

# TOWARDS A HISTORY OF LAW AS AN ACADEMIC DISCIPLINE

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*The purpose of this paper is to argue for more histories of Australian legal scholars that study their endeavours through the lens of legal education; in other words, studies which situate legal scholars within the context of Australian law schools. I argue that these histories could contribute vitally to the history of law as an academic discipline in Australia by providing crucial insights into two of the most important developments in the history of law, lawyers and legal education: the movement of legal education into universities and the significant expansion of university law schools. I suggest that such histories could contribute to the basis of rational discussion within the discipline, adding to its intellectual core.*

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## I INTRODUCTION: A PRESSING PUZZLE

Within the last 160-odd years two of the most important developments in the history of law, lawyers and legal education in common law countries have been the movement of legal education into universities and the significant

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expansion (in terms of student, academic and graduate numbers) of law schools within those universities. These changes to legal education had — and continue to have — the potential to influence dramatically the nature of lawyering, judging, the form and content of laws, the relationship between law and society, and the permeation of legal techniques<sup>1</sup> into a broad spectrum of professional life, public services and private endeavour.<sup>2</sup> And yet the intellectual puzzles raised by the changes have not received the attention they deserve.

At the broadest level, the shift to university legal education raises the obvious question: ‘how did the founders of university legal education frame the problem of university legal education and how did they try to solve it?’<sup>3</sup> The significant expansion of university legal education in the middle of the 20<sup>th</sup> century — bringing with it full-time university students, a community of full-time legal scholars and an identity (for both graduate and scholar) transcending legal practice — requires a slight rephrasing of this question so that it becomes: ‘how did a *community* (as opposed to the small scattering of

<sup>1</sup> As defined and taught by the legal academy.

<sup>2</sup> ‘As is well known, the formative influence of legal education on later actors in the legal process is critically important in shaping any legal system. That is why the history of legal education is crucial to an understanding of the development of law generally’: Michael Tilbury, ‘Marion Dixon, *Thirty Up: The Story of the UNSW Law School 1971–2001*’ (2002) 25 *University of New South Wales Law Journal* 255, 259. Bruce Kercher begins his seminal work on the history of Australian law by suggesting that there is a clear connection between how law has been taught in Australia, how Australian law is understood and how it has developed. He suggests that legal education might, at least partially, explain why in the 20<sup>th</sup> century lawyers failed to recognise the local nature of early Australian law and instead assumed that local law largely accorded with the laws of England: Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) ix. Mark Lunney explores this theme further and has argued that ‘we should not be surprised if we find that changes in thinking about Australian law can be explained in part by reference to changes in the academy’: Mark Lunney, ‘Legal Émigrés and the Development of Australian Tort Law’ (2012) 36 *Melbourne University Law Review* 494, 495.

<sup>3</sup> By posing this question I am advocating a method favoured by Karl Popper in his studies of scientific discovery:

Among the many methods which [a philosopher] may use — always depending, of course, on the problem in hand — one method seems to me worth mentioning. It is a variant of the (at present unfashionable) historical method. It consists, simply, in trying to find out what other people have thought and said about the problem in hand: why they had to face it: how they formulated it: how they tried to solve it. This seems to me important because it is part of the general method of rational discussion. If we ignore what other people are thinking, or have thought in the past, then rational discussion must come to an end, though each of us may go on happily talking to himself.

Karl Popper, *The Logic of Scientific Discovery* (Taylor & Francis, first published 1959, 2005 ed) xx.

founders) of legal scholars along with government, the legal profession and the university more generally, frame and solve the problem of *large-scale* university legal education?<sup>4</sup>

The underlying normative premise of much that follows in this article is that, at least in Australia (the primary focus of this article), we have hardly begun to ask — let alone answer — these questions. The ultimate message, robbed of all subtlety and nuance, is that we need more studies. While this is a value-ridden claim that is based on my impression of existing scholarship, I note that I am not alone in making this observation.<sup>5</sup> My premise implies that there is a way to carry out histories of legal education and that such studies either have not been done, or, if they have, they are insufficient in number. I am therefore making an implicit criticism of the present scholarly terrain. To make good my claim I am therefore obliged to explain what is needed and demonstrate why the body of existing histories falls short.

The phrase ‘legal education’ will be used throughout this paper to refer to the phenomena described above: the transplanting of legal education into universities, and the endeavour that promoted and sustained the existence of law schools. In this sense legal education in Australia is largely synonymous with law schools.<sup>6</sup> Such endeavour includes teaching, scholarship, administra-

<sup>4</sup> As Weisbrot explains: ‘The number of university law students in Australia more than doubled between 1950 and 1965 (to 3039), and then trebled between 1965 and 1980 (to 8981)’: David Weisbrot, ‘Recent Statistical Trends in Australian Legal Education’ (1991) 2 *Legal Education Review* 219, 222.

<sup>5</sup> ‘The historical writing which has so far emerged from within Australian legal quarters has, with some notable exceptions, largely dismissed legal education as a pre-ordained and unilluminating aspect of our local legal history’: Linda Martin, ‘From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales’ (1986) 9(2) *University of New South Wales Law Journal* 111, 111. Similarly, in America Stevens has considered that decisions in law schools have generally been made assuming that ‘the structure of American legal education dates from time immemorial rather than having been forged by the economic and social conditions of the Great Depression’: Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, 1983) 279. In 2001, in England, Duxbury argued that

[w]e need also studies of the development of legal scholarship and textbook writing more generally, of the arguments and normative agenda developed and advanced by legal academics, of the roles played by these academics, of their objectives and achievements as scholars, teachers and legal consultants; in short, we need to delve deeper into the history and development of law as an academic discipline in England. Some of this work ... has already been done. But there is a long way to go yet.

Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing, 2001) 118. Tilbury makes a similar point with respect to Australian law schools and scholars: Tilbury, above n 2, 259.

<sup>6</sup> It may also include Legal Studies schools such as that at La Trobe University.

tive work and any other activity that directly or incidentally shaped, furthered or hampered university legal education in Australia. The enterprise of legal education is therefore broader and, I would argue, more important than any one of these things and certainly must be explained through something more than what occurred in the classroom. How legal scholars conceptualised and advanced certain fields of study are, as will be argued, a central part of any account of the trajectory of legal education. For most of the 20<sup>th</sup> century, Australia did not have research institutes like the Max Planck Institute established in Germany in 1911, where law could be studied independently from law schools and teaching.<sup>7</sup> Unlike the natural sciences, pure research into law was not something that supported the place of law within Australian universities.<sup>8</sup> Instead, the movement of legal education — the education of legal practitioners — into universities and the associated growth in full-time legal academics is what enabled the growth and professionalisation of legal scholarship.<sup>9</sup> In Australia the destinies of scholarship and legal scholars both explain and can be explained through the context of legal education.

As argued in the body of this paper, to contribute to these broader histories scholarly fields ought to be studied through what I describe as the ‘lens of legal education’. In other words, they must be studied for what they say about the character and identity of legal education at particular points in time. For example, were fields advanced to improve the education of the law schools’ undergraduate or postgraduate body or to educate members of the legal profession or judges? Or were they advanced to enhance the academic credentials of legal scholars so that their teaching would be respected and so that law would be understood as properly deserving the title ‘academic

<sup>7</sup> While in 1951 a law professor, Geoffrey Sawer, was appointed to the Research School of Social Sciences at the Australian National University, he viewed his role as subsidiary to his social science colleagues: Geoffrey Sawer, *The Place of a Lawyer in the Social Sciences* (Australian National University, 1953) 10. Studying law outside of a teaching institution was considered an exception and anomaly.

<sup>8</sup> For an interesting discussion of whether a professionalised legal academy is needed for either research or education, see Mathias M Siems, ‘A World without Law Professors’ in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 71.

<sup>9</sup> Cosgrove argues that ‘[a]cademic legal culture changed the nature and intent of jurisprudence dramatically. This new tradition, in its increasingly professional manifestations, took the broad conception of jurisprudence and reduced it to an academic enterprise’: Richard A Cosgrove, *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York University Press, 1996) 14. See also Finnane’s work on the history of criminology in Australia. He asks whether criminology existed before the discipline was formed: Mark Finnane, ‘The Origins of Criminology in Australia’ (2012) 45 *Australian & New Zealand Journal of Criminology* 157.

discipline? Conversely, was there little or no relationship between the platform of legal education (the institutional context) and how scholars thought about their scholarship? If this was the case, on what basis was their scholarly endeavour justified? The history of legal education therefore includes, but is larger than, the history of the disciplinary practices that shaped the discipline of law. It should be added that government, the profession, other university disciplines and management also play a crucial role in explaining the growth, form and continued existence of university legal education.

The purpose of this article is not to provide an exhaustive description of all of the work in this area or to provide a definitive template for the field, but to explain that something fundamental is missing. I do this by both advancing argument and by elucidating examples of existing works that contribute partially, and in some cases fundamentally, to the intellectual puzzle of the birth and rise of modern legal education.

## II COLLECTIVE WISDOM

One preliminary matter that ought to be considered carefully is the relevance of a 'history' of Australian legal education written at this point in time. Had someone raised the possibility of writing such a history in the 1950s or 1960s, when for the first time Australian law schools began employing greater numbers of full-time legal academics to supplement the existing skeletal staff,<sup>10</sup> their colleagues would have found the notion absurd. Perhaps there would have been something to say about the first Professors of Law which would have been relevant to the creation and establishment of the legal academy during its formative period,<sup>11</sup> but as there was so little legal scholar-

<sup>10</sup> See Susan Bartie, 'A Full Day's Work: A Study of Australia's First Legal Scholarly Community' (2010) 29 *University of Queensland Law Journal* 67.

<sup>11</sup> I am not suggesting here that there was little interest in the history of legal education at this time, simply that compiling such histories was not a priority. Short histories of law schools were written: see, eg, Robin L Sharwood, 'A Short History of the Law School' in The University of Melbourne, *Faculty of Law Handbook, 1963* (1963); Sir Thomas Bavin (ed), *The Jubilee Book of the Law School of the University of Sydney 1890-1940* (Halstead Press, 1940) (which mentions the first Challis Professor of Law, Pitt Cobbett). One might also speculate that members of this first community of legal academics were aware of larger historical works conducted elsewhere, such as F H Lawson, *The Oxford Law School 1850-1965* (Clarendon Press, 1968). Some biographical works were published on judges who had been instrumental in the development of some law schools as well as the form and content of the law schools' early curricula: see, eg, A J Hannan, *The Life of Chief Justice Way: A Biography of the Right Honourable Sir Samuel Way, Bart, PC, DCL, LL.D, for Many Years Lieutenant-Governor and*

ship, so few teaching materials, and so many students were flooding the law schools, writing a history of legal education would have been looked upon by this first real community of Australian legal scholars as an esoteric indulgence. It would be seen as froth and bubble when what was needed was beer.

Further, the first community of full-time legal scholars were so few in number that they generally knew one another and several had connections to the old order: the skeletal staff of late 19<sup>th</sup> and early 20<sup>th</sup> century university legal education.<sup>12</sup> The creation and furtherance of Australian legal education was *the* hot topic of conversation for this new generation, which meant that there was a shared knowledge and understanding of what had gone before as well as what needed to be done to fulfill their high ambitions for Australian legal education.<sup>13</sup> In most respects they were a ‘community’ in the true sense

*Chief Justice of South Australia, and Chancellor of the University of Adelaide* (Angus and Robertson, 1960), the biography of Sir Samuel Way who was Vice-Chancellor and then Chancellor at The University of Adelaide. Some of the first professors, such as the founding Professor of Law at The University of Western Australia, Frank Beasley, were mentioned in larger histories of the University: see Fred Alexander, *Campus at Crawley: A Narrative and Critical Appreciation of the First Fifty Years of the University of Western Australia* (F W Cheshire, 1963) 119. Several historical accounts had also been given of the first Dean of Law at The University of Melbourne, William Hearn: Douglas B Copland, *W E Hearn: First Australian Economist* (Melbourne University Press, 1935); J A La Nauze, *Political Economy in Australia: Historical Studies* (Melbourne University Press, 1949); Geoffrey Blainey, *A Centenary History of The University of Melbourne* (Melbourne University Press, 1957).

<sup>12</sup> For example, at The University of Melbourne members of the first community of legal scholars, David Derham, Zelman Cowen and Geoffrey Sawer, had each been educated by the handful of law professors who taught in the Faculty of Law prior to 1950. Geoffrey Sawer had taught alongside the old order and there is clear evidence that he thought about one of his predecessors at Melbourne, Professor William Hearn: Sawer, *The Place of a Lawyer*, above n 7, 10–11. At The University of Sydney Kenneth Shatwell, who served as Dean of the Faculty of Law from 1947 to 1973, had been the Dean of Law at the University of Tasmania in the 1930s and so was familiar with the system of university legal education prior to the Second World War: see Richard Davis, *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893–1993* (University of Tasmania, 1993) 27–31. The University of Tasmania makes for an interesting study and contrast as there was a considerable turnover of staff in the 1950s that appears to be, at least in part, due to attitudes towards the University’s handling of the Orr case, which concerned allegations made that a professor had seduced and taken advantage of a student. As the handling of the dispute made it difficult to attract academics from Australia to the University, members of the Faculty of Law were recruited from overseas: at 46–52. For further discussion of the Orr case, see W H C Eddy, *Orr* (Jacaranda Publishers, 1961).

<sup>13</sup> The establishment of the Australian Universities Law Schools Association in the late 1940s, with its annual conference, helped with the dissemination of information amongst the full-time staff of Australian law schools. The annual conference was an important event in a legal scholar’s academic calendar, with each school sending delegates. Much of the agenda was occupied with matters concerning the teaching of law (this can be readily appreciated from a review of the early minutes of the conference).

of the word.<sup>14</sup> A history of the old order would have no doubt thrown up some new insights but it would have traversed much familiar ground. There were more important things to research and explore, things of a more pressing nature that they knew much less about.

Can the same be said of Australian legal scholars today? Can we identify a community who share common wisdom about the problems associated with legal education and share beliefs on how to solve them? Perhaps there is in some sense a community but its shape and form is very different — fractured, specialised, several small frogs in a much larger pond. Discussions about legal education seem removed from the pioneering spirit that motivated the first community of legal academics and the searching questions about the role of university legal education that sat squarely in the minds of those pioneers. Several models of university legal education exist and often seem entrenched, altered only in response (strategically or otherwise) to government or bureaucratic trends, making it seem as though there is little to pioneer. Further, there is a perception that the context of university legal education — with managers and government imposing measures of accountability and driving up student numbers — serves to curb intellectual independence and creativity.<sup>15</sup> Within the contemporary academy there are those legal scholars who define themselves by (amongst other things) their interest in certain aspects of legal education (writing and delivering papers on legal scholarship and teaching, applying for teaching grants and prizes, and putting themselves forward for roles in curriculum design) and those who do not. Adverse judgments are sometimes made by one group about the other.

It is important to recognise that treating sustained inquiries into legal education as a specialty is a new phenomenon and, I would argue, an unfortunate one. One does not need to search very hard to find evidence of the majority of members of the first community of legal scholars, including its best and brightest, engaging in serious and searching scholarly investigation into the role of law schools, how best to advance university legal education,

<sup>14</sup> Which is not to suggest that there was not any friction within that community.

<sup>15</sup> There is much writing on neoliberalism, managerialism and the contraction of the critical voice within universities and law schools: see, eg, Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012); Stuart Macintyre, 'Universities' in Clive Hamilton and Sarah Maddison (eds), *Silencing Dissent: How the Australian Government Is Controlling Public Opinion and Stifling Debate* (Allen & Unwin, 2007) 41; Matthew Ball, 'Legal Education and the "Idealistic Student": Using Foucault to Unpack the Critical Legal Narrative' (2010) 36(2) *Monash University Law Review* 80, 85–90.

and how and what should be studied, published and taught.<sup>16</sup> Leaders in the second wave of law schools — the new schools that emerged in the 1960s and 1970s<sup>17</sup> — also made it a matter of considerable importance.<sup>18</sup> The fact that earlier generations treated legal education as a matter of serious scholarly inquiry and that there exists a long tradition of thought on legal education involving most members of faculty seems to have gone largely unacknowledged. Instead there has grown up a bizarre folk law, sparked and engendered by the much maligned yet still relied upon *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* ('Pearce Report'),<sup>19</sup> that rigorous, introspective and reflective teaching, scholarly and disciplinary practices are something new, something which emerged in the 1990s. The fact that those who carried out this assessment of Australian law schools could not find a neatly packaged explanation of law

<sup>16</sup> See above n 12. There are references to scholarship on legal education authored by members of the first community of Australian legal scholars peppered throughout this paper.

<sup>17</sup> The law schools created in this second wave were at Monash University, The University of New South Wales ('UNSW'), Macquarie University, Queensland Institute of Technology (now Queensland University of Technology) and New South Wales Institute of Technology (now University of Technology, Sydney). A legal studies school was also created at La Trobe. See also Part VI(B) below.

<sup>18</sup> For example Professor David Derham, the founding Dean of the Faculty of Law at Monash University, wrote a large body of scholarship on legal education: see Philip Ayres (ed), *David Derham: Talks on Universities, History and the Law* (Oryx Publishing, 2009). See also Peter Yule and Fay Woodhouse, *Pericleans, Plumbers and Practitioners: The First Fifty Years of the Monash Law School* (Monash University Publishing, 2014) ch 2. The founding academics at the Law School at UNSW are also reported to have engaged in searching inquiry into the nature and form of legal education: see Brian Kelsey, "'What's Wrong with the Law School?'" in Critique of Law Editorial Collective (ed), *Critique of Law: A Marxist Perspective* (UNSW Critique of Law Society, 1978) 124; Gill H Boehringer, 'Introduction' (1988–89) 5 *Australian Journal of Law and Society* 53, 55; Marion Dixon, 'Thirty Up' — *The Story of UNSW Law School, 1971–2001* (UNSW Law School, 2001) 4–9. For a recent account of the beginnings of the UNSW Law School, see Frank Carrigan, 'They Make a Desert and Call It Peace' (2014) 23 *Legal Education Review* 313, 318–21. Carrigan's article also provides a frank account of the range of educational objectives of the Law School at Macquarie University and the opposition faced by the critical legal scholars: at 324–34. The fifth volume of Macquarie's *Australian Journal of Law and Society* was devoted entirely to matters of legal education.

<sup>19</sup> Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) vol 1. While the *Pearce Report* provoked numerous published criticisms in newspapers and journals by Australian legal academics who wrote on behalf of both their institutions and all Australian law schools, a balanced critical analysis was conducted by academics who were not located in Australian law schools and therefore had no vested interest in the report: see Craig McInnis, Simon Marginson and Alison Morris, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Publishing Service, 1994). They identified several major flaws in both the report's methodology and its findings.

school and disciplinary practices<sup>20</sup> led to their recommendation that more scholarship on the topic was needed and their support for the creation of a specialised legal education journal.<sup>21</sup> These comments wrongly gave rise to the view that earlier generations of legal scholars thought little about such things.<sup>22</sup> It has enabled a new band of specialist legal educators to suggest that they are the only pioneers. This belittles the thought, energy and excitement that was injected into legal education in the 1950s, 1960s and 1970s. Of course new ideas have emerged and some old practices have been found wanting, but such an observation does not and should not imply that earlier generations of legal scholars did not think long and hard about legal education. In fact even meagre inquiries will reveal that the reality is quite the opposite.<sup>23</sup> Many

<sup>20</sup> Pearce, Campbell and Harding, above n 19, lxii.

<sup>21</sup> Ibid lxii.

<sup>22</sup> Attitudes of prominent law graduates of The University of Sydney in the 1960s may have also contributed to this view. For example, Michael Kirby has reported on the unimaginative narrowness of his legal education at Sydney, save for the Jurisprudence class: Michael Kirby, 'The Graduating Class of Sydney Law School 1962: Talented, Lucky, Unquestioning' (2012) 36 *Australian Bar Review* 189, 196, 199–200. Given that from what is known it is apparent that Australian law schools in different states had different histories, reports on one law school ought not to be used as a proxy for all.

<sup>23</sup> Some have wrongly suggested that this earlier generation taught doctrine in a narrow, positivist and uncritical fashion, following the traditions of their predecessors: see, eg, Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 710; John Gava, 'Introductory Essay' (1988–89) 5 *Australian Journal of Law and Society* 1, 3; Nickolas James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26 *Sydney Law Review* 587, 596; Margaret Thornton, 'The Dissolution of the Social in the Legal Academy' (2006) 25 *Australian Feminist Law Journal* 3, 15; Carrigan, above n 18, 315–16, citing Margaret Thornton, 'Portia Lost in the Groves of Academe Wondering What to Do about Legal Education' (1991) 34(2) *Australian Universities' Review* 26. Without further elaboration it is difficult to know what exactly is meant by these opaque value-ridden descriptions. However, if it is suggested that these scholars were not innovative or aware of approaches to teaching law beyond Austinian positivism, several histories of individual scholars and law schools, as well as my own investigations, suggest quite the opposite: see Bartie, 'A Full Day's Work', above n 10. Lunney has also suggested that this characterisation 'may be too harsh': see Lunney, 'Legal Émigrés and the Development of Australian Tort Law', above n 2, 498. It also does not marry with the number and content of the many tributes dedicated to members of our first community of legal scholars: see, eg, Ross Cranston, "'Lawyer in the Social Sciences" — Geoffrey Sawer' (1980) 11 *Federal Law Review* 263; Mark Lunney, 'Fleming's *Law of Tort*: Australian-Made or Foreign Import? Australia's Role in Making the "King" of Torts' (2013) 36 *Australian Bar Review* 211; Ian Ramsay, 'Professor Harold Ford and the Development of Australian Corporate Law' (2011) 29 *Company and Securities Law Journal* 30; Justice Michael Kirby, 'People in Criminal Law: Louis Waller AO' (2001) 25 *Criminal Law Journal* 215; Helen Irving, Jacqueline Mowbray and Kevin Walton (eds), *Julius Stone: A Study in Influence* (Federation Press, 2010); Guenther Doeker-Mach and Klaus A Ziegert (eds), *Alice Erh Soon Tay: Lawyer, Scholar, Civil Servant* (Franz Steiner Verlag, 2004); Geoffrey Lindell, 'Leslie Zines — From a Personal Perspective'

predecessors made the form and content of legal education, and its reasons for existence, their primary occupation.

The relatively recent development (emerging in the 1990s) of treating legal education as a form of specialty and the temptation to ignore the thoughts of earlier generations is unfortunate for many reasons but I will highlight just two. First, it leads to a segregation of knowledge and public debate about legal education where the views of some of the most important legal scholars are left out (mostly of their own volition). Second, it has meant that this body of scholarly endeavour has largely been divorced from what could have formed its intellectual core. There is no sense of building or responding to previous thought and reflection but instead we are presented with what are largely reactions to loose impressions. By ignoring what others have thought about the problems of legal education in the past we weaken — and perhaps even remove — the possibility for rational discussion today.<sup>24</sup>

Rather than froth and bubble, the present situation suggests that there is a real need for histories that allow for proper reflection on the entirety of 20<sup>th</sup> century endeavour that help to explain the phenomenon of Australian legal education. In this highly specialised — one might even say alienating — environment, there is a very real risk that in the absence of historical studies legal scholars will form their impressions of the opportunities, choices and models available to legal educators solely from the limited pool of specialised scholarship and mentors they are ‘fortuitously’, ‘accidentally’ or ‘unfortunately’ introduced to in their formative years. This has the very real potential of shutting down rather than opening up thinking about legal education.

This state of affairs also brings with it the very real risk that scholars will lose sight of the central questions that any discipline ought to face and were once at the apex of thinking about legal education: why does it exist and what should it do? These questions seem vitally important in an environment where large numbers of graduates are struggling to find employment and lengthy criticisms are made of the expansion of law schools and the job

(2010) 38 *Federal Law Review* 317; Malcolm Smith, ‘Comparative Law and Legal Culture: A Tribute to David Allan and Mary Hiscock’ (2003) 15(2) *Bond Law Review* 20; Annesley Athaide, ‘Alex Castles on the Recognition of Australian Legal History 1955–1963’ (2003) 7 *Australian Journal of Legal History* 107. A recent symposium was also held at The University of Melbourne, 26–27 March 2014, dedicated to the Law School’s former distinguished Dean, Sir Zelman Cowen. Some of the papers presented at the symposium will be published in issue 38(3) of the *Melbourne University Law Review*.

<sup>24</sup> See Popper, above n 3, xx.

prospects of legal academics, suggesting that both are self-serving.<sup>25</sup> If legal scholars do not know how these questions were addressed at either the time that law schools or the legal academy were founded, how can we begin to answer them today? While precedent is a fundamental tool of reasoning in law, it has rarely been used in discussions of legal education in part because there is so little knowledge about these earlier periods; the primary materials have not been explored and interrogated.

Not only does the present legal academy need studies of the history of legal education, there are also factors that suggest that conditions are favourable for such histories. All histories are influenced by the context in which they are written as well as by the views of the historian who writes them. For example, Shreve believed that Stevens' critical history of the American law school<sup>26</sup> was overly pessimistic about the state of legal education and judged it by too harsh a standard because '[a]ny appraisal of legal education's role and future made in 1970 is likely to be jaundiced by the despair that then pervaded law schools and the country as a whole'.<sup>27</sup> A similar view could be taken of John Henry Schlegel's history of American empirical legal scholars.<sup>28</sup> Published in 1995, it is clear that Schlegel lamented the fact that empirical studies had failed to grab a solid hold of the legal academy. The perspective and profile of the scholar conducting the study as well as the openness of the current generation of legal scholars to challenging some of the pillars on which law schools are perceived to stand must therefore be borne in mind. In Australia in the 1970s a large body of students emerged who were sympathetic towards elements of Marxist doctrine and critical of their professors' views on both the scope of law and the law's potential for social change.<sup>29</sup> If a student who emerged during this decade were inclined to write a history of legal education then one would expect that their teachers and predecessors would be portrayed in largely unsympathetic terms. While similar concerns and frustrations about the characterisation of teaching law can be found among the legal academy today, in the past 20 years increased variety and plurality in both scholarship and

<sup>25</sup> For a particularly damning account of the self-serving nature of American law schools, see Brian Z Tamanaha, *Failing Law Schools* (University of Chicago Press, 2012).

<sup>26</sup> See Stevens, above n 5.

<sup>27</sup> Gene R Shreve, 'History of Legal Education' (1983) 97 *Harvard Law Review* 597, 604.

<sup>28</sup> See John Henry Schlegel, *American Legal Realism and Empirical Social Science* (University of North Carolina Press, 1995).

<sup>29</sup> Geoffrey Sawer, 'Who Controls the Law in Australia?: Instigators of Change, and the Obstacles Confronting Them' in David Hamblin and John Goldring (eds), *Australian Lawyers and Social Change* (Law Book, 1976) 118, 121–2.

(to some but a lesser extent) teaching<sup>30</sup> has created an environment where legal scholars seeking change are less likely to believe that bold condemnation of prior practices is the only way to make room for a new orthodoxy. In this environment there is a greater likelihood that past practices will be explored with an attitude of balanced maturity and will be judged on their own terms rather than against present attitudes.<sup>31</sup> In other words, the past won't be ploughed and dismissed merely as part of an argument for present change.

### III LAW AS AN ACADEMIC DISCIPLINE

A robust, critical, historical and sociological study of the origins of university legal education — probing what was created, how and why it endured and prospered — is the critical first step towards a proper understanding of the nature of legal education today. Without knowing what, how and why university legal education was created in the first place and then understanding how and why it grew, we cannot understand what it has become. And, as several have argued, we cannot understand what law — in the broader sense — has become.<sup>32</sup>

In this Part, my point is to suggest that the endeavours of legal scholars are essential to any explanation of the birth and rise of legal education. An important question to explore in any history of university legal education is the extent to which, and how, law became an 'academic' discipline.<sup>33</sup> What is it that distinguishes law at university from the practice of law and the teaching of law in practice?<sup>34</sup> What distinguishes it from other disciplines? What has it borrowed from other disciplines and practice and what has it reacted against? And, more broadly, what does this say about, or how has it altered, the pursuit

<sup>30</sup> See Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality and Prospects for the Future' (2004) 26 *Sydney Law Review* 537.

<sup>31</sup> See Susan Bartie, 'The Lingering Core of Legal Scholarship' (2010) 30 *Legal Studies* 345, 353–4.

<sup>32</sup> See above n 2.

<sup>33</sup> The term 'academic' is used here to refer to a form of teaching and studying law that can be contrasted with the learning of law within professional practice. The term is not used to make an evaluation of whether the teaching and study of law ought to be described as 'academic'. A penetrating analysis of what it means to be an academic or an intellectual and whether legal scholars deserve such a title is beyond the scope of this paper. For an interesting exploration of the topic, see Stefan Collini, *Absent Minds: Intellectuals in Britain* (Oxford University Press, 2006).

<sup>34</sup> Indeed, there may be little that distinguishes the two, suggesting that the teaching of law at university did little to build or enhance its academic credentials.

of legal education? Presumably law could only become academic either through the endeavours of academics that were not full-time legal practitioners or through the efforts of legal practitioners who believed that the teaching of law should be conducted in a manner distinctive from practice. Histories of legal education that concentrate on legal scholars therefore have the greatest potential to yield insights into the history of law as an academic discipline. They are a special type and subset of histories of the broader topic: legal education. They reveal the *intellectual* framing and answering of the puzzles outlined at the beginning of this paper.<sup>35</sup> To describe the intellectual framing of legal education it is necessary to interrogate the relationship between academic endeavour and the context of Australian legal education. It cannot be assumed that the context of legal education and law schools will influence the endeavour or that the endeavour is always a product of its context.<sup>36</sup>

The remainder of this paper focuses on this important subset of histories of legal education on the basis that this subset is both one of the most important pieces of the puzzle and one that so far has suffered the greatest neglect. Most histories or sociological accounts of legal education either focus on institutions or broader trends. Biographies or tributes to scholars often rip the scholar from the context of legal education. Many jurisprudential works treat academic contributions as floating ideas sitting independently from the context of legal education. My point is to argue for studies that focus on or incorporate close investigation of scholarly endeavour so that the ‘academic’ side of legal education — the relationship between scholarly endeavour and the trajectory of legal education — can be properly acknowledged and incorporated into the history of Australian legal education.<sup>37</sup>

<sup>35</sup> Lunney speaks of how the ideas of Wolfgang Friedmann at The University of Melbourne and John Fleming at the University of Canberra marked a change in the intellectualisation of Australian law schools: Lunney, ‘Legal Emigrés and the Development of Australian Tort Law’, above n 2.

<sup>36</sup> For a similar argument, see Brian Leiter, ‘Is There an “American” Jurisprudence?’ (1997) 17 *Oxford Journal of Legal Studies* 367. Recently Lunney argued that

although certain structural features of the Australian legal academy in general, and of Canberra University College in particular, provided a propitious environment for [Fleming’s textbook on the law of tort] to be written, the content of the textbook owes little to anything Australian.

Lunney, ‘Fleming’s *Law of Tort*’, above n 23, 211. Fleming’s work may say something about what was possible within an Australian law school and speak of ambitions within such schools but may not say anything about the existence or emergence of a particular kind of ‘Australian’ intellectual tradition.

<sup>37</sup> In the spirit of Horwitz I am trying to ‘bridge the chasm between legal theory and legal history’: Morton J Horwitz, ‘History and Theory’ (1987) 96 *Yale Law Journal* 1825, 1835.

It does not necessarily follow from this that the investigation of scholarly endeavour will show that legal academics were integral to the colonisation of legal education by universities. It may be that scholars in fact had relatively little influence and that the founding and expansion of academic law can be divorced entirely from the ideas of legal scholars, and the way they shaped the curriculum and founded scholarly practices; that is, that it was not accompanied by legal ideas. While it would be ironic indeed that law could become 'academic' (in the sense of being placed in the hands of full-time professional law teachers) without — or with little — assistance from 'academics', it is nonetheless possible. However, if this is the case it ought to be proved rather than merely asserted and such proof must, as a minimum, involve exploring intellectual endeavour to search for connections and influence.

I also hold serious concerns about sociological theorising that treats academics in a similar way to how Marxists have treated the proletariat — as mere pawns to be directed by government, university administration and the profession. In other words, I am sceptical of theorising that treats academics as mere victims of circumstance.<sup>38</sup> While the bureaucratisation of universities is a very real phenomenon, its effects on academics and whether, how and when it robbed them of discretion and autonomy can only be known after a careful study of those academics.<sup>39</sup>

In contrast to some of the sociological and institutional studies, some existing literature supports the idea that a legal scholar's involvement in the founding of legal education, and the ideas they embraced and pursued, may be crucial to any explanation of the trajectory of the discipline. Take, for example, Linda Martin's trailblazing social history of legal education in 19<sup>th</sup> century New South Wales.<sup>40</sup> Prior to Martin's study it was believed that the decision to introduce legal studies into The University of Sydney's curricu-

<sup>38</sup> A theme in Judith Lancaster, *The Modernisation of Legal Education: A Critique of the Martin, Bowen and Pearce Reports* (Centre for Legal Education, 1993).

<sup>39</sup> Duxbury, for example, argues that ideas in jurisprudence in England have very much been isolated from larger movements:

The links between jurisprudence and society in England are fewer and generally more tenuous than those which can be established on this side of the Atlantic. While, for example, it seems very difficult to determine the influence of the creation of the welfare state on English jurisprudential thought, the picture is very different when we consider, say, the similarities between New Deal and realist legal outlooks or the influence of events of the 1960s on the emergence of critical legal studies.

Neil Duxbury, 'When Trying Is Failing: Holmes's "Englishness"' (1997) 63 *Brooklyn Law Review* 145, 146 (citations omitted).

<sup>40</sup> See Martin, above n 5.

lum was never questioned. In stark contrast to this traditional belief, Martin demonstrated that although practising lawyers played a crucial role in the founding of The University of Sydney they, along with the first teachers in law, were reluctant to include law within the University's curriculum.<sup>41</sup> Lawyers believed that only law in its general and classical sense was an academic subject of study.<sup>42</sup> When eventually the Vice-Chancellor proclaimed that the time had come to include law within the University he was criticised for his vulgar resort to 'utility' in legal education.<sup>43</sup> Martin suggests that the movement of legal education into the University was not delayed by lack of funding, but by a pervasive belief that there was little value in practical university legal studies.<sup>44</sup>

According to Martin's history, John Fletcher Hargrave, Solicitor-General and member of the Legislative Council, gave the first lectures in law at Sydney in 1859. His views on and approach to teaching were instrumental in the initial failure of law at Sydney to gain traction:

In the preface to the first of his books, Hargrave describes his initial endeavour as one to make law 'Popular, Accessible, Intelligible and Interesting' to his 'fellow colonists of New South Wales'. His lectures spanned a wide range of subjects, including Constitutional Law, the Judicial and Legal System, the Nature of the Common Law, Real and Personal Property, and Commercial Law. The introductory lectures were, however, specifically directed to the study of Jurisprudence or 'abstract law' as 'a high and noble science', referring to the works of Burke, Blackstone, Bacon and others.

One of the lectures was prefaced by a quote from Bolingbroke remarking on a perceived decline in legal standards and exhorting lawyers to take a liberal education. Where once there had been lawyers who were 'Orators, Philosophers, Historians', the passage read, the profession had lately fallen prey to greed and avarice. Lawyers could only escape this fate

by climbing up the 'vantage ground' of science ... instead of grovelling all their lives below in a mean but gainful appreciation of all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be marked among the learned professions.<sup>45</sup>

<sup>41</sup> Ibid 121–2.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid 132.

<sup>44</sup> Ibid 141–3.

<sup>45</sup> Ibid 122 (citations omitted).

Lacking a clear link to the day-to-day practices of law and given that '[u]niversity education at the end of the nineteenth century was hardly a popular pastime',<sup>46</sup> Hargrave's lectures stunted rather than promoted the growth of legal education at Sydney. Legal education only began in earnest at the initiation of the Vice-Chancellor and Martin's work suggests that there would have been even greater delays were it not for an external push for the amalgamation of barristers and solicitors in accordance with common standards and pressure for The University of Sydney to keep up with The University of Melbourne, which had established a law school several decades before.<sup>47</sup>

Within the next major phase in university legal education we find similar evidence to suggest that the growth and form of legal education should be understood through both academic and non-academic actors. Take, for example, developments at The University of Melbourne prior to the Second World War. There the two law professors, Bailey and Paton, were both committed to instilling law graduates with a broad, liberal education and had an 'aversion to technical professional training'.<sup>48</sup> They pushed for a broad academic education that was 'more jurisprudential, less professional and vocational, and directed more towards the social and theoretical context of law'.<sup>49</sup> Their adversaries included members of the Law Institute of Victoria, who wished to increase the articulated clerks course as well as the number of 'practical' subjects (such as taxation and trust accounts) taught within the University.<sup>50</sup> This led to a long-running battle which demonstrated both that the law teachers did not possess full autonomy over the running of the law school, and that the law professors were able combatants. The professors managed to stave off some of the proposals and were even successful in using some of the Institute