

## AUSTRALIAN LEGAL EDUCATION AND THE INSTABILITY OF CRITIQUE

NICKOLAS JOHN JAMES\*

*[While the word 'critique' appears with considerable frequency in contemporary Australian legal education texts, the meaning and the emphasis accorded to 'critique' vary widely. This article describes, analyses and explains this inconsistency of meaning and emphasis. Rather than a stable and consistent body of knowledge and practices, legal education can be viewed as a dynamic nexus of at least six distinct and competing discourses: doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism. Each of these discourses is simultaneously a form of knowledge and an expression of disciplinary power within the law school. As a form of knowledge, each discourse accords critique a different meaning and a different emphasis. As an expression of power, each discourse is an attempt to normalise a particular approach to the teaching of law and to enhance the status of a particular type of legal scholar. Critique, in a variety of forms, is a strategy deployed by each discourse in order to achieve these objectives and to dominate and displace competing discourses.]*

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### I INTRODUCTION

The 1987 Commonwealth Tertiary Education Commission report, *Australian Law Schools: A Discipline Assessment ('Pearce Report')*,<sup>1</sup> concluded that Australian legal education at that time was, inter alia, insufficiently critical.<sup>2</sup>

\* BCom, LLB (Hons) (UQ), LLM (QUT); Lecturer, T C Beirne School of Law, University of Queensland. This article is part of a larger project analysing power-knowledge in Australian legal education. I am grateful to the following colleagues for their feedback regarding this project: Dr Helen Stacy at Stanford University, Dr Barbara Hocking and Dr Sally Sheldon at Queensland University of Technology and Dr Bill McNeill at Griffith University.

<sup>1</sup> Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Committee* (1987) vols 1-4.

<sup>2</sup> In relation to the value and importance of critique, the *Pearce Report* noted the following: universities are concerned to evaluate social institutions. They have an important role as the critique and the conscience of society. They are allowed a wide freedom or autonomy to protect that. A university law school is concerned to evaluate and criticise the law, legal institutions and legal processes and to ask of them 'what are you good for' and to assess whether they should be changed. In educating law students, accordingly, it is desirable to cultivate a stu-

According to the *Pearce Report*, most Australian law schools were too ‘rule-oriented’: there was too much emphasis on exposition of legal doctrine and insufficient emphasis on theoretical and critical dimensions of law.<sup>3</sup> The first of the 64 suggestions made to Australian law schools in the *Pearce Report* was that ‘all law schools examine the adequacy of their attention to theoretical and critical perspectives’.<sup>4</sup>

Sixteen years later, chapter 11 of the 2003 Australian Universities Teaching Committee Report, *Learning Outcomes and Curriculum Development in Law* (‘*Johnstone Report*’),<sup>5</sup> presented the responses of 11 Australian law teachers to questions about what they were trying to achieve with their teaching. Seven of the law teachers expressly referred to the importance of critique.<sup>6</sup>

Current references to critique appear with considerable frequency in works of Australian legal education scholarship and in Australian law school teaching policies and course descriptions. For example, according to Charles Sampford, ‘[t]he full range of skills that students need to study law in a university, and practise it reflexively afterwards, includes critical and theoretical skills along with communication skills’.<sup>7</sup> At the University of Adelaide Law School, one of the intellectual and social competencies which law students are expected to learn is ‘critical thinking and problem solving skills’.<sup>8</sup> The law subject ‘Feminist and Critical Legal Theory’ at the Australian National University aims ‘to provide students with critical skills which they can bring to bear in any area of law’.<sup>9</sup>

dent’s intellect in a spirit of free enquiry and to encourage independent thought and enquiry about the law.

Ibid vol 1, 21 (citations omitted).

<sup>3</sup> Ibid 57. The *Pearce Report* also noted that there was insufficient emphasis on the practical aspects of law.

<sup>4</sup> Ibid 59.

<sup>5</sup> Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003). The *Johnstone Report* documented approaches adopted by Australian law schools in relation to: undergraduate law curricula, principally for the LLB program; graduate and postgraduate law curricula; the processes and procedures adopted by law schools to oversee undergraduate, graduate and postgraduate programs; and teaching and learning in law schools. Most of the data collected for the report was gathered during visits to 27 of the 28 Australian law schools to interview key law school staff and conduct focus groups with law teachers. Interviews and focus groups were also conducted with students and with employers of law graduates: at ch 1.

<sup>6</sup> One law teacher described attempts to get students to ‘criticise what they’re reading and hearing about’. Another law teacher described how they seek to equip students to ‘be able to read quickly and understand, [and] think critically about what they’re reading.’ A third talked about how they invite students ‘to reflect critically on their own views’. The objective of a fourth law teacher was to better arm students to have ‘critical thought’. A fifth insisted that one of the most important aspects of legal education is ‘getting people to think and getting them to think deeply about not just the legal system but about learning and to provide an environment where they can gain knowledge and discipline and critical thought’. A sixth discussed the relationship between doctrine and ‘critical enquiry’, and the seventh law teacher to refer to critique explained how their role is ‘as a conductor, developing students’ various skills and then [encouraging them] to critique the laws’: ibid 282–5.

<sup>7</sup> Charles Sampford, ‘Rethinking the Core Curriculum’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 129, 140.

<sup>8</sup> University of Adelaide, *Law School: Graduate Attributes* (2004) <<http://www.law.adelaide.edu.au/degrees/attributes.html>>.

<sup>9</sup> Australian National University, *Undergraduate Handbook Course: Feminist and Critical Legal Theory* (2003) <<http://studyat.anu.edu.au/DisplayCourse.asp?role=1&course=LAWS2218>>.

One might therefore conclude that the suggestions of the *Pearce Report* regarding the necessity of a critical approach have been heeded and that the importance of critique is now widely recognised within Australian law schools. Yet a closer analysis reveals that although the use of the term ‘critique’ and its many variations — ‘critical thinking’, ‘critical reasoning’, ‘critical evaluation’, ‘critical perspectives’, ‘criticism’<sup>10</sup> — has become increasingly common over the past two decades, three factors undermine the initial conclusion that a critical approach has been comprehensively adopted. Firstly, most Australian legal education texts, law school teaching policies and course descriptions do not refer to critique at all.<sup>11</sup> Secondly, in those texts which do refer to critique, the precise meaning of the term is almost never expressed and is rarely even implied. Thirdly, among those texts where the meaning of the term ‘critique’ is apparent, there is little consistency regarding its definition, purpose or importance. For example, a law school policy that directs law teachers to teach students to think critically and a work of legal education scholarship informed by radical feminist theory that encourages law teachers to do the same thing may use the same terminology, but they clearly have different ends in mind.

It is this last factor which is the starting point for the analysis conducted in this paper. Although a substantial number of Australian legal education texts contain references to critique in some form, it is clear that there is a significant variation in the meaning and the importance they ascribe to critique. While most texts are consistent in their definition of critique as some form of *criteria-based judgement*, within this two-part definition there is still a significant scope for variation: what are the criteria upon which judgement is based and what is it that is being judged? The answers to the first question include truth, intellectual rigour, rationality, fairness and justice; the answers to the second question include law, legal doctrine, legal practice, social norms, authority, tradition, the statements of others and an individual’s own thoughts and beliefs. Sometimes critique appears to be an explicit part of the content of a law course and at other times it appears to be something practised both within and beyond the classroom. For some, critique is a skill; for others, it is an attitude. Some portray critique as peripheral to the learning of law, whilst others argue that it is central to that endeavour.

The primary objectives of this article are the identification and description of the various meanings of critique within Australian legal education texts, the assessment of the varying degrees of importance given to critique, and the construction of an explanation as to why critique is inconsistently defined and emphasised.<sup>12</sup> In the process of achieving these objectives, what is revealed is a

<sup>10</sup> It could be argued that rather than mere variations, ‘critique’, ‘criticism’ and ‘critical thinking’ are in fact completely different notions. However, the terms are often used interchangeably within Australian legal education discourses and this article therefore elects to treat them as a series of different labels for the general practice of criteria-based judgement.

<sup>11</sup> In the *Johnstone Report*, for example, only two out of the 27 participating Australian law schools explicitly distinguished themselves as emphasising a critical approach to law: see *Johnstone Report*, above n 5, 26–7.

<sup>12</sup> It should be noted that three important limitations are imposed upon the scope of this analysis. Firstly, there is a geographical limitation — the focus is upon Australian legal education discourses. Secondly, there is a chronological limitation — the focus of the analysis is upon Australia.

discipline that is not a monolithic body of texts and practices with consistent conceptualisations of the nature of legality and of legal education; rather, like all disciplines within the university, the discipline of law is characterised by conflicts and tensions between ideologies or ‘discourses’, each of which competes for dominance by propagating particular forms of knowledge and utilising particular modes of power. The key conclusion reached by this article is that particular statements about the meaning and importance of critique are not only forms of knowledge, but are also expressions of power in the sense that they are strategies adopted to normalise a particular legal education discourse and to displace competing discourses. Critique is both a victim and a weapon in the ongoing battle of ideologies within the law school.

## II SIX CRITIQUES

Rather than a stable and consistent body of knowledge and practices, Australian legal education can be viewed as a dynamic nexus of at least six relatively discrete ideologies or discourses: doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism.<sup>13</sup> Each of these discourses is a mode of ‘power–knowledge’: each is a different form of knowledge and each is a different expression of power. Michel Foucault coined the term ‘power–knowledge’ to indicate the close relationship between knowledge and power.<sup>14</sup> He insisted that the production and dissemination of knowledge is always an expression of power, and that the expression of power always involves the production and dissemination of knowledge. Foucault described how discourses

lian legal education since 1987 when the *Pearce Report* was published. The *Pearce Report* had a significant impact upon the teaching of law in Australia, evident in the fact that methods of legal education have changed considerably since its release. Thirdly, the source of legal education statements analysed indicates a further limitation. Rather than what those located outside the discursive field of legal education have to say about the teaching and critique of law, the focus is instead upon those within the discipline. The documents produced by non-academics, non-legal academics, government bureaucrats and educational scholars are peripheral to the scope of the analysis; those produced by Australian law teachers, law students, law school managers and lawyers are central to its concerns.

<sup>13</sup> The six discourses identified as categories in this article are neither arbitrary nor new. They emerge from an exhaustive examination of the archive of Australian legal education texts and each has previously been identified as a discrete ideology or approach to the teaching of law by legal education scholars. For example, doctrinalism was referred to and questioned in Margaret Thornton, ‘Portia Lost in the Groves of Academe Wondering What to Do about Legal Education’ (1991) 9(2) *Law in Context* 9. Vocationalism was identified and questioned in Andrew Goldsmith, ‘Standing at the Crossroads: Law Schools, Universities, Markets and the Future of Legal Scholarship’ in Fiona Cownie (ed), *The Law School — Global Issues, Local Questions* (1999) 62. Corporatism was identified and questioned in Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (1996). Liberalism was identified and defended in Sir Anthony Mason, ‘Universities and the Role of Law in Society’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) ix. Pedagogicalism (although not named as such) was identified and questioned in William Twining, ‘Bureaucratic Rationalism and *The Quiet (R)evolution*’ (1996) 7 *Legal Education Review* 291. Radicalism was identified and criticised in *Pearce Report*, above n 1.

