For instance, whether a particular understanding of the concept of social change is acceptable or not is ultimately a function of choice (rather than that of discovery of the truth of the matter). Therefore, when Marxist analysts challenge the Liberal explanations of the desirability of capitalism they 'choose' to focus on a different set of issues than the Liberals. Rather than conceptualizing society as consensus driven they 'see' it as conflict driven. The point to note, however, is that it is the same society but differently understood. Similarly, when the critical theorists focus on the role of ideology or the post-structuralists focus on discourse, they are 'choosing' to explain the extant social arrangements with the help of different concepts. It is not that the social arrangements and institutions are different than those analyzed by the earlier theorists, only one chooses to deploy different analytical concepts. There is no objective or outside measure of the appropriateness of the concepts that are chosen. But the consequences of such choice can explain the structures of society as just or unjust and, therefore, as acceptable or not. It is this element of choice at the level of definitions that needs to be brought into focus.

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<sup>20</sup> The concept of perspectivism is a feminist concept and it is meant to circumvent the relativism of post-structural analyses. See, for example, Katherine Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829.

<sup>21</sup> Hank Bromley, 'Identity Politics and Critical Pedagogy' (1989) 39(3) *Educational Theory* 207.



It follows that those 'choosing' to accept a particular meaning must also be the ones who are legitimizing the ideas and contributing to the creation of a particular discourse and the consequent possibility or lack of it to initiate change. The point being that self-reflexivity about one's role in legitimizing ideas is an essential aspect of accepting responsibility for one's views or, in other words, being a critical thinker. This potential of post-structural theory needs to be developed and the following section explores briefly how such a change of focus in analyses may be brought about.

### III EDUCATION FOR CRITICAL THINKING

Notwithstanding post-modern insights about the nature of knowledge, there are obvious reasons why a fundamental challenge to the professional interests (including academics) is not likely to come from the relatively privileged 'thinkers' of the system. It is evident that the present ways of theorizing are elitist and underpin the privilege of the intellectuals. If a fundamental and widespread challenge to such ways of thinking has to happen, we must look elsewhere than to the theorists themselves. Therefore, I wish to suggest that such change can and must happen at the level of education.

Students can and ought to be trained to be independent and critical thinkers. Such critical thinkers who can capture their agency in the legitimation of ideas will of necessity also understand their role in making and unmaking social structures. Once the individual thinker is thus implicated in making sense of the social structures, it should become that much harder for the theorists to propose ideas that leave out of the theory the responsibility of the thinker. That is, if the thinker is not simply describing the surrounding reality but also partly 'constitutes' it, then it is logical to expect that the injustices of the contemporary arrangements ought not to be allowed to go on unchecked. Otherwise those 'constituting' such arrangements as inevitable are complicit in perpetuating them.

This is a somewhat circuitous way of saying that the theorists have the task of explaining contemporary arrangements and if they make them appear inevitable and not susceptible to change they may be protecting their own interests rather than being objective. And, if it is argued that 'objectivity' is not conceptually possible in any knowledge, in that case the burden of the theorists is to acknowledge at least the partiality of their perspective. Once the particular perspective can be seen for what it is, a choice, it should become that much more difficult to distance oneself from the consequences of one's ideas. Once such distancing of the thinker from the consequences of their theories is not possible, it just might be that we all will become responsible thinkers. This argument is not about personal morality but more so about conventions of theorizing. It follows that it must be the task of the educators to inculcate the necessary skills of independent but responsible thinking in the students.

I am not oblivious to the reality that this is an extremely difficult shift to make as the implications of having truly independent thinkers may not be conducive to creating stable and hierarchical societies, but as Joan Scott asks in another context:

[I]f political survival is imperiled by critical reflection, where will radical critiques come from, and how are we to value them? If there is no fundamental criticism and no place where it is practiced, taught, and perfected, what will be the sources of renewal and change? Without critical thinking, and the conflicts and contests it articulates, will there be democracy at all?<sup>22</sup>

My reason for suggesting this role for education is contingent, however, on the design of education being reconceived. Moreover, this argument is directed at the institutional level as well as at the individual level. Even if it is argued (although I do not accept) that institutional change is either impossible or unlikely, it still remains the case that individual teachers are engaged in an everyday activity that can be more or less meaningful. It is undoubtedly true that the individual teachers will be severely constrained by the prevailing institutional culture and most likely that such culture does not encourage independent thinking. But if one is not to be complicit completely, some role for individual autonomy must remain. The individual teacher can choose to assume the responsibility to help students develop critical thinking capacities or keep doing the usual things. In either case it must be remembered that it is a choice.

Critical thinking as the aim of education is not that radical an idea.<sup>23</sup> I will rely on Giroux's work to develop an argument that education has a transformative potential and it is the responsibilities of teachers to help realize that potential. This of course flies in the face of received wisdom that education is one of the chief means of legitimizing hierarchies. Giroux<sup>24</sup> in an earlier work analyses the relationship between schooling and the capitalist societies of the industrialized west.<sup>25</sup> He examines the theories of social reproduction articulated by Althusser, and Bowles and Gintis; theories of cultural reproduction developed by Bourdieu, and Bernstein; and theories of resistance represented in the works of Willis, and of cultural studies. All of them seek to explain in different ways the continued existence of dominance in society, even when the repressive state apparatuses are no longer evident. However, Giroux objects to Althusser's notion of ideology as existing without the benefit of human agents. Similarly Bourdieu's concepts of cultural capital and

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<sup>22</sup> Joan Scott, 'Rhetoric of Crisis in Higher Education' in Michael Bérubé and Cary Nelson (eds), *Higher Education Under Fire: Politics, Economics, and the Crisis of the Humanities* (1995) 293, 302.

<sup>23</sup> Stephen Brookfield, *Developing Critical Thinkers: Challenging Adults to Explore Alternative Ways of Thinking and Acting* (1987) 3–4 gives a list of educational literature that recommends an emphasis on critical thinking. He also discusses various interpretations of the concept of critical thinking 11–14.

<sup>24</sup> For a review of the developments in the area of critical education, see Henry A Giroux, *Critical Theory and Educational Practice* (1983) especially 28–33.

<sup>25</sup> Henry A Giroux, 'Hegemony, Resistance, and the Paradox of Educational Reform' in Henry A Giroux, Anthony N Penna and William F Pinar (eds), *Curriculum and Instruction: Alternatives in Education* (1981) 400, 414–15.

habitus are useful in explaining how the educational system transmits the dominant culture, but ultimately the concept of habitus is not that different from a form of hegemony that denies the possibility of social change. As a consequence all that these theorists can do is to explain how the hierarchies are maintained.

Giroux's argument is that, while it is true that education serves to reproduce a hierarchical social order, nevertheless possibilities for resistance exist. In order to realize these possibilities, analyses of ideology that show how education systems sustain and produce ideologies must then go on to explain how individuals or groups in concrete relationships negotiate, resist or accept these ideas. For this he relies on Gramsci's concept of hegemony, but with an important rider that hegemony does not represent a coherent force. There are many tensions and contradictions within the concept of hegemony and their existence makes counter-hegemonic struggle possible. Rather than conceptualizing hegemony as unchallenged dominance, it is better to understand it as a form of control that has to be constantly fought for. Education can thus be an important site of struggle. This is also what Foucault's concept of power as something that is exercised rather than possessed can do. It allows for an explanation of the nature of power, as not only something that constrains but also that constitutes the subject. It is in this sense that power has both negative and positive aspects. In its negative aspect power institutionalizes ideology as a form of hegemony by denying the critical possibilities. In its positive aspect it refers to the latent and manifest modes of critical discourse and practices that is the core of ideology.<sup>26</sup>

Giroux argues that critical pedagogy is important precisely because it equips students with the knowledge to understand the institutional conditions that influence their lives. This capacity for critical thinking in turn enables the students to participate in ongoing conversations about important political and social issues. Such engagement with wider issues is central to creating truly democratic societies.<sup>27</sup> He says that critical pedagogy seeks to provide students with the competencies they need to cultivate the capacity for critical judgment, thoughtfully connect politics to social responsibility, and expand their own sense of agency in order to curb the excesses of dominant power, revitalize a sense of public commitment, and expand democratic relations.<sup>28</sup> This concept of critical pedagogy can be the basis of reconceptualizing all education, but legal education in particular. Any adequate design of education must raise the issue of how hegemony functions in the education system and how various forms of resistance and opposition either

<sup>26</sup> Ibid 418–19. Giroux's views on critical pedagogy have generated extensive critique. For example see Sue Jackson, 'Crossing Borders and Changing Pedagogies: From Giroux to Feminist Theories of Education' (1997) 9(4) *Gender and Education* 457; Susan Gabel, 'Some Conceptual Problems with Critical Pedagogy' (2002) 32(2) *Curriculum Inquiry* 177.

<sup>27</sup> Henry A Giroux, 'Pedagogy of the Depressed: Beyond the New Politics of Cynicism' (2001) 28(3) *College Literature* 1, 14–15. Cf Gregory Jay and Gerald Graff, 'A Critique of Critical Pedagogy' in Michael Bérubé and Cary Nelson, *Higher Education Under Fire* (1995) 201 for a critical view of critical pedagogy. They propose ethical pedagogy as the appropriate approach.

<sup>28</sup> Giroux, 'Pedagogy of the Depressed', above n 27, 11.

challenge or help to sustain it.<sup>29</sup> This would mean that everyone will be trained to be able to think for themselves. And it follows that if every individual is aware of their role in the legitimation of ideas and the consequent construction of knowledge, they will find it that much more difficult to distance themselves from the consequences flowing from their views. This is what I mean: everyone has the responsibility to be self-reflective of their position and acknowledge that certain viewpoints privilege and advance their interests.<sup>30</sup>

However, Jay and Graff pertinently object that critical pedagogy cannot guarantee that students will arrive at a predetermined political stance. Moreover, the students will rightly consider as dogmatic the expectation that they reach 'progressive' or 'just' positions.<sup>31</sup> This is a fundamental issue for the entire argument: whether we can expect students to aspire to a just social system, and it invokes the wider issue of why human beings ought to be moral beings.<sup>32</sup> The basis of my argument is that a sense of agency and responsibility go together. What is missing in most contemporary educational practices is that the post-structuralist insights are presented as cutting edge theory but not enough effort is made to draw out the practical implications of such insights. Instead the perennial issue of theory versus practice is reintroduced to keep the debate going but simultaneously also ensuring that it is not resolved. Post-structuralists have well and truly deconstructed the binaries of thought in all aspects of theory, and it is probably the reason that these thinkers eschew any responsibility to explain the implications of their theories for political action. However, it is not so evident that the distinction is no longer meaningful. Instead theory is portrayed as all encompassing, so that the theorist has to do no more than propound the theory. One way of responding to the imperviousness of the theorists is to say that theory and practice have to be combined together in a meaningful way. For example, Pfister makes a convincing argument that critique for its own sake is problematic and that every critique must include an action plan.<sup>33</sup>

However, I want to make a different argument and emphasize the importance of ideas in legitimizing world views and existing social arrangements. Another way of putting this is to say that individual intellectual work is political action.<sup>34</sup> But it is political action only if the sense of agency can be linked to a sense of responsibility and the students learn to appreciate their role in legitimizing disciplinary

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<sup>29</sup> Giroux, 'Hegemony, Resistance, and the Paradox of Educational Reform', above n 25, 419. For contrary views that question the presence or effectiveness of such agency, see Eric Margolis (ed), *The Hidden Curriculum in Higher Education* (2001).

<sup>30</sup> Henry A Giroux and Peter McLaren, *Critical Pedagogy, The State and Cultural Struggle* (1989).

<sup>31</sup> Jay and Graff, above n 27, 207.

<sup>32</sup> It is not my main topic here but there is sufficient literature for this expectation. For a brief introduction see Michael S Pritchard, *On Becoming Responsible* (1991).

<sup>33</sup> Joel Pfister, *Critique for What: Cultural Studies, American Studies, Left Studies* (2006).

<sup>34</sup> See William Pinar, 'The Abstract and the Concrete in Curriculum Theorizing' in Henry A Giroux, Anthony N Penna and William F Pinar (eds), *Curriculum and Instruction: Alternatives in Education* (1981) 431.

knowledge. Once the agency of the individual is thus acknowledged, it becomes possible for them to take responsibility for the views they hold and, more importantly, to be able to defend their choices as conducive to creating a just social system. But even if it is still objected that we cannot expect all students to be socially progressive, I would like to suggest that social justice ought to be the concern of everyone. This claim is the logical culmination of the post-structural insight that neutral or objective knowledge is not possible. If so then the only course of action is that the preferred viewpoint is acknowledged and explicitly justified.<sup>35</sup> In the following section I illustrate how this conception of education in Law can be training for critical thinking and thus creating a new conception of legal regulation.

#### IV LEGAL EDUCATION AND SOCIAL JUSTICE

I suggest that integrating theoretical analyses of law in the entire curriculum is conducive to producing critical thinkers and, therefore, it can be one possible way of re-conceptualizing the design of legal education. If students can be enabled to learn to critique different theories about the nature of law in a rigorous fashion, it can make students into independent thinkers. There are a number of assumptions underlying this claim and they need to be elaborated. In suggesting that critiquing theory can enhance one's ability for independent thinking, not any kind of theory will suffice. Moreover, mere inclusion of theory will not suffice, unless it is well integrated into the entire curriculum so that it serves to enhance the critiquing abilities of the students. Second, post-structural legal theory can be as relativistic as theory in any other discipline and simply introducing this into the legal curriculum would not change anything. Post-structural legal theory would need to be responsible theory, as discussed above. Last, there is resistance to such a change, as contemporary legal education is enmeshed with the legal profession and has an ambivalent attitude to theory.

Before elaborating my argument, it is important to address the preliminary issue that theory in academia is a marker of status and the more abstract it is the higher status it has. In a different context, Bell Hooks has pertinently commented:

It is evident that one of the many uses of theory in academic locations is in the production of an intellectual class hierarchy where only work deemed truly theoretical is work that is highly abstract, jargonistic, difficult to read, and containing obscure references.<sup>36</sup>

My argument avoids using theory in an effort to maintain hierarchies. Instead it can do the opposite because, if students are enabled to reflect on the assumptions of each theory and the consequences that flow from using some assumption rather than

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<sup>35</sup> See also Michael Apple, *Power, Meaning and Identity: Essays in Critical Educational Studies* (1999) 113–34 for a view that critical educators must challenge the resurgence of right leaning conservative views.

<sup>36</sup> Bell Hooks, *Teaching to Transgress: Education as the Practice of Freedom* (1994) 64.

another, they can challenge the implied inevitability of such hierarchies.<sup>37</sup> If it can be argued that training in theoretical analyses can make students into independent thinkers, it still remains to be explored what kind of theories would serve this aim.

Contemporary legal theory, like theory in all other disciplines, is increasingly post-structuralist in its orientation.<sup>38</sup> As a consequence, the analysis discussed above as to the implications for directed change is applicable to post-structural legal theory as well. Therefore, merely introducing this genre of theory into legal education cannot be a step in the direction of achieving the goal of creating reflective and responsible legal thinkers. In fact legal scholarship, like scholarship in most other disciplines, is full of analyses that disparage the aspiration of social justice through law.<sup>39</sup> But it does not have to be this way and post-structural theory can yield arguments why theorists of law must also bear the responsibility for the consequences flowing from their standpoints.

That said, the main issue is how such a change in the conventions of legal theorizing may come about. This is where the design of legal education becomes relevant. That is, I hope that if the students can learn to think for themselves they will in turn produce socially responsible theories. It may turn out to be a misplaced hope but it is worth a try and is certainly better than how legal education is designed at present. Critical thinking at the very minimum requires an examination of the assumptions on which knowledge is built and attaching responsibility for the consequences of ideas to the thinker. This could yield a theoretical imperative to justify the choice of assumptions in any theory that lead to a fairer society for everyone and not only the privileged.<sup>40</sup>

The history of Common Law may partly explain why, despite being taught in the Universities, the shape of legal education is still defined as training for the profession.<sup>41</sup> Over time this conception has been challenged but not replaced and

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<sup>37</sup> See in a slightly different context Bernard Williams, 'The Idea of Equality' in Hugo A Bedau (ed), *Justice and Equality* (1971) 116 for the argument that hierarchies could be dismantled if everyone could exercise self-reflexivity about their position in the prevailing social arrangements.

<sup>38</sup> See for a review article Peter C Schank, 'Understanding Post Modern Thought and its Implications for Statutory Interpretation' (1992) 65 *Southern California Law Review* 2505.

<sup>39</sup> This line of thinking has a long history starting with Marxist analyses of law as an instrument of domination and oppression. See, for example, of a post-modernist stance Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (1995); see also Costas Douzinas and Ronnie Warrington, with Shaun McVeigh, *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (1991); Peter Fitzpatrick, *The Mythology of Modern Law* (1992); Roach Anleu, *Law and Social Change* (2000).

<sup>40</sup> I disagree with the argument of Scott Veitch that law is designed to allow the avoidance of responsibility of actors. Legal concepts in their present forms are constituted to yield this outcome but surely there is scope for arguing for a re-conceptualization of these very concepts; see Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (2007).

<sup>41</sup> For an introduction to the vast literature in this area see Gerald J. Postema, *Bentham and the Common Law Tradition* (1986); cf Allan C Hutchinson, *Evolution and the Common Law* (2005).

has lead to varying degrees of incorporation of legal doctrine or theoretical analyses in the curricula. Any argument about the shape of legal education must also take note of the state of legal scholarship: that extensive legal analyses exist that utilize different strands of post-structuralist theory. However, not much of this extensive theoretical and critical literature finds its way into the legal curricula in any systematic manner. In this state of affairs, where the cross-currents between scholarship and education curricula are less than robust, the initial task is to uncover how critical analyses are kept out of legal curricula. This will also serve as an illustration of the post-structural insight that knowledge is constructed.

At present extreme diversity exists in the actual content of the undergraduate law programs. Diversity in itself is not a problem but there is a need to articulate the connection between the disciplinary knowledge and the aims of education in a discipline. The disjuncture between scholarship and content of education is problematic, because what is considered valuable scholarship is then deemed not important enough for the students of law. But these very students will be the legal scholars in time. In addition, they will be the opinion makers in all parts of the legal system as the future lawyers, judges, legislators and policymakers. Therefore, they must not only be acquainted systematically with the diversity of theoretical ideas about law but, more importantly, they should develop the skills to critique these ideas with a sense of responsibility.

A brief overview of the design of legal education in Australian universities demonstrates that a curious state of *laissez faire* exists and it is maintained in the name of choice, academic autonomy, or even the professional nature of the discipline. In view of the contemporary theoretical developments, there would be few if any curricular models that primarily emphasize doctrinal knowledge; most programs of study incorporate some theory, but usually it is a narrow understanding of legal theory. Lip-service is paid to the importance of theory in the curricula but it is left to the individual institutions or teachers to decide whether and how to use theoretical analyses of law. Traditionally the mainstream theories of law, also given the title of legal philosophy or Jurisprudence,<sup>42</sup> are primarily lawyers talking about law. The resulting analyses reify law as a special kind of knowledge with its own set of assumptions and the idea that autonomy of law is its defining feature. Jurisprudence, defined in the mainstream sense, itself has a disputed presence in legal curricula and, therefore, the case for a wider inclusion of theories is even more difficult to make. But at the same time interdisciplinary analyses of law and critiques form the cutting edge of scholarship.<sup>43</sup>

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<sup>42</sup> See, for example, many of the standard jurisprudence texts in the area, Reginald W M Dias *Jurisprudence* (5<sup>th</sup> ed, 1985).

<sup>43</sup> For an accessible introduction to this literature, see Margaret Davies, *Asking the Law Question* (2<sup>nd</sup> ed, 2002); Stephen Bottomley and Stephen Parker, *Law in Context* (1997).

While extensive literature exists on why theory is significant in legal teaching,<sup>44</sup> there is no adequate or systematic representation of theoretical trends in most law curricula. For example, James has succinctly analyzed a recent report into legal education and says that Australian Law schools still give a relatively low priority to teaching legal critique. Only five out of 27 law schools expressly promote themselves as concerned with legal critique. Only 17 law schools are guided by teaching and learning policies that encourage legal critique, and of those 17 policies only four contain more than a couple of token references to legal critique. None of the law schools has adopted a clear definition of what it means to teach law critically.<sup>45</sup> This survey makes it painfully obvious that there is no common understanding of theory and even less agreement about the reason why and how theory should inform the design of legal curricula in Australian universities.

Ian Duncanson has eloquently argued that critique in the sense of refusing to accept objects of knowledge as unproblematic is not easily accommodated by the mainstream and traditional view of law as an already existing object.<sup>46</sup> When critical analyses of law question how this object 'law' is constituted, they challenge the hegemony of the traditional views and, therefore, are disparaged, not supported or marginalised. This is reason enough for the argument that adequate legal education demands that all students are acquainted with a multiplicity of theoretical analyses of law. Legal curriculum should mainstream theory and integrate it throughout the curriculum. By doing so the students will be enabled to think for themselves and take responsibility for their views. In this way they will be the agents of creating ethical laws and achieving social justice.<sup>47</sup> Introducing such a vision of legal education would not endanger academic freedom, as I will explain shortly.

Eclectic choice of theoretical perspectives is not adequate to generate the possibility of critical thinking. Development of such capacity for critical thinking requires that a multiplicity of theoretical perspectives on law is introduced to the students. Moreover, as a prerequisite for generating such capacity, theory of all kinds must be integrated into the curriculum. The reason for this two-step approach is that, when students are exposed to a multiplicity of theoretical perspectives, they would have to make comparisons and justify choosing one over another. This necessity to

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<sup>44</sup> As an introduction to the debates, see Charles Sampford and Diana Wood, 'Theoretical Dimensions of Legal Education' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 100; Julian Webb, 'Why Theory Matters' in Julian Webb and Caroline Maugham (eds), *Teaching Lawyers Skills* (1996) 23; Anthony Bradney, 'Law as a Parasitic Discipline' in Anthony Bradney and Fiona Cownie (eds), *Transformative Visions of Legal Education* (1998) 71.

<sup>45</sup> See Nickolas James 'A Brief History of Critique in Australian Legal Education' (2000) 24, *Melbourne University Law Review* 965.

<sup>46</sup> See Ian Duncanson, 'Legal Education and the Possibility of Critique: An Australian Perspective' (1993) 8 *Canadian Journal of Law and Society* 59.

<sup>47</sup> See Ian Duncanson, 'Broadening the Discipline of Law' (1993–1994) 19 *Melbourne University Law Review* 1075 for some of the implications of reconceptualizing legal education.



articulate the reasons for their preferences leads to the recognition that ultimately one has to take responsibility for one's views.

Integration of theory throughout the curriculum helps avoid compartmentalization and thus the marginalization of theory. This in turn reinforces the centrality of the conception of knowledge as constructed. An obvious objection to this argument is that academic freedom demands that teachers have the autonomy to decide how to teach. In fact, to a large extent my argument hinges on individual teachers exercising this autonomy: despite the increasing corporatisation of Higher Education and the ascendancy of the Neo-Liberal discourse, it is up to the individual teachers to create a space within the confines of the prevailing ethos.<sup>48</sup> This design of legal curriculum need not be seen as curtailing autonomy of individual teachers.

Academic freedom is an article of faith among academics and that in turn underlies a reticence to articulate any one conception of curriculum content or design as better than another. It is thus understandable that, while the education literature is burgeoning, most of it concerns itself with the processes of education, style of teaching and assessment rather than with the substantive content. In part this is a consequence of 'education' being a special expertise of those working in the discipline of education. They cannot be expected to engage with the substantive debates about various disciplinary knowledges. But it is nevertheless necessary to discuss the substantive content of any curriculum and it is only right that legal scholars should provide the arguments for particular contents of legal curricula.

Legal scholars, however, are no better placed to further this enquiry because among them there is no agreement about the nature of their disciplinary knowledge. Thus the debates about doctrine and theory as the preferred focus of legal education are interdependent on a conception of the disciplinary knowledge. This is the reason it is important to conceptualize legal knowledge as more than legal doctrine. The strong hold on the imaginations of the law persons of this conception of knowledge is undeniable. And that in itself is a reason for challenging it wherever possible. The arena of legal education is an important site for such a challenge.

A focus on how the mainstream versions of the content of legal education are ascertained also helps in identifying the mechanisms of exclusion and silencing of alternative viewpoints.<sup>49</sup> It is at this level that both the institutions and the individual scholars are implicated in maintaining the legitimacy of hierarchies through education. Individual teachers excuse themselves from having to integrate theoretical analyses in their teaching in the name of lack of autonomy within the

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<sup>48</sup> See Margaret Thornton, 'The Dissolution of the Social in the Academy' (2006) 25 *Australian Feminist Law Journal* 1, for an account of how difficult if not impossible it is to fight such forces. However, I would like to believe that even if we cannot change the macro-environment maybe as individuals we can put up resistance to such forces.

<sup>49</sup> See Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (1990) 191–226.

education system. More importantly the institutional structures 'permit' the individuals to thus absolve themselves of any responsibility.<sup>50</sup>

Similarly the 'professional' nature of the discipline of law means that the professional bodies have the power to 'recognize' or not degrees awarded by various universities. Thus it is argued that there is very little scope for the institutions or the legal academics to decide what they can or should include in the curriculum.<sup>51</sup> However, it is also a fact that such professional bodies set very general parameters. It is up to the individual institutions to design their curriculum within the broad parameters. Therefore, the problem is not that professional bodies set the parameters of knowledge but that in the individual universities the *laissez faire* attitudes determine whether to include and what kind of theories to include in the curriculum.<sup>52</sup>

Feminist critiques of law are an apt illustration of these mechanisms of exclusion and marginalization coming together in the disciplinary knowledge of law. Despite the fact that extensive feminist critiques of mainstream legal theories have existed for a long time, they are still not integrated into legal curricula and thus have not managed to alter the nature of legal discourse or the dominant legal constructs.<sup>53</sup> It is more often the case that 'progressive' faculties allow individual teachers to decide whether or not to include feminist critiques of mainstream theories. Such freedom of choice, of course, functions to reinforce the idea that mainstream legal theories retain their validity despite the challenges from various critics including the feminist critics. The powerbrokers of the faculty are free to decide whether or not to include feminist critiques in their courses and this is justified in the name of academic freedom. Moreover it is claimed that it is only right since other teachers have the freedom to include feminist critiques in their courses.<sup>54</sup>

The problem with this version of freedom of choice argument is that what we teach is as important as how we teach. Therefore, in the curriculum it is essential to enable the students to deconstruct the claims of objectivity as well as the ahistorical and acontextual nature of mainstream legal theory. It follows that, unless the students are acquainted with a multiplicity of theoretical perspectives, there is not much chance of them developing their own arguments. Thus the inclusion of a broad spectrum of theory in the legal curriculum is necessary, not for its own sake

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<sup>50</sup> For example, in a slightly different context Bourdieu explains how universities distribute distinctions and use this as a means of managing the self-judgment of faculty as well as students. Pierre Bourdieu, *Homo Academicus* (Peter Collier trans, 1984 ed, reprint 1988).

<sup>51</sup> See Thornton, above n 48.

<sup>52</sup> The legal scholars are in turn supported by the professional bodies and the bureaucrats to maintain the hegemony of the narrow conception of legal knowledge. But if something is to change it will have to be at the site of education. This may be a naïve hope but the alternative is absolute determinism of the corporatisation argument.

<sup>53</sup> See also Martha Fineman, *The Neutered Mother: The Sexual Family and Other Twentieth Century Tragedies* (1995) 100.

<sup>54</sup> See also Margaret Thornton, *Portia Lost in the Groves of Academe Wondering What to do About Legal Education* (1991).

but because it is one way of enabling the students to learn the skills of independent thinking.

A legal education that focuses mostly on legal doctrine not only fails to provide for developing the skills to critique law but it plays a major role in maintaining the legitimacy of the hierarchical status quo. For example, in a slightly different context Martha Minow argues that law works to stabilize social inequality by refusing to acknowledge and understand differences.<sup>55</sup> It is also the case that the mere existence of multiple theories can enable students to understand how knowledge, especially legal knowledge, is constructed. Since these diverse theories are also mutually incompatible, the students would necessarily have to assess the merits or adequacy of any theory about the nature of Law. The fact that they will have to choose one among many theories must bring home the fact that choosing any viewpoint carries certain consequences and the individuals making the choices must also bear the responsibility for justifying their views.

The imperative of incorporating multiple and diverse theoretical perspectives in the curriculum is also a safeguard against indoctrinating students with a particular perspective. But more importantly the students will also learn how they carry the ultimate responsibility for deciding to choose perspectives that lead to social justice or maintaining hierarchies. This is the capacity for critical as well as ethical thinking. Students who are critical thinkers, therefore, are able to understand the constructed nature of legal knowledge and recognize their own agency in making the particular choices. Notwithstanding the increasing corporatisation of higher education it must be that teachers (and other cultural workers) can rediscover themselves as agents rather than passive subjects.<sup>56</sup> Therefore, it is important that post-structural insights are deployed and developed in a manner that brings the agency of the thinker centrestage. In legal discourse this necessary change in the conception of knowledge will best happen if the next generation of thinkers are trained to take responsibility for creating ethical legal theory that encourages social inclusion rather than exclusion.

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<sup>55</sup> Minow, above n 49, 53–78.

<sup>56</sup> Barry Kanpol and Peter McLaren 'Introduction: Resistance, Multiculturalism and the Politics of Difference' in Barry Kanpol and Peter McLaren (eds), *Critical Multiculturalism: Uncommon Voices in a Common Struggle* (1995) 1–8; see also Amita Dhanda, 'The Power of One: The Law Teacher in the Legal Academy' in Amita Dhanda and Archana Parashar (eds), *Decolonisation of Legal Knowledge* (forthcoming).