<sup>14</sup> He did not suggest, however, that power and knowledge are the same thing. While many believe that Foucault insisted that ‘power is knowledge’ or that ‘knowledge is power’, according to Gavin Kendall and Gary Wickham, Foucault himself remarked that if they were the same thing it would have been a waste of most of his scholarly life to analyse their relation: Gavin Kendall and Gary Wickham, *Using Foucault’s Methods* (1999) 51.

designate the conjunction of power and knowledge: it is through discourses that the production of knowledge takes place and through which power is exercised and power relations are maintained.<sup>15</sup> Discourses seek both to inform and influence, both to educate and dominate. They tell subjects about themselves and about the world, and also construct that world and determine its subjects. It is power–knowledge, in the form of discourse, that determines what is allowed to be said and thought within a discipline, and ‘who can speak, and when, with what authority’.<sup>16</sup> Each legal education discourse, then, is simultaneously a category of statements about the teaching of law and an expression of power within the law school seeking to achieve a range of objectives, including the normalisation of a particular approach to the teaching of law, the enhancement of the status of a particular type of legal scholar and the establishment of a regime of truth. The six discourses compete with each other to dominate the discursive field of Australian legal education, deploying a range of strategies including the propagation of particular constructions of ‘critique’.

Most legal education texts, whether doctrinal, vocational, corporate, liberal, pedagogical or radical, portray legal education as seeking to achieve singular objectives, as incorporating singular practices and as producing singular meanings of law and legality. There are, of course, exceptions. Some texts portray legal education as characterised by a tension between two or more ideologies.<sup>17</sup> These texts, however, still typically claim that these ideologies can ultimately be reconciled into a singular vision, that any analysis of legal education should seek to acknowledge all viewpoints and that to argue that one is more important than the other is to make a false distinction.<sup>18</sup> In other words, doctrinal, vocational, liberal and other perspectives upon legal education can and

<sup>15</sup> Michel Foucault, *The History of Sexuality 1* (Robert Hurley trans, first published 1976, 1980 ed) 101 [trans of: *La Volente de Savoir*].

<sup>16</sup> Stephen Ball, ‘Introducing Monsieur Foucault’ in Stephen Ball (ed), *Foucault and Education: Disciplines and Knowledge* (1990) 1, 2.

<sup>17</sup> Vivienne Brand describes how ‘law as a discipline struggles as much as, or perhaps more than, any other discipline in its attempts to reconcile its close historic connections to professional practice with its current location in a university environment’: Vivienne Brand, ‘Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education’ (1999) 10 *Legal Education Review* 109, 109. William Twining describes the tension between liberalism, radicalism and vocationalism:

In all Western societies law schools are typically caught in a tug of war between three aspirations: to be accepted as full members of the community of higher learning; to be relatively detached, but nonetheless engaged, critics and censors of law in society; and to be service-institutions for a profession which is itself caught between noble ideals, lucrative service of powerful interests and unromantic cleaning up of society’s messes.

William Twining, *Blackstone’s Tower: The English Law School* (1994) 2. See also Penny Crofts, ‘Crossing the Theory/Practice Divide: Community-Based Problem Solving’ (2001) 3 *UTS Law Review* 40; Lyndal Taylor, ‘Skills: Skills-Kind Inclusion and Learning in Law School’ (2001) 3 *UTS Law Review* 85, 87.

<sup>18</sup> For example, Twining has argued that

[t]he standard dualistic conceptions of legal education — academic versus practical, theory versus practice, liberal versus vocational, educating for practice versus educating for the other uses to which law degrees are put — are false dichotomies. They do not represent dilemmas but different facets of legal education, and far from being in conflict, it is often the case that neither can be effectively addressed without the other.

William Twining, ‘Preparing Lawyers for the Twenty-First Century’ (1992) 3 *Legal Education Review* 1, 2.

should be reconciled into a single overarching approach.<sup>19</sup> Other texts acknowledge the range of interests involved in the shaping of legal education — including the profession, the university, the state and the students<sup>20</sup> — but imply that these competing interests manifest themselves as forces shaping a relatively stable and internally consistent body of knowledge about the teaching of law. Despite describing the range of possible objectives, approaches and visions, the portrayal of legal education is still that of a monolithic enterprise. Such texts imply that notions such as ‘law’, ‘education’ and, most relevantly, ‘critique’ have singular, stable meanings.

This article, on the other hand, argues that such singularity and stability do not exist. Each of the forces that participates in the discipline of legal education in fact produces its *own* knowledge, including knowledge about ‘critique’, and these knowledges compete to be accepted and recognised as truth about legal education by the participants. Discourses compete for dominance within law schools, within specific texts and within the thoughts and practices of subjects within law schools. Rather than seeking to reconcile the various meanings, interests and perspectives, this article acknowledges that reconciliation is impossible and that Australian legal education is a battlefield of competing and inconsistent truths. A central assertion of this article is that ‘legal education’ is only singular in the sense that it is a field of possibility; it is otherwise a nebulous term seeking to encircle an unstable and inconsistent collection of texts, practices, ideologies and assumptions.<sup>21</sup>

#### A Doctrinal Critique

Doctrinal discourse is defined as the set of statements about legal education produced by law schools, law teachers and legal scholars that privilege legal doctrine by locating it at the core of the legal curriculum and by emphasising its intellectual rigour, academic value and social importance. Doctrinalism historically dominated the discursive field of Australian legal education, although in the past few decades it has been increasingly displaced by vocationalism, corporatism and liberalism. There are very few contemporary legal education books and articles overtly advocating a doctrinal approach to teaching law. Legal education discourses do not, however, consist solely of the statements made about legal education in academic journals and monographs. The principal

<sup>19</sup> For example, legal education can be both more theoretical and more practical: see, eg, Bruce Dyer, ‘Making Company Law More Practical and More Theoretical: Curriculum Design’ (1995) 5 *Australian Journal of Corporate Law* 281; John Schlegel, ‘Legal Education: More Theory, More Practice’ (1988) 13 *Legal Service Bulletin* 71.

<sup>20</sup> The *Johnstone Report* referred to the ‘competing demands ... which law schools are now under some pressure to take into account in their development of curricula — from the university, from students, from employers and law societies, from admission boards, not all of whom share the same vision for legal education’: *Johnstone Report*, above n 5, 468.

<sup>21</sup> Foucault insisted that knowledge within a discipline is always discontinuous. Each discourse is in conflict with other possible meanings. Discourses ‘must be treated as discontinuous practices, which cross each other, are sometimes juxtaposed with one another, but can just as well exclude or be aware of each other’: Michel Foucault, ‘The Order of the Discourse’ in Robert Young (ed), *Untying the Text: A Post-Structuralist Reader* (1981) 48, 67.

statements which comprise doctrinalism in legal education are located in curriculum and course design, and in law school documents (such as course and subject descriptions). Doctrinal law subjects are those concerned principally with the learning of legal rules and principles, either formal or procedural, local or international. Based upon the descriptions published online, approximately one third of the introductory law subjects taught in Australia are doctrinal in that they are concerned primarily with traditional legal frameworks and concepts.<sup>22</sup> Doctrinalism is also inherent in the internal organisation of many subjects taught within the LLB. Most compulsory law subjects and many elective law subjects focus upon the exposition and analysis of what the law *is*.<sup>23</sup> While it is now relatively rare for a law subject to be concerned solely with the description of legal rules, and other approaches to the study of law are often incorporated into law subjects, many law subjects still privilege doctrine by making it the core of the curriculum and by making practical, theoretical and alternative perspectives on law secondary considerations.

Doctrinalism emphasises the transmission of doctrinal knowledge from law teacher and law text to law student. Critique is largely inimical to this process of transmission, because doctrine must be accepted and repeated, not criticised. Within the context of doctrinal legal education discourse, there exists a body of correct doctrine; law teachers know or possess this doctrine and successful law students learn and are capable of repeating this body of correct doctrine. Deviation is failure, and to the extent that criticism is deviation from correct doctrine, criticism is also failure.<sup>24</sup> The objective of doctrinal legal education is, literally, indoctrination. The ability to remember legal rules and apply them to the solution of legal problems is of primary importance; an ability to question legal rules is generally not necessary to the learning of law.<sup>25</sup> Of course, a doctrinal law teacher or text may themselves question and criticise the legal doctrine being taught; they may, for example, judge the doctrine according to the criteria of logic or internal consistency, or compare the doctrine with other possible doctrines from the past or from other jurisdictions. Critique is not,

<sup>22</sup> Regarding the importance of introductory subjects, see Helen Ward, ‘‘The Adequacy of Their Attention’’: Gender-Bias and the Incorporation of Feminist Perspectives in the Australian Introductory Law Subject’ (2000) 11 *Legal Education Review* 1, 13–14.

<sup>23</sup> This assessment is based upon a review of the online subject descriptions for each law school conducted by the author in 2003 (copies on file with author).

<sup>24</sup> One interviewee in the *Johnstone Report* explained the difficulty in reconciling doctrine with critique:

I think the legal doctrine is just the substance that we use to encourage students to learn and to engage in critical enquiry. ... [But] I think sometimes that actually makes the education process more difficult and it gets in the way sometimes of encouraging people to enquire, because it almost starts from the position that there is a body of doctrine that you have to know, and that’s more a learning process than any sort of critical enquiry.

*Johnstone Report*, above n 5, 283.

<sup>25</sup> Desmond Manderson and Richard Mohr have described how a doctrinal approach to legal education and scholarship emphasises the *discovery* of knowledge rather than *contribution* to knowledge. Doctrinalism is ‘closer to theology than to any of the social sciences, both in terms of its exegetical cast, its faith in authority, and its devotion to untangling the intricacies of canonical texts’: Desmond Manderson and Richard Mohr, ‘From Oxymoron to Intersection: An Epidemiology of Legal Research’ (2002) 6 *Law Text Culture* 159, 163.

however, a practice to be engaged in by the student. Most doctrinal texts do not refer to critique at all.

Doctrinalism persists despite decades of legal education scholarship criticising the preoccupation of law schools and law teachers with legal doctrine. Australian law schools and law teachers seem unwilling and unable to wholly abandon a teaching method that privileges the transmission of legal rules. An emphasis upon legal doctrine might be justified as necessary to ensure that law students are taught what the law 'is' with a view both to future practice and to the maintenance of the rule of law within the community. A law graduate with no knowledge of legal doctrine would be unemployable and law students need to know what the legal rules are in order to implement them in practice and to ensure that they are understood and obeyed by the wider community.

An alternative and more persuasive explanation for the persistence of doctrinalism relates to its power effect. Doctrinalism, like all discourses, is an expression of power within the law school, one which constructs and privileges a particular academic role: the legal specialist. Doctrinal discourse creates an environment for legal specialists within which they are the experts, the only persons qualified to judge and determine legal knowledge. Doctrinalism accords legal specialists privilege and status over others: practitioners, students, and non-legal scholars. Doctrinalism persists within the law school because many legal scholars benefit from its persistence. As an expression of power, doctrinalism seeks to preserve the legitimacy of 'law' as a discrete and highly privileged field of expertise within both the university and wider society. That purpose is not furthered by the facilitation or encouragement of critique. For doctrinalism, critique is a dangerous practice because it questions faith in the law and threatens to break down the disciplinary, academic and social barriers between law and non-law and between lawyers and non-lawyers.

### B *Vocational Critique*

Vocational discourse is the set of statements and practices about legal education produced by law schools, law teachers and legal scholars that prioritise the teaching of legal skills and emphasise the importance of employability as an objective of legal education. According to vocational discourse, the primary purpose of legal education is to teach students to be either lawyers or workers with legal skills; what students learn to do is just as important as, if not more important than, what they learn to know. Consequently, the doctrinal law course is inadequate in that there is too much emphasis upon learning legal doctrine<sup>26</sup> and insufficient emphasis on learning practical legal skills.

Most Australian law schools in their promotional texts refer to the close connections between the school and the professional legal community, the teaching of legal skills within the degrees offered by the school and the employability of

<sup>26</sup> Ironically, often referred to as 'legal theory' within vocational texts.

their graduates.<sup>27</sup> Regardless of how they describe themselves, every Australian law school offers at least some vocational law subjects or programs.<sup>28</sup> According to the *Johnstone Report*, the infusion of legal skills education and training into LLB programs has been the biggest change in law school curricula over the last decade.<sup>29</sup>

There are many works of Australian legal education scholarship that explicitly advocate a vocational approach to the teaching of law. Some texts focus upon the importance of and the methodology for teaching legal and generic skills to law students.<sup>30</sup> Some describe the design or the teaching of clinical legal education<sup>31</sup>

<sup>27</sup> For example, the University of Adelaide Law School advises prospective students that the LLB 'incorporates in the degree a number of Legal Skills focussed subjects, taught closely in conjunction with mainstream substantive subjects' and that 'many members of the Law School have active and prominent associations with the practising legal profession and the broader legal community': University of Adelaide, above n 8. Graduates from Griffith University Law School 'can look forward to high employment rates and high starting salaries' and the Law School 'places a heavy emphasis on the practical and generic skills of lawyering': Griffith University, *Griffith Law School* (2004) <<http://www.gu.edu.au/school/law>>. The Charles Darwin University Law School emphasises vocationalism by providing 'a solid theoretical and practical general legal education that well prepares students for professional practice' and by maintaining 'close contact with members of the practising legal profession': Charles Darwin University, *Head of School's Welcome* (2004) <<http://www.cdu.edu.au/law/welcome.htm>>. The University of Notre Dame College of Law's LLB program was 'specially designed in practical and ethical content by some of Western Australia's leading legal practitioners. ... It is a law degree made by lawyers, for lawyers': University of Notre Dame Australia, *College of Law* (2004) <<http://web.nd.edu.au/acadc/law>>.

<sup>28</sup> This includes compulsory and elective law subjects described as focusing upon general legal skills. Furthermore, subjects focusing upon specific legal skills such as legal research, legal reasoning, drafting, dispute management, advocacy, trust accounting, interviewing, legal practice management, and computing skills; law clinics; moot programs; internship programs; and practical legal training ('PLT') programs are all concerned, at least peripherally and often primarily, with the inculcation of practical skills and training for legal practice.

<sup>29</sup> *Johnstone Report*, above n 5, 166. The *Johnstone Report* gave examples of four approaches to the incorporation of legal skills into the curricula: a minimalist approach; a more explicit approach where there are dedicated law skills subjects, modules within law subjects, clinical programs and placements; carefully planned incremental, integrated and coordinated skills programs spanning the entire LLB; and the inclusion of fully-fledged professional legal training programs within LLB programs. The Report concluded that most schools have adopted the second approach and whilst none of the law schools have ignored legal skills altogether, an increasing number of schools have either adopted the fourth approach or are thinking about doing so.

<sup>30</sup> See, eg, Sharon Christensen and Sally Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration?' (2000) 11 *Legal Education Review* 207; Neil Gold, 'Taking Skills Seriously: A Research Prospectus' (1987) 5 *Journal of Professional Legal Education* 64; Neil Gold, 'Are Skills Really Frills?' (1993) 11 *Journal of Professional Legal Education* 1; Ross Hyams, 'The Teaching of Skills: Rebuilding — Not Just Tinkering around the Edges' (1995) 13 *Journal of Professional Legal Education* 63; Sally Kift, 'Lawyering Skills: Finding Their Place in Legal Education' (1997) 8 *Legal Education Review* 43; Fiona Martin, 'The Integration of Legal Skills into the Curriculum of the Undergraduate Law Degree: The Queensland University of Technology Perspective' (1995) 13 *Journal of Professional Legal Education* 45.

<sup>31</sup> See, eg, Susan Campbell, 'Blueprint for a Clinical Program' (1991) 9 *Journal of Professional Legal Education* 121; Graeme Coss, 'Field Placement (Externship): A Valuable Application of Clinical Education?' (1993) 4 *Legal Education Review* 29; Adrian Evans, 'Client Group Activism and Student Moral Development in Clinical Legal Education' (1999) 10 *Legal Education Review* 179; Jeff Giddings, 'Using Clinical Methods to Teach Alternative Dispute Resolution: Developments at Griffith University' (1999) 10 *Australasian Dispute Resolution Journal* 206; Ainslie Lamb and John Goldring, 'Professional Placement Programs' (1996) 14 *Journal of Professional Legal Education* 109; Lee Steusser, 'Skills for the Masses: Bringing Clinical Skills to More Students at Less Cost' (1992) 10 *Journal of Professional Legal Education* 119.

or practical legal training programs.<sup>32</sup> Many other works that could be characterised as primarily doctrinal, liberal, pedagogical or radical contain statements that also explicitly or implicitly advocate the incorporation of legal skills and deference to legal practice.

Vocational texts often recognise the relevance and importance of critique — referred to as ‘critical thinking’, ‘critical reasoning’ or ‘critical evaluation’ — as one of the skills that law students should acquire during their legal education. Reference has already been made to the University of Adelaide Law School’s emphasis upon ‘critical thinking and problem solving skills’.<sup>33</sup> Similarly, the LLB at Monash University aims to ‘[e]ncourage students to analyse the law critically’ and to develop attributes of ‘critical thought and analysis’.<sup>34</sup> Sharon Christensen and Sally Kift have described how law graduates should develop ‘critical thinking and problem solving skills, to enable effective analysis, evaluation and creative resolution of legal problems.’<sup>35</sup> Very few of the vocational texts that refer to critical thinking, however, define the term in any detail. The *Pearce Report*, for example, did not explain precisely what it meant by ‘critical thought’ or ‘critical evaluation’, but its use of the terms in the context of references to intellectual skills, together with its comments about the inappropriateness of teaching Critical Legal Studies (‘CLS’) in the law school, suggests that it was not referring to a sociopolitical form of critique. It appears that most vocational texts assume an understanding of the term ‘critical thinking’, which appears to be the one promulgated by what is known as the critical thinking (‘CT’) movement.

The CT movement is a trend within education scholarship and amongst teaching practitioners which advocates an emphasis on the skill of critical thinking. It now informs a variety of critical thinking guides and handbooks,<sup>36</sup> academic scholarship and educational policies. In 1988, Harvey Siegel reviewed a range of CT texts and found agreement between many CT theorists that ‘critical thinking’ has at least two central components: a cognitive component, which involves abilities and skills relevant to the proper understanding and assessment of

<sup>32</sup> See, eg, Geoff Monahan and Bronwyn Olliffe, ‘Competency-Based Education and Training for Law Students in Australia’ (2001) 3 *UTS Law Review* 181; Stephen Nathanson, ‘Putting Skills and Transactions Together in Professional Legal Training’ (1987) 5 *Journal of Professional Legal Education* 187; Stephen Nathanson, ‘Bridging the Divide between Traditional and Professional Legal Education’ (1997) 15 *Journal of Professional Legal Education* 15; Stephen Nathanson, ‘Designing a Powerful PLT Program’ (1998) 16 *Journal of Professional Legal Education* 229; Robert Park, ‘Appropriate Methods for the Teaching of Legal Skills in Practical Training Courses’ (1990) 8 *Journal of Professional Legal Education* 161; Anne Shorten, ‘The Benefits of Hindsight: Obtaining the Graduate Perspective on a Practical Training Course’ (1988) 6 *Journal of Professional Legal Education* 181; L Keith Young, ‘The Practical Training Course Curriculum: Meeting the Needs of the Students’ (1989) 7 *Journal of Professional Legal Education* 39.

<sup>33</sup> University of Adelaide, above n 8.

<sup>34</sup> Monash University, *Undergraduate Program: Bachelor of Laws (LLB)* (2004) <<http://www.law.monash.edu.au/undergraduate/llb.html>>.

<sup>35</sup> Christensen and Kift, above n 30, 216.

<sup>36</sup> See, eg, Vincent Barry and Joel Rudinow, *Invitation to Critical Thinking* (1990); Toni-Lee Capossela (ed), *The Critical Writing Workshop: Designing Writing Assignments to Foster Critical Thinking* (1993); Richard Paul, *Critical Thinking: What Every Person Needs to Survive in a Rapidly Changing World* (1994).

reasons, claims and arguments; and a ‘critical spirit’ component, which is a complex of dispositions, habits of mind and character traits.<sup>37</sup> Vocational critique, then, is the ability to recognise faulty arguments, hasty generalisations, assertions lacking evidence, truth claims based on unreliable authority, and ambiguous or obscure concepts. The primary objective in teaching critique is to supplant sloppy or distorted thinking with thinking based on reliable procedures of inquiry. As such, critique is a skill that is clearly useful to the legal practitioner. An ability to think critically is one aspect of an ability to ‘think like a lawyer’.

The critical thinking advocated in most vocational legal education texts, however, appears to be limited to the first level identified by Siegel — that is, skill in the understanding and assessment of reasons, claims and arguments. The higher level ‘critical disposition’ is generally not recognised. The emphasis appears to be upon a form of critique most useful for an employee lawyer; students are not encouraged to question *everything*, just certain rules, certain statements, and the opposing counsel’s arguments.<sup>38</sup> The principal factor determining both the meaning of and emphasis upon vocational critique is employability. To the extent that critique is seen as a skill enhancing the employability and usefulness of a student it is encouraged; to the extent that it is an attribute or practice which is irrelevant to employability it is generally ignored.

The particular notion of critique constructed by vocationalism is one strategy deployed by vocational discourse in the achievement of its disciplinary objectives: the successful propagation of vocationalism, the enhanced status of vocationalism’s advocates and the production of employable graduates. Vocational critique is a practical skill, a competence enabling the student to rationally judge reasons, arguments and statements. It is a skill that is useful to practising lawyers, who need to argue with others, defend their clients, negotiate agreements and settlements, cross-examine witnesses and prepare pleadings. By defining critique as a practical skill, the notion that education equates with training is reinforced among students, teachers and graduates. Inculcating critical thinking skills in law students is also likely to encourage practising lawyers to adopt a rationalistic and pragmatic world view, who consequently will encourage law schools to continue to move toward a more practical and skills-based legal education.

<sup>37</sup> Harvey Siegel, *Educating Reason: Rationality, Critical Thinking and Education* (1988) ch 2. A similar two-tier model to that observed by Siegel was proposed in 1990 by the American Philosophical Association:

We understand critical thinking to be purposeful, self-regulatory judgment which results in interpretation, analysis, evaluation, and inference, as well as explanation of the evidential, conceptual, methodological, criteriological, or contextual considerations upon which that judgment is based. [Critical thinking] is essential as a tool of inquiry.

American Philosophical Association, *Critical Thinking: A Statement of Expert Consensus for Purposes of Educational Assessment and Instruction* (1990) 2.

<sup>38</sup> Robin Handley and Damien Considine make this limitation explicit: ‘whilst we agree that critical analysis is a fundamental component of legal education, such analysis should, in our view, take place in the context of how the law operates, or should operate, in the community’: Robin Handley and Damien Considine, ‘Introducing a Client-Centred Focus into the Law School Curriculum’ (1996) 7 *Legal Education Review* 193, 204.

Vocational critique also enhances the status of the vocational law school. Law schools that focus upon the inculcation of vocational critique — and not other, more sociopolitical forms of critique — produce graduates who are able to think like lawyers but who are unlikely to engage in practices which are less conducive to obedient service. These graduates are likely to be employed by the more commercially successful and hence more prestigious firms, thereby enhancing the school's status in the eyes of vocationally-oriented students and corporate university management.

One of the key objectives of vocationalism is to train a compliant workforce of legal practitioners. Vocational critique promotes this objective by restricting the scope of criticism to that which is most useful to employers and by ignoring possible targets of criticism that may be contrary to the interests of employers. Consider the range of formulations of 'critical thinking' presented above: criticism is limited to specific statements, reasons and arguments. Ideologies (particularly that of the critical thinker), world views and cultural perspectives are ignored. Vocational critique does little to encourage the student to judge the normativity and universality of liberalism, capitalism, or Western conceptions of law and justice, and vocationalism itself is unlikely to be questioned. The role of the law school is to service the profession by providing new workers and by retraining existing workers. The social status quo favours employers by allowing them to occupy positions of institutional, political and economic privilege, and the vocational law school seeks to reinforce this situation and to ensure that the present privilege is retained. Critique has the potential to undermine privilege: vocationalism therefore appropriates critique and transforms it into a practical legal skill that enhances an employee's productivity, but does little to threaten the employer's privileged status.

### *C Corporate Critique*

The definition of corporatism employed in this article is the set of statements and practices about legal education produced by law schools, law teachers and legal scholars that emphasise and prioritise the accountability of teachers and students, the efficiency of the teaching process and the marketability of the law school.<sup>39</sup> Corporatist statements emphasise accountability, efficiency and marketability ahead of such objectives as the transmission of doctrinal knowledge, the inculcation of legal skills, the achievement of liberal ideals, pedagogical innovation or social reform. It is not the case that these other objectives are disregarded completely; rather, they are permitted only to the extent that they are regarded as consistent with the satisfaction of corporatist objectives.

<sup>39</sup> Corporatism shares many of the characteristics of vocationalism, and as modes of power these two discourses often coincide. Vocationalism is the insistence that the law school exists as an adjunct to the profession or at least as a training school for future workers; corporatism is the insistence that the law school is, or should be, an efficient and profitable institution in its own right. Like vocationalism, corporatism is concerned primarily with utility, but instead of focusing solely upon the utility of the legal education it is concerned with the utility of the law school itself.

The specific texts within which corporatist statements are primarily located are law school policy documents. Administrative policies address and seek to regulate all aspects of the legal education process in the name of efficiency, accountability and marketability.<sup>40</sup> The day-to-day working lives of most Australian law teachers and law students are not regulated by legal scholarship or textbooks, but by the administrative requirements of the law school. To a much lesser degree, corporatist statements are also located within works of legal education scholarship.<sup>41</sup>

Corporatism is a relatively new discourse, but it has been particularly successful and its impact upon legal education has been enormous. Decisions within the law school about what is taught, by whom and to whom are increasingly likely to be based principally upon what decision-makers perceive as the most economically advantageous course of action. Corporate notions of quality and efficiency dictate the form and content of many law courses and the relationship between law teacher and law student has evolved into one that bears many similarities to that between service provider and customer, or between manufacturer and product.

For corporatism, critique is a mechanism through which non-traditional perspectives on the law can be introduced into the curriculum. The purpose of critique is to make the educational 'product' more distinctive and hence more marketable to potential customers. Critique has become almost fashionable, and many course descriptions include the word 'critical' to convey to potential customers the impression that the law course is innovative or will make graduates better lawyers. In the discourse of corporatism, the word 'critical' is used to market the law degree — beyond that it has very little meaning or relevance.

The corporate notion of critique is one of the strategies deployed by corporatism in the achievement of its objectives. Corporate critique is a form of critique that extends little further than the criticism of some aspects of law and legality and the facilitation of basic critical thinking skills. It does not extend to the

<sup>40</sup> For example, at the University of Queensland law school, policies address such matters as: induction of new teaching staff; setting teaching objectives; drafting course materials; development of course websites; conducting teaching surveys; allocation of teaching hours; assessment procedures and grading; addressing student concerns and reviewing assessment; student enrolment and withdrawal; conducting examinations, exclusions and appeals; appointment of casual tutors; administration tutorials; development of new courses; and annual reviews of teaching performance: University of Queensland, *T C Beirne School of Law* (2003) <<http://www.law.uq.edu.au>>.

<sup>41</sup> For example, David Spencer and Geoff Monahan have explored the notion that minimising and more efficiently using resources could achieve better quality pre-admission legal skills and vocational training:

It is possible to produce high quality law graduates using alternative methods of educational delivery. Potentially, this learning can be achieved in the same time, or even in less time, than traditional face to face methods, and with arguably fewer resources than are currently being expended.

David Spencer and Geoff Monahan, 'Alternative Learning Strategies for Legal Skills and Vocational Training' (2001) 3 *UTS Law Review* 210, 210–11. Other works incorporating corporatist statements include: Tony Tarr, 'The Funding and Sponsorship of Legal Education' (1994) 12 *Journal of Professional Legal Education* 17; Maria Tzannes, 'Quality Assurance in Practical and Clinical Legal Education: A Brave New World' (1994) 12 *Journal of Professional Legal Education* 57.

rigorous judgement of underlying ideologies within the law and the legal system. The unwillingness of corporatism to encourage deep criticism is perhaps due to the fact that such a level of critique would inevitably turn to question the legitimacy of corporatism itself. To enhance the prospects of its own propagation, corporatism cannot allow anything more than a tempered version of critique.

Corporate critique enhances the status of the university and law school administrators. Critique is fashionable; it is recognised by other disciplines within the university as a high level academic exercise or ability, and this perception is to a limited extent embraced by law students, who perceive a course that involves some element of critique as academically prestigious. The administrator who encourages critique in the delivery of law courses therefore enhances his or her own status within the university, both directly by appearing to encourage a greater degree of academic rigour and indirectly by making law subjects and courses more attractive to students and hence more profitable. Corporate critique also enhances the efficiency of the law school. Critique — at least the kind of critique advocated by corporatism — is relatively cheap. Making a law course more critical is unlikely to cost more money, take up more law school resources or require the employment of extra staff. Critique makes the course more marketable without incurring any extra cost.

Ultimately, however, critique is of relatively little importance to the overall shape and direction of corporate legal education. Corporatism is more likely to be unsupportive of rigorous critique because it is an element of legal education which is difficult to measure or assess.<sup>42</sup> Rigorous critique — of law, society, learning, self or knowledge — is time-consuming and requires effort on the part of both the teacher and the student. The rewards earned as a result of expenditure of this time and effort cannot be measured in terms of quality and profit. Rigorous critique often appears to be difficult and challenging, and hence less appealing to the time-poor and already overworked law student as consumer. Critique cannot be so complicated or difficult that prospective students are repelled by it, or so thorough that it is perceived as wasting resources and adding unnecessarily to the amount of time it takes to complete a law subject or course.

Corporatism, like doctrinalism and vocationalism, seeks to preserve the status quo within the law school and the community and does not seek change beyond the desire for endless growth and profitability. Rigorous critique has the potential to encourage students and others to question and even subvert the status quo and

<sup>42</sup> Andrew Goldsmith has written about the difficulty of reconciling critique with corporate objectives:

In terms of the consequences of new directions in law teaching and support for non-traditional forms of scholarship, there are signs that those committed to innovation or diversity will be hindered, rather than unleashed, by this ideological shift ... It is crucial we do not lose sight of intellectual debates and especially the role of critical reflection in university education, among the demands for relevance, vocationalism, and efficiency in the delivery of legal education.

Goldsmith, 'Standing at the Crossroads', above n 13, 63–4 (emphasis omitted). Later in the same article, he asks the questions that go directly to the heart of the inconsistency between corporatism and critique: 'is criticism or reflection efficient? How would you ever show it to be so?': at 66.

to that extent corporatism discourages critique. Rigorous critique includes criticism of the nature of legal education and the role of the law school itself and corporatism cannot countenance a practice that may lead to the school and its product being portrayed as less appealing or less marketable.

#### D *Liberal Critique*

Liberalism is defined in this article as the set of statements about legal education which endorse the liberalising of traditional legal education by advocating individual freedom, social responsibility and the inculcation of an informed rationality. Liberalism emphasises individual freedom by insisting that the law student be free to direct their own education and growth, that the law teacher be free from excessive intervention by the law school, and that the school be free from excessive intervention by the university, the profession and the state. Liberalism tempers this emphasis upon individual freedom by also insisting upon the importance of social responsibility. Many of the more recent works of liberal legal education scholarship explore the ways in which ethical values can be taught to law students.<sup>43</sup> Other works of liberal scholarship encourage law school and university administrators to embrace liberal ideals of fairness and justice in relation to the admission of students to the law school<sup>44</sup> or in relation to the teaching of law generally.<sup>45</sup> Finally, liberalism is characterised by an insistence upon the inculcation of an ‘informed rationality’ — that is, an intellectual ability beyond mere doctrinal expertise or vocational skill. Some liberal scholars insist that this is best achieved by the teaching of more legal theory.<sup>46</sup> Others encourage law teachers to teach law in a more contextual

<sup>43</sup> See, eg, Frank Armer, ‘The Teaching of Ethics in Australian Law Schools’ (1998) 16 *Journal of Professional Legal Education* 247; Susan Burns, ‘Teaching Legal Ethics’ (1993) 4 *Legal Education Review* 141; Margaret Castles, ‘Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia’ (2001) 12 *Legal Education Review* 81; Diana Henriss-Anderssen, ‘Teaching Legal Ethics to First Year Law Students’ (2002) 13 *Legal Education Review* 45; Marlene Le Brun, ‘Enhancing Student Learning of Legal Ethics and Professional Responsibility in Australian Law Schools by Improving Our Teaching’ (2001) 12 *Legal Education Review* 269; Guy Powles, ‘Taking the Plunge: Integrating Legal Ethics in Australia’ (1999) 33 *Law Teacher* 315.

<sup>44</sup> See, eg, David Barker, *Access to Legal Education* (1996); Kevin Dolman, ‘Indigenous Lawyers: Success or Sacrifice?’ (1997) 4 *Indigenous Law Bulletin* 4; Heather Douglas, ‘The Participation of Indigenous Australians in Legal Education 1991–2000’ (2001) 24 *University of New South Wales Law Journal* 485; Daniel Lavery, ‘The Participation of Indigenous Australians in Legal Education’ (1993) 4 *Legal Education Review* 177; David Weisbrot, ‘Access to Legal Education in Australia’ in Rajeev Dhanan, Neil Kibble and William Twining (eds), *Access to Legal Education and the Legal Profession* (1989) 85; Alex Ziegert, ‘Social Structure, Educational Attainment and Admission to Law School’ (1992) 3 *Legal Education Review* 155.

<sup>45</sup> See, eg, Judith Dickson, ‘Teaching about Justice as Well as Law’ (2003) 28 *Alternative Law Journal* 18; Jeff Giddings and Jody Thomas, ‘Teaching the Law as It Relates to Older People’ (2002) 27 *Alternative Law Journal* 78, 80–1; Mary Anne Kenny and Anna Copeland, ‘Legal Education: Clinical Legal Education and Refugee Cases: Teaching Law Students about Human Rights’ (2000) 25 *Alternative Law Journal* 252.

<sup>46</sup> See, eg, John Goldring, ‘The Place of Legal Theory in the Law School: A Comment’ (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 159; John Goldring, ‘Tradition or Progress in Legal Scholarship and Legal Education’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 27; Mary Keyes and Graham Orr, ‘Giving Theory “A Life”’: First Year Student Conceptions of Legal Theory’ (1996) 7 *Legal Education Review* 31; Charles Sampford and David Wood, ‘Legal Theory and the Law Curriculum:

manner and to incorporate insights about law from other disciplines and other cultures.<sup>47</sup>

References to the critique of law and of legal institutions are commonplace within liberal texts. Indeed, many liberal texts place critique at the centre of the legal education project. Sir Anthony Mason, when discussing the desirability of a liberal legal education, has described critique as ‘essential’.<sup>48</sup> John Goldring has emphasised the importance of the development of ‘critical techniques and attitudes’<sup>49</sup> and gone so far as to *equate* a liberal legal education with the capacity for independent, critical thought.<sup>50</sup>

There are three key features of liberal critique that distinguish it from vocational critique. The first distinction is the object of critique. Where vocational critique is the judgement of statements and arguments, liberal critique extends the object of criticism to include the judgement of law as a social phenomenon of legal institutions and legal texts. Charles Sampford and David Wood have linked critique with the judgement of the knowledge and skills of the legal profession,<sup>51</sup> and Sampford later offered a detailed description of a possible

Responding to Pearce’ (1987) 61 *Law Institute Journal* 1258; Charles Sampford and David Wood, ‘Theoretical Dimensions of Legal Education’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 100.

<sup>47</sup> See, eg, Ian Duncanson, ‘Degrees of Law: Interdisciplinarity in the Law Discipline’ (1996) 5 *Griffith Law Review* 77; Anthony O’Donnell, ‘Thinking “Culture” in Legal Education’ (1996) 7 *Legal Education Review* 135; Anthony O’Donnell and Richard Johnstone, *Developing a Cross-Cultural Law Curriculum* (1997); Andrea Rhodes-Little, ‘Teaching Lawyering Skills for the Real World: Whose Reality? Which World? Or the Closing of the Australian Legal Mind’ (1991) 9(2) *Law in Context* 47; Klaus Ziegert, ‘The Day in Court: Legal Education as Sociological Research Practice in the Form of an Ethnographic Study’ (1990) 2 *Legal Education Review* 59.

<sup>48</sup> Mason has written:

Without an accurate understanding of the law as it is, one is scarcely equipped to participate in a debate about what the law ought to be. But, as a number of High Court decisions have shown in recent years, there is a vast scope for debate about what the existing law is without moving on to the contentious stage, what it ought to be. Even if one does not move on to that second stage, it is essential to view the existing principles critically.

Mason, above n 13, xii.

<sup>49</sup> Goldring has written:

Among legal academics there is a growing belief that whatever the aims of legal education and legal scholarship may be, they must include the development of critical techniques and attitudes. These objectives should be as important within legal education as they are in other areas of scholarship and higher education.

Goldring, ‘Tradition or Progress in Legal Scholarship and Legal Education’, above n 46, 28.

<sup>50</sup> Goldring has written:

If the capacity for independent, critical thought (ie a ‘liberal education’) is a desired outcome of legal education, we must ask whether existing approaches to and methods of teaching and learning law are the best way to deliver this or whether other approaches, including distance learning, may do as well.

John Goldring, ‘Coping with the Virtual Campus: Some Hints and Opportunities for Legal Education’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 76, 85.

<sup>51</sup> Sampford and Wood have written:

it is clear that a large proportion of the profession freely acknowledges that not only is a university-style education at the core of a good legal education, the traditional conception of a profession as involving a body of knowledge and skills is no longer adequate in the 20<sup>th</sup> (and soon 21<sup>st</sup>) century. What is needed is a critical questioning and reflexive awareness of that knowledge and skills; these qualities are the hallmark of a good university education.

Sampford and Wood, ‘Theoretical Dimensions of Legal Education’, above n 46, 115.

‘critical dimension’ of legal education, which included criticism of legislators and legislation, appointments to the judiciary, the way judges exercise their choice and judicial justifications of rules.<sup>52</sup>

The second feature of liberal critique relates to the criteria by which the object of critique is judged. The criterion used to judge law and legal institutions is liberal rationality.<sup>53</sup> Legal phenomena are judged according to liberal standards of reason, fairness, equality and ethicalness.

The third distinguishing feature of liberal critique is the notion that it is sometimes appropriate to judge law, legal institutions and legal texts from the perspective of other disciplines and cultures.<sup>54</sup> Liberalism thus introduces into critique the notion that the criteria applied in the judgement of law and legality include more than legal rationality; they also include beliefs and standards typically ignored in the traditional approaches to legal education.

Liberal critique is a more rigorous form of critique than that produced by doctrinal, vocational and corporate legal education discourses. However, critique is still defined restrictively by liberal texts. The focus of critique is limited to particular legal phenomena and the criteria upon which judgement is made are generally limited to liberal standards. Liberal critique is less supportive of the disciplinary and social status quo than the discourses and forms of critique considered above in the sense that it promulgates a desire to see legal education, legal scholarship and legal practice made more rational, just, ethical, fair and

<sup>52</sup> See Charles Sampford, ‘Teaching Theory in Substantive Subjects’ in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 117, 124–5.

<sup>53</sup> For example, Goldring has written:

A University law school can and should effect a number of things. It must, above all, develop the student’s ability to think critically, to question accepted wisdom and to examine rationally and coolly a range of optional solutions to any problem. That is the quintessence of the University education.

John Goldring, ‘Networking: Law Schools and Practical Legal Training Institutions’ (1993) 11 *Journal of Professional Legal Education* 79, 82. Goldring has also suggested that ‘[t]hose who engage in the search for understanding must exercise both doubt and critical skills. In this task, they need theory as a tool, especially in the building of hypotheses which can be examined and, through the process of empirical examination, further our understanding’: Goldring, ‘Tradition or Progress in Legal Scholarship and Legal Education’, above n 46, 30.

<sup>54</sup> For example, Marlene Le Brun and Richard Johnstone have written:

Since we know that no one has a ‘purchase’ on reality — that our world is made up of a cacophony of voices — we believe that we as law teachers must ensure that our students understand that the knowledge, skills, attitudes, and beliefs that are transmitted in law schools are only perspectives on social life and law. As a result, in our opinion, our job as law teachers is to expose our students to various theories so that they are better placed to select and adapt what they learn to construct their own legal world view. *Teaching law in a critical way facilitates this objective.*

Marlene Le Brun and Richard Johnstone, *The Quiet (R)Evolution: Improving Student Learning in Law* (1994) 394 (emphasis added). Goldring has argued that

legal scholars must not accept the self-imposed boundaries of the legal culture; they must question the assumptions which underlie not only the legal order but also the culture which the operation of that order has produced. The operation of the aspects of the legal order must be measured against standards external to itself.

Goldring, ‘Tradition or Progress in Legal Scholarship and Legal Education’, above n 46, 39. Kathy Laster has defined critique in terms of promoting the students’ capacity to look at law from the informed position of ‘insider’ while preserving the critical eye of the ‘outsider’ towards legal practice and institutions: Kathy Laster, ‘Design-a-Court: An Introductory Socio-Legal Assessment Exercise’ (1998) 9 *Legal Education Review* 193, 195.

inclusive. Yet liberal critique is characterised by an ongoing acceptance of the inevitability of law, rationality and liberalism itself. Although critique may be acknowledged as an important objective (if not the most important feature) of a liberal legal education, legal education is still about producing a citizen who will conform to social rules, standards and expectations. In a similar vein to vocationalism, a critical graduate is desirable, but not a graduate who is so critical that they no longer participate within the community as an obedient subject.

In addition to being a form of knowledge, liberal critique is also one of the strategies deployed by liberalism-as-power in the achievement of its objectives. It is a strategy by which the liberal criteria of rationality, ethicality and justice are used to judge laws, legal institutions and legal practices. This is consequently a strategy that simultaneously propagates those liberal values and undermines competing discourses such as doctrinalism and vocationalism. Liberal critique is notionally about the application of reason to make explicit that which is implicit, thereby revealing a hidden truth, but the truth which is revealed is consistent with the liberal world view and liberal ideals. The liberal notions of rationality, individualism, justice, ethics and rights are contested notions, but liberal critique offers them as universal and inevitable criteria against which all laws, legal knowledge and legal practices can be judged.

Liberal critique also enhances the status of liberal legal scholars, who by practising and teaching a theoretical and interdisciplinary form of critique are more likely to be viewed by scholars within other disciplines as conducting research and practising teaching at a more academic and more rigorous level than those law teachers and scholars who are concerned merely with legal doctrine or legal training.

Finally, liberal critique is one element within the much larger liberal project: the incorporation and assimilation of all knowledge within the liberal notion of truth. Liberal critique includes criticism of law and legal institutions from the perspective of other disciplines and other cultures. These perspectives are thereby assimilated into the liberal world view and the liberal world view is consequently enhanced and privileged. When the theoretical and philosophical basis for a legal phenomenon is uncovered, or when that phenomenon is criticised as culturally biased, or when it is questioned from the perspective of another discipline, such as sociology or psychology, the result is the enhancement of the liberal explanation of the world by the inclusion of more knowledge, more detail and more experience.

### *E Pedagogical Critique*

Pedagogicalism is the set of legal education texts produced by law schools and legal education scholars which emphasise the importance of effective teaching and learning and insist that law be taught in a manner consistent with orthodox education scholarship. Orthodox education scholarship generally defines

teaching as the facilitation of learning. As Paul Ramsden has suggested to Australian law teachers,

teaching means more than instructing and performing and extends more broadly to providing a context in which students engage productively with subject matter. There is now a widespread view in academic development circles, derived directly from the student learning research, that we should concentrate on learning, on what the learner does and why the learner thinks he or she is doing it, rather than what the teacher does.<sup>55</sup>

Orthodox education scholarship also emphasises a distinction between approaches to learning, based upon the work of Ference Marton and Roger Saljo, who defined the distinction between ‘surface’ and ‘deep’ approaches to learning. Students who adopt a surface approach to learning tend to learn by rote and not to question the assumptions that underpin the material or to relate it to context. Students who adopt a deep approach to learning tend to examine arguments critically, to question the assumptions on which they are based and to relate them to previous knowledge and understanding.<sup>56</sup> It is the role of the teacher to inculcate in students a deep approach to learning.<sup>57</sup>

Australian legal education scholarship has also embraced the orthodox notion of ‘effective teaching’. The *Johnstone Report* summarised the various aspects of effective teaching that have been promulgated by pedagogical legal education scholarship in recent years.<sup>58</sup> Today, the ‘good teacher’ is one who endeavours to

<sup>55</sup> Paul Ramsden, ‘Improving the Quality of Higher Education: Lessons from Research on Student Learning and Educational Leadership’ (1995) 6 *Legal Education Review* 3, 4.

<sup>56</sup> Ference Marton and Roger Saljo, ‘On Qualitative Differences in Learning — 2: Outcomes as a Function of the Learner’s Conception of the Risk’ (1976) 46 *British Journal of Educational Psychology* 115.

<sup>57</sup> The distinction between surface and deep approaches to learning is one that has been accepted by a number of Australian legal education scholars: see, eg. Carol Bond and Marlene Le Brun, ‘Promoting Learning in Law’ (1996) 7 *Legal Education Review* 1; Beth Campbell, ‘Professional Legal Education, Deep Learning and Dispute Resolution’ (1997) 15 *Journal of Professional Legal Education* 1; Crofts, above n 17; Goldring, ‘Coping with the Virtual Campus’, above n 50; John Goldring, ‘Thinking about First Year Law Teaching’ (1995) 2 *Canberra Law Review* 137, 139–40; Marlene Le Brun, ‘Curriculum Planning and Development in Law: Why Is Innovation So Rare?’ (1991) 9(2) *Law in Context* 27; Le Brun and Johnstone, above n 54; Elena Marchetti, ‘The Influence of Assessment in a Law Program on the Adoption of a Deep Approach to Learning’ (1997) 15 *Journal of Professional Legal Education* 203; Nicolette Rogers, ‘Improving the Quality of Learning in Law Schools by Improving Student Assessment’ (1993) 4 *Legal Education Review* 113.

<sup>58</sup> The effective teacher: is enthusiastic about sharing a love of the law subject with others; motivates students to feel the need to learn the law subject material; makes the material of the law subject genuinely interesting; shows concern and respect for students, recognising the diversity within the student body; is available to students; makes it clear to students what they are expected to be able to do; uses clear explanations, using a variety of appropriate techniques; focuses on key concepts and students’ misunderstanding of them, rather than on trying to cover a lot of ground; uses a variety of valid methods for assessment that focus on the key areas that students need to master; encourages students to engage deeply with the task; avoids forcing students to rote learn or merely reproduce detail and avoids unnecessary anxiety; enables students to work collaboratively; engages in a dialogue with the learner and seeks evidence of student understanding and misunderstanding; gives timely and high quality feedback on student work; engages with students at their level of understanding; ensures that student workload is appropriate to allow students to explore the main ideas in the subject; encourages student independence; uses methods that demand student activity, problem solving and cooperative learning; is aware that good learning and teaching are dependent on the context within which learning is to take place; constantly monitors what students are experiencing in their learning situations; and

ensure that their teaching is consistent with most or all of these characteristics. Furthermore, these characteristics establish the criteria by which the teaching performances of many law teachers are now judged.<sup>59</sup>

The recent success of pedagogicalism appears to be largely contingent upon — and limited to — the consistency of the pedagogical notion of good teaching with the corporatist objectives of efficiency, accountability and marketability. For law school and university decision-makers seeking to manage and monitor teaching practices, pedagogicalism and orthodox education theory provide a consistent definition of good teaching and offer a detailed set of criteria by which teaching practices can be judged and compared. University and law school administrators are given a relatively clear and consistent set of benchmarks with which law teachers can be compelled to comply. University teaching and learning policies informed by orthodox education theory are increasingly imposed on law schools and law teachers. The use and enforcement of these university policies are further encouraged by calls from government and private funding bodies for greater levels of accountability.<sup>60</sup> These bodies seek to ensure that universities are providing a ‘quality service’ to their customers and therefore scrutinise teaching methods within universities and insist that time and money be invested in their improvement. Orthodox education theory provides a means by which such improvement might be measured and proven.

On the other hand, most pedagogical legal education scholarship retains the characteristics of its liberal origins. These pedagogical texts, like liberal texts, typically position critique at the centre of the legal education project. For example, Richard Johnstone has argued that critique must occupy a central position in the teaching of law and must not be left until later or added on as an extra.<sup>61</sup> In their seminal legal education text, *The Quiet (R)Evolution*, Marlene Le Brun and Richard Johnstone describe their objective as being to improve law students’ learning by bridging ‘the perceived gulf between educational theory and practice so that our work as teachers is more informed, reflective, *critical* and, thus, improved in practice’.<sup>62</sup> Some pedagogical legal education scholarship refers to the desirability of teaching students to think critically. Such scholarship appears to understand critical thinking in the same sense as vocational discourse:

tries to find out about the effects of teaching on student learning and then modifies their approach to teaching in the light of the evidence collected: *Johnstone Report*, above n 5, 278–81.

<sup>59</sup> Law is not the only discipline within the university to be influenced by pedagogicalism. Ramsden has described how

[t]he ideas of a previously little-known group of academics from Britain and Sweden have become accepted into the discourse of quality in higher education. Powerful people and statutory bodies now use phrases from what used to be a comfortable area of educational research as part of their lingua franca.

Ramsden, above n 55, 4.

<sup>60</sup> See, eg, Brand, above n 17.

<sup>61</sup> Richard Johnstone, ‘Rethinking the Teaching of Law’ (1992) 3 *Legal Education Review* 17, 21.

<sup>62</sup> Le Brun and Johnstone, above n 54, xi–xii (emphasis added). In 1990, Goldring claimed that it is ‘now generally accepted that part of a good legal education is the development of critical faculties which allow students to identify and evaluate the policies underlying the law’: John Goldring, ‘Distance Teaching in Law: Possibilities for Commonwealth Cooperation’ (1990) 2 *Legal Education Review* 83, 90.

reasoned judgement of the arguments of others.<sup>63</sup> Other works of pedagogical legal education scholarship describe critique in a way similar to liberal texts — as judgement of law and legal institutions in their social and cultural contexts and according to liberal criteria.<sup>64</sup> There are, however, two important differences between the pedagogical and the vocational and liberal constructions of critique. Firstly, the critical thinking described by pedagogical scholarship is more likely to be self-reflective or ‘strong sense’ critical thinking. Richard Paul first wrote about the distinction between ‘weak sense’ and ‘strong sense’ critical thinking: those engaged in weak sense critical thinking lack ‘the ability, and presumably

<sup>63</sup> For example, the description by Lyndal Taylor and her co-authors of their notion of ‘critical reading’ accords with the concept of critical reading advocated by and within the CT movement: ‘critical reading involves interaction with the text, “... to make students conscious of the invisible workings of a text”, implying the possibility that knowledge can be challenged, evaluated, accepted and rejected by the reader’: Lyndal Taylor et al, ‘Reading Is Critical’ (2001) 3 *UTS Law Review* 126, 130 (citations omitted). Taylor et al also emphasise the importance of critique (at 130–1):

Ideally, law graduates must be able to not only ‘know’ the law and apply it, but also develop the ability to critique the law. Lawyers need to be able to pre-empt alternate arguments to their client’s case to effectively prepare for litigation. Law reform requires practitioners who can not only identify limitations in the law but also suggest means to improve it. This process of moving students to higher order cognitive thinking is reminiscent of Bloom’s oft-cited taxonomy of objectives of Knowledge, Comprehension, Application, Analysis, Synthesis and Evaluation. The goal of the law teacher is to develop the skills of knowledge, comprehension and application, as without these skills, analysis, synthesis and evaluation cannot occur.

Dean Bell and Penelope Pether have described the concept of ‘critical consciousness’, a rigorous form of critical thinking, in Dean Bell and Penelope Pether, ‘Re/Writing Skills Training in Law Schools: Legal Literacy Revisited’ (1998) 9 *Legal Education Review* 113. Critical consciousness is associated with the use of ‘metadiscourse’, or discourse ‘that calls attention either to the relationship between the author and the claims in the text or to the relationship between the author and the text’s readers’: Cheryl Geisler, *Academic Literacy and the Nature of Expertise: Reading, Writing and Knowing in Academic Philosophy* (1994) 11. The use of metadiscourse points to uncertainties, inferences and perspectival or contextual limitations that are unacknowledged by the authorial voice, and ‘enables readers to determine the appropriate level of certainty to grant the claims the text contains’: at 14.

<sup>64</sup> For example, Annette Hasche has written:

We are not purely concerned with conveying knowledge about black letter law and teaching skills of application to the future profession. If we stopped there, the legal profession would be an agglomeration of petty technicians. We should aim at producing lawyers who know and can apply the law, but who are also able to critically evaluate it, detect socio-legal problems and make practical recommendations for their solution. Accordingly we must seek to develop analytical skills as well as critical and lateral thinking.

Annette Hasche, ‘Teaching Writing in Law: A Model to Improve Student Learning’ (1992) 3 *Legal Education Review* 267, 268 (citations omitted). Tracey Booth has emphasised the importance of critical reflection on the law on the part of students, and defined critical reflection in terms of the recognition of ‘the social, political and cultural contexts in which ... laws are made and enforced’: Tracey Booth, ‘Learning Environments, Economic Rationalism and Criminal Law: Towards Quality Teaching and Learning Outcomes’ (2001) 3 *UTS Law Review* 17, 25. Similarly, Johnstone has emphasised the sociopolitical aspect of critique:

Law should always be taught within the context that it operates within a complex society. Law has an impact on that society, and its content and practice is shaped by that society. Interdisciplinary studies can be used to show the impact of law on different groups within society, and the impact of different groups, depending on their power, on the law. Students should be encouraged to ask who benefits from different aspects of the law; who is disadvantaged; who has best access to the law; whose rights are ignored by the law and similar questions.

Johnstone, above n 61, 25.

the disposition also, to critique their own most fundamental categories of thought and analysis.<sup>65</sup> Strong sense critical thinking, on the other hand, involves:

(a) an ability to question deeply one's own framework of thought; (b) an ability to reconstruct sympathetically and imaginatively the strongest version of points of view and frameworks of thought opposed to one's own; and (c) an ability to reason dialectically (multilogically) to determine when one's own point of view is weakest and when an opposing point of view is strongest.<sup>66</sup>

According to Paul, the key difference between strong sense and weak sense critical thinking is a willingness and ability to apply critical thought to one's own position, perspective or argument. For example, Shirley Rawson and Alan Tyree have contrasted the approach to reading a case taken by a novice student with the approach taken by a more experienced student:

After training in the case law method, they read the case from a different critical viewpoint. They know the criteria to be applied in order to gain official approval and have learned how to evaluate their reading 'performance' ... Improvement in each of the skills requires *an ability to be self-critical* during the process of exercising the skill.<sup>67</sup>

Similarly, Sharon Hunter-Taylor has argued that a

'move beyond a narrow interpretation of critical thinking, "being confined largely to its place in relation to formal knowledge" ... and to include and embrace critical self-reflection (the self) and critical action (the world)' would ensure the relevance and effectiveness of critically reflective learning within PLT.<sup>68</sup>

Pedagogical critique therefore extends the object of critique to include the critic and the critic's own thinking and beliefs. Critique is something not only directed outwards, at the world, but also inwards, towards the self. It is a practice that requires, in addition to the criteria identified earlier in the article, a measure of humility.

The second distinctive characteristic of pedagogical critique is its identification as an important characteristic of the self-directed learner. One of the

<sup>65</sup> Paul, above n 36, 206.

<sup>66</sup> Ibid.

<sup>67</sup> Shirley Rawson and Alan Tyree, 'Self and Peer Assessment in Legal Education' (1989) 1 *Legal Education Review* 135, 136 (emphasis added).

<sup>68</sup> Sharon Hunter-Taylor, 'Professional Legal Education: Pedagogical and Strategic Issues' (2001) 3 *UTS Law Review* 59, 67, citing Anne Brockbank and Ian McGill, *Facilitating Reflective Learning in Higher Education* (1998) 51 (citations omitted). Roderick Macdonald has defined critique as the uncovering of ideological positions and as including, importantly, an awareness of one's own ideological position:

law is a lesson in personal vulnerability ... Being personally vulnerable means not hiding behind purple prose, obscure generalities, third person attribution or the sham of ideological neutrality. In the University, objectivity can mean nothing more than to rest one's position on the 'best' arguments one can find, knowing that these may ultimately prove illusory. But a qualified objectivity is not at the same time a license for inculcation. This is especially true in the classroom. Those who use the podium as a political platform forget the extent to which their own ideas are, themselves, a product of their ideology. The University is ideological; the law faculty more so; there is no ideological critique of law which is also not internal to oneself.

Roderick Macdonald, 'Academic Questions' (1992) 3 *Legal Education Review* 61, 68–9.

purposes of pedagogical critique is to demonstrate an ability to transcend a mere surface approach to learning, and to adopt a deep approach to learning. Johnstone has explained the importance of self-directed learning:

An important objective of legal education ... is the motivation of students to learn, to explore all aspects of legal phenomena, and constructively to criticise legal rules, their application in practice, theories about the law, and legal education. Recently there has been much research into self-directed learning. Adult educators have argued that learning is an internal process, self-initiated and intrinsically motivated. The only learning which significantly influences behaviour is self-discovered, self-appropriated learning. Legal education should not just enable the student to learn about the law in all the different aspects discussed above, but should involve freeing the learner from dependence upon traditional pedagogical methods, and enabling the learner to learn how to learn.<sup>69</sup>

Pedagogical critique is self-directed critique. The critical law student is one who questions not only when and in the manner they are told to do so by their teacher and the course materials; rather, motivated by their own desire, they question whenever they deem it appropriate to do so. Pedagogical critique indicates an ability and a willingness on the part of the student to think independently and to act on their own initiative.

Pedagogical critique is a more reflective and thorough form of critique than those forms considered above. On the other hand, there are limitations upon the scope of critique that pedagogical texts rarely acknowledge. Most importantly, while the student is encouraged to think independently and to be critical of law, legal institutions, the ideas of others and their own thinking, they are not permitted to be so critical that they question the teacher too often or too rigorously, undermine the curriculum, refuse to cooperate or disrupt the classroom. Pedagogicalism appears to encourage a form of critique that requires a student to question everything, including their own assumptions and beliefs. 'Everything', however, does not necessarily extend to the course content, the course structure, the teacher's control of the classroom or the university's expectations. In relation to these matters students must accept what they are told. Critique is only permissible within certain parameters and the hegemonic relationship of teacher and student cannot be challenged by the student. The student, no matter how self-critical, self-aware and self-directed, is still subordinated to the teacher and to the university.

As an expression of power, pedagogical critique is one of the strategies employed in the propagation of pedagogical discourse. One of the objectives in facilitating pedagogical critique is the inculcation of an awareness by law students of the implicit biases and prejudices of other discourses. The law student is more likely to recognise doctrinal, vocational or corporate knowledge as such and not blindly accept it as universal and objective truth. This in turn has the effect of undermining those discourses, reducing the probability of their propagation and universalisation. Critical law teachers and students are more likely to question the emphasis upon coverage of doctrine, training for employ-

<sup>69</sup> Johnstone, above n 61, 27 (citations omitted).

ment or efficiency and marketability, and to advocate and agitate for an increased emphasis upon the pedagogical ideals of effective teaching and quality learning.

Pedagogical critique enhances the status of the 'good teacher'. The teacher who successfully encourages students not only to question what others take for granted but also to undergo personal transformation by questioning their own deeply held beliefs and assumptions may be perceived by students as a better teacher.<sup>70</sup> A pedagogical teacher is also likely to be highly regarded by those other law teachers who equate an ability to engage in self-directed critique as an indication of a deep approach to student learning.

More importantly, pedagogical critique preserves the status of the teacher generally. The teacher has traditionally occupied a privileged position in relation to the student and pedagogicalism does little to alter this relationship. Pedagogicalism constructs a form of critique that is generally more rigorous than those constructed by the more traditional legal education discourses. Nevertheless, pedagogical critique is constructed in such a way that, while recognising the value of criticism, questioning, independence and autonomy on the part of students, it maintains and enforces the hierarchical relationship between teacher and student at the same time. For all its rhetoric of moving away from authoritarian relationships and encouraging a greater level of approachability on the part of law teachers, the 'good teacher' constructed by pedagogical discourse is still the *teacher*, and the 'good student' is still the *student*. Critique of law, legal knowledge, and one's own opinions and experiences is applauded, but overt criticism of the teacher by the student is discouraged, and outright disrespect and disobedience is penalised. Pedagogical critique is a strategy used to propagate pedagogical discourse generally and to enhance the status and preserve the privilege of the pedagogical law teacher.

#### F *Radical Critique*

Radicalism is the set of statements about legal education that criticises and seeks to undermine the status quo within the law school and within the legal system by exposing and questioning undisclosed political positions, gender biases, cultural biases and/or power relations within legal education and within law. Radical legal education discourse generally involves the application of radical legal concepts such as feminist legal theory,<sup>71</sup> CLS<sup>72</sup> or critical race theory<sup>73</sup> to the teaching of law.

<sup>70</sup> On the other hand, some students, particularly those seeking vocational training and little else, may be threatened by and consequently resent such an approach.

<sup>71</sup> Feminist legal scholarship emphasises the failure of law to acknowledge or respond to the values and experiences of women. Early liberal feminism criticised the ways in which the law, as an institution, both promoted and maintained gender inequality by failing to include women in legal processes. Recent feminist scholarship, however, criticises the ways in which the law maintains and aggravates the oppression of women through the myths of impartiality and neutrality. Examples of Australian feminist legal education scholarship include Lucinda Finley, 'Women's Experience in Legal Education: Silencing and Alienation' (1989) 1 *Legal Education Review* 101; Regina Graycar and Jenny Morgan, 'Legal Categories, Women's Lives and the Law Curriculum OR: Making Gender Examinable' (1996) 18 *Sydney Law Review* 431; Katherine Hall, 'Theory,

Radical legal education discourse most explicitly encourages critique as both a pedagogical activity and as an outcome of legal education. Most radical legal education texts and practices are directly concerned with critique in one form or another.<sup>74</sup> Consider, for example, the various descriptions of radical law subjects within Australian law schools. In the subject 'Law and Sexuality' at Macquarie University, students are taught to 'interrogate and critique the liberal law reform process through considering a series of concrete law reform issues'.<sup>75</sup> The subject 'Law, Gender and Feminism' at Monash University includes 'the critique of male-centred concepts of equality and human rights'.<sup>76</sup> The subject 'Feminist Legal Theory' at Murdoch University identifies 'some key concepts (such as equality and objectivity) which underpin the law and legal institutions and

Gender and Corporate Law' (1998) 9 *Legal Education Review* 31; Barbara Hocking, 'Feminist Jurisprudence: The New Legal Education' (1992) 18 *Melbourne University Law Review* 727; Miranda Stewart, 'Conflict and Connection at Sydney University Law School: Twelve Women Speak of Our Legal Education' (1992) 18 *Melbourne University Law Review* 828; Margaret Thornton, 'Women and Legal Hierarchy' (1989) 1 *Legal Education Review* 97; Margaret Thornton, 'Hegemonic Masculinity in the Academy' (1989) 17 *International Journal of the Sociology of Law* 115; Thornton, 'Portia Lost in the Groves of Academe Wondering What to Do about Legal Education', above n 13; Margaret Thornton, 'Discord in the Legal Academy: The Case of the Feminist Scholar' (1994) 3 *Australian Feminist Law Journal* 53; Margaret Thornton, 'The Development of Feminist Jurisprudence' (1998) 9 *Legal Education Review* 171; Helen Ward, above n 22.

<sup>72</sup> CLS emphasises the political nature of law as well as its indeterminacy and incoherence. CLS scholarship argues that contrary to their typical portrayal, law and legal institutions are not, and can never be, objective or scientific. The law is actually a system of beliefs and meanings that is constructed and enforced in order to make inequalities of wealth and privilege appear natural and inevitable. The late 1980s and early 1990s saw the publication of a small number of papers within Australia concerned with the application of the CLS ideology to the teaching of law: Hilary Charlesworth, 'New Directions in Legal Theory: Critical Legal Studies' (1989) 63 *Law Institute Journal* 248; Andrew Fraser, 'Turbulence in the Law School: Republican Civility v Patrician Deference?' (1988–89) 5 *Australian Journal of Law and Society* 44; Gerald Frug, 'A Critical Theory of Law' (1989) 1 *Legal Education Review* 43; Robert Gordon, 'Critical Legal Studies as a Teaching Method, against the Background of the Intellectual Politics of Modern Legal Education in the United States' (1989) 1 *Legal Education Review* 59; Rob McQueen, 'Is There a Critical Legal Studies Movement in Australia? Innovation in Australian Legal Education after the Pearce Report' (1990) 2 *Culture & Policy* 3.

<sup>73</sup> Critical race scholarship highlights the racial and cultural biases in law and legal institutions. While in agreement with many of the ideas produced by CLS and feminist legal scholarship, critical race scholarship seeks to correct those ideas that have the effect of disempowering minority groups. In Australia, critical race scholarship often takes the form of scholarship about indigenous issues from indigenous perspectives, the relationship between indigenous persons and non-indigenous law, and the recognition of indigenous law by non-indigenous legal institutions. The (relatively few) examples of Australian critical race legal education scholarship include: Greta Bird, 'Race, Ethnicity, Class and Gender: Integral Issues for a Law Curriculum?' in Claude Hedrick and Robert Holton (eds), *Cross-Cultural Communication and Professional Education* (1990) 155; Jennifer Clarke and Anne Orford, 'Grand Narratives and the Law School Curriculum: Teaching *Indigenous Australians and the Law*' (1998) 11 *Australian Feminist Law Journal* 156; Douglas, above n 44; Heather Douglas and Cate Banks, "'From a Different Place Altogether': Indigenous Students and Cultural Exclusion at Law School" (2000–01) 15 *Australian Journal of Law and Society* 42; Ainslie Lamb, 'The Role of the Lawyer in a Multi-Cultural Society' (1987) 5 *Journal of Professional Legal Education* 31.

<sup>74</sup> In fact, the texts constituting radicalism are usually grouped together under the title 'critical'. In order to avoid confusion, however, the terms 'radicalism' and 'radical discourse' are used in this article.

<sup>75</sup> Macquarie University, *Law and Sexuality* (2000) <<http://www.law.mq.edu.au/HTML/unitdesc/law520.htm>>.

<sup>76</sup> Monash University, *Law, Gender and Feminism* (2004) <<http://www.monash.edu.au/pubs/handbooks/subjects/LAW4151.html>>.

critically examines those to consider whether they work to the detriment of women'.<sup>77</sup> Students studying 'Women and the Australian Legal System' at the Queensland University of Technology are taught 'to critically analyse substantive laws having regard to their failure to embody women's experiences in both the civil and criminal justice systems.'<sup>78</sup> The law subject 'Critical Legal Theory' at the University of Western Australia is 'a contemporary inter-disciplinary critique of legal practices, institutions and education'.<sup>79</sup>

Radical critique, like other forms of critique identified in this article, is concerned with the revelation of that which is hidden. How does radical critique differ from the other forms of critique? Firstly, radical critique removes law from its position of privilege within the law school and recognises the potential for law to be used as a tool for political oppression. Radical discourse sees society as fundamentally divided by relations of unequal power and is concerned with the impact of laws and other practices that perpetuate or legitimate an unjust status quo. Traditional approaches to legal education often portray law as politically neutral, but radicalism insists that to remain silent about the negative political consequences of the law is to thereby imply that the present legal system is the best (or only) way of ordering society and achieving justice. According to radicalism, this implication is a subjective assertion and such an approach to teaching law is misleading because it cloaks this subjective assertion with the myth of neutrality and objectivity. In order to practise radical critique the student must be prepared to question the intent and the impact of every law and to accept the possibility that many laws and many legal institutions are in fact conduits of oppression. Through radical critique, the emphasis of traditional legal education on law and legality's objectivity, neutrality and universality is rendered problematic and unsustainable.

The second important difference between radical critique and other forms of critique is the way radical critique privileges the excluded 'other'.<sup>80</sup> Legal doctrine is a description of law from a particular cultural, racial and gendered perspective: it emphasises some aspects of law but hides or denies others, and this alleged objectivity and neutrality of legal doctrine must be challenged by including consideration of the law and legal institutions from the perspective of

<sup>77</sup> Murdoch University, *Feminist Legal Theory* (2003) <<http://online.murdoch.edu.au/public/LAW360>>.

<sup>78</sup> Queensland University of Technology, *Unit Details: Women and the Australian Legal System* (2003) <<http://www.courseshbq.qut.edu.au/cgi-bin/WebObjects/CoursesHbk.woa/wa/selectUnitFromCourseDetails?unitID=LWN141>>.

<sup>79</sup> University of Western Australia, *Critical Legal Theory* (2003) <<http://handbooks.uwa.edu.au/units/200/200.311>>.

<sup>80</sup> This is an element of critique more likely to be emphasised by feminist theory and critical race theory. CLS was criticised by other radical academics for its failure to acknowledge the importance of the perspectives of the 'other' to the practice of legal critique. For example, Greta Bird argues that CLS was 'dominated by Anglo, male, middle class senior academics' and that 'the critique of law it has produced, while very valuable in attacking the myths of impartiality, objectivity and fairness in the legal system, [has ignored] the interaction of race, ethnicity, class and gender': Bird, above n 73, 160. Bird insists that the failure to acknowledge these issues inevitably leads to 'a discordance in the curriculum between the reality of the legal order as perceived by people who daily experience that reality ... and the "reality" found in the case-books and texts': at 12.

the 'other'. Feminist legal education scholarship typically defines the 'other' as the feminine, and radical critique as revealing the feminine perspectives on law and the masculine bias of legal doctrine. Legal doctrine is shown to be founded upon an inherently masculine way of looking at the world and law is shown to be a political institution that empowers men and subordinates women.<sup>81</sup> Critical race scholarship defines critique as exposing the white bias inherent in law and legal institutions, and the 'other' as members of non-white races and cultures. A critical teacher is one who strives to 'anthropologise the West',<sup>82</sup> they emphasise ideas taken for granted as universal and 'make them seem as historically peculiar as possible.'<sup>83</sup> Although liberal critique also emphasises the importance of gendered and cross-cultural perspectives, there is an important difference. Liberal discourse insists that the perspectives of women, of other disciplines and of other cultures be assimilated into the legal curriculum. This is consistent with liberalism's objective of constructing a single, internally consistent and universal liberal explanation for the world. Radical discourse, on the other hand, acknowledges not merely the relevance but the *superiority* of the world view of the 'other' and insists that the orthodox perspective be subverted and undermined by other knowledge.

The third way radical critique differs from other forms of critique is by expressing a clear notion of what a better world would look like and a willingness to work towards achieving that better world. It is not enough for the critic to judge and to question: they must be prepared to participate in the reform of society and the transformation of oppressive institutions and social relations.<sup>84</sup> Teaching law students feminist or racial critique is often a matter of fostering a willingness both to recognise and to act to change beliefs that are repressive or

<sup>81</sup> Catharine MacKinnon, *Toward a Feminist Theory of State* (1989) 237. Helen Ward has argued that a law course that uncritically presents legal doctrine risks adopting and perpetuating the unstated point of view of a particular cultural group, which she identified as largely comprised of affluent, educated, Anglo-Celtic males: Helen Ward, above n 22, 2. Ward argues that 'to fail to consider and teach the law critically, and instead to consider and teach it in isolation from its relationship with the rest of the world, would be to fail to consider and acknowledge the underlying masculinity of law and legal systems': at 4.

<sup>82</sup> Paul Rabinow, 'Representations Are Social Facts: Modernity and Post-Modernity in Anthropology' in James Clifford and George Marcus (eds), *Writing Culture: The Poetics and Politics of Ethnography* (1986) 234, 241.

<sup>83</sup> *Ibid.* Anthony O'Donnell has explained the desirability of teaching the law from the perspective of other cultures in O'Donnell, above n 47. He quotes critical pedagogue Henri Giroux, who argues that cross-cultural perspectives on the law have the potential to contribute to a broader pedagogy 'in which relations of power and racial identity become paramount as part of a language of critique and possibility': Henry Giroux, 'Insurgent Multiculturalism and the Promise of Pedagogy' in David Goldberg (ed), *Multiculturalism: A Critical Reader* (1994) 325, 326.

<sup>84</sup> This is an aspect of radical critique particular to feminist and critical race discourses. Many of the critics of CLS complained that its criticisms of law and of legal education were not accompanied by any suggestions regarding legal reform. Although some CLS scholars did offer constructive alternatives to the present arrangements, many argued that it was not necessary to do so. Rather, they claimed that it was neither necessary nor appropriate that they suggest particular ways to reform the law in their critique: the process of critique would itself ultimately lead to transformation of the legal system.

unjust.<sup>85</sup> The teaching of radical critique thus transforms the legal curriculum from one that is implicitly political to one that is overtly political. According to radicalism, teaching law is always a political activity; it is not possible to teach law in a way that is *not* informed by a particular belief system. Those law teachers who pretend not to be political are ‘simply more dangerous, not less political’;<sup>86</sup> law teachers are political actors, whether they like it or not.

The three key characteristics of radical critique — the recognition of the potential for law to be used as a tool for political oppression, the privileging of the perspective of the ‘other’ and the willingness to identify and work towards the achievement of a clear set of political and social objectives — distinguish radical critique from other forms of critique. Radical critique shares with the other forms of critique the assumption that there is still a truth that is accessible through the practice of critique. All of the forms of critique described in this article assume that there is something ‘real’ that is revealed by the process of critique, against which mistaken beliefs and distorted perceptions can be tested. Students can be taught to recognise ‘the way things are’. How each discourse talks about ‘the way things are’ is different: for vocationalism, it is about the assumptions and presuppositions underlying statements and arguments; for liberalism, it is about the liberal model of reality; for pedagogicalism, it is about what knowledge really means and how the thinker really thinks; and for radical critique, it is about structures of oppression and relations of domination. All discourses, including radical discourse, seek through their various conceptions of critique to normalise their own particular perception of reality. All of the versions of critique described in this article are mechanisms by which a particular discourse seeks to universalise its subjective map of the world.

How is radical critique a strategy for the propagation of radicalism? Radicalism is notorious for its explicit attacks upon traditional discourses. Radical critique is a process by which the critic strips away law’s masks of normality and universality and uncovers the political, gendered and cultural biases behind them. By expressly criticising alternative discourses on law and legal education, radical critique portrays radicalism itself as the only true discourse. The truths

<sup>85</sup> For example, Catharine MacKinnon has described the changes that she believed need to be made to the way law is taught:

I have a list. I will know feminism exists in legal education when these things occur. When gender literacy is a requirement across the board. When women and women’s point of view is represented and respected in texts and in class. When students are taught responsibility for the inevitability of their social engagement — that everything you do is on one side or another of a real social divide — rather than being taught conservatism in the guise of simply representing your client. When women students (and faculty) are not sexually harassed by our colleagues. When there are as many male secretaries as women and as many women faculty members and deans as men. When criminal law professors stop being obsessed about rape and start thinking about it; when they stop making vicious rape hypotheticals the subjects of 100 per cent finals; and when they begin their classes on rape noting not only that women in the class must have been raped but that men in the class must have raped. When women students speak with comparable ease and presumption of place as men students in class. And when one’s intellectual and personal integrity, one’s contribution to life and thought, is not something one has to choose at the price of one’s ability to make a living. In other words, when it no longer takes courage to be a feminist in the legal academy.

MacKinnon, ‘Feminism in Legal Education’, above n 71, 93–5.

<sup>86</sup> Ian Ward, *An Introduction to Critical Legal Theory* (1998) 160.

about law and life uncovered by radical critique reinforce radicalism's insistence that law really is politically oppressive and that the categories of women, non-white races, non-Western cultures, the under-privileged and the politically powerless both really exist and really are marginalised. These are subjective assertions whose objective realities are proven by the practice of radical critique.<sup>87</sup>

Radical critique also seeks to enhance the status of the radical academic. There is nothing that texts informed by other discourses can say that cannot be critiqued by radicalism. The proponents of radicalism achieve status within the law school and the legal community by loudly and passionately criticising and undermining the proponents of alternative discourses.

Finally, radical critique is one of the many strategies employed by radicalism in its attempted subversion of the status quo: feminist discourse seeks the emancipation of women; critical race theory seeks the recognition of the marginalised experiences and perspectives of non-white races and cultures. Radical critique is an important tool for radical discourses because it can be used as a weapon against the discourses and ideologies that oppose them.

Radicalism, to a much greater degree than the other legal education discourses, emphasises the importance of critique in legal education. The discourse produces a complex, comprehensive, politically and socially activist version of critique and advocates its adoption in all law courses, in all law schools and by all law teachers. It is still, however, a strategy of power deployed in order to propagate one particular discourse at the expense of others, to enhance the status of one particular academic role above others within the law school, to universalise a particular subjective way of looking at the world and to achieve particular social and political objectives.

### III CONCLUSION

The law school is a complex disciplinary structure. The law school regulates its participants — legal scholars, law teachers, law students and administrators — sometimes through the explicit exercise of 'sovereign' power but more often through the subtle exercise of disciplinary power. Norms, beliefs, texts and practices constitute a disciplinary framework that limits not only what subjects within the law school can do, but also what they can know. This disciplinary framework is not monolithic, with consistent and stable conceptualisations of the nature of legality and of legal education. Rather, the discipline of law, like all disciplines within the university, is characterised by conflicts and tensions between discourses, each of which competes for status and dominance by propagating different knowledge and utilising different strategies of power. Many of the terms used regularly within legal education texts lack the stability of meaning they are apparently presumed to possess. The nature of knowledge as

<sup>87</sup> In making such a distinction between subjective and objective, it is not intended that objectivity be privileged above subjectivity. The fact that many of the claims made by radicalism are subjective and particular rather than objective and universal does not make them any less valid.

an expression of power is such that particular meanings are only propagated to the extent that they enhance the prospects of success of a particular discourse.

Six discourses dominate Australian legal education: doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism. Each discourse is a form of knowledge about the teaching of law. Each legal education discourse is also an expression of power, producing and privileging particular roles within the law school, and propagating a particular conception of critique.<sup>88</sup> Doctrinalism, vocationalism and corporatism generally produce weaker or narrower forms of critique; liberalism, pedagogicalism and radicalism produce broader and more complex forms of critique. These multiple manifestations of the critique concept compete and collide within the discursive field of legal education. The narrower, more traditional conceptions are generally more successful within Australian legal education than the more rigorous conceptions. In the dynamic clash between discourses, doctrinalism, vocationalism and corporatism often prevail over liberalism, pedagogicalism and radicalism because of the range of historical, social and political contingencies that support the former, the range of contingencies that discourage the latter, and the range and efficacy of the strategies employed by the former in the achievement of their objectives. This is not to say that the latter three discourses always fail; there are locations where they do dominate. Liberalism, for example, dominates legal education scholarship, and pedagogicalism dominates law school teaching and learning policy. When a broader, discipline-wide perspective is taken, however, it becomes possible to see that the narrower conceptions of critique produced and propagated by doctrinalism, vocationalism and corporatism generally prevail. Critique is widely understood as largely irrelevant to the learning of law, or as no more than the skill of logical analysis, or as a word used to make a law subject or course appear more interesting. The wider, deeper, more complex, more self-reflective and more socially consequential possibilities for critique are commonly disregarded.

It is hoped that this article will encourage a greater level of reflection on what 'critique' is assumed to mean within the context of legal education and what the consequences of those meanings might be. It is also hoped that there will be more consideration of the possibilities for critique within Australian law schools. The question yet to be answered is whether critique within legal education has the potential to be *more* than a technology employed in the battle between discourses. Is there a form of critique that amounts to a refusal to be dominated by *any* knowledge or to accept that *any* institution, personality or perspective is necessary? Can such a form of critique even be taught within a law school? Can it even be taught at all, or must it be discovered for oneself? All communication takes place within a discursive framework and within a regime of truth that necessarily requires acceptance of an incomplete knowledge; is the verbal

<sup>88</sup> It is not suggested, however, that the law school is cleanly divided into warring tribes of teachers and students, each allied to a distinct discourse. Rather than being influenced by a single discourse, individuals are, more often than not, influenced by multiple legal discourses and these either compete or cooperate within the individual's subjective experience and actions.

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communication of critique therefore impossible? Is true critique only possible from a position of stillness and silence? When one tries to verbally describe critique or to inculcate it within another, is one always reduced to substituting one incomplete truth for another and re-engaging in an endless battle between competing discourses? These are the questions on which this article hopes to encourage greater reflection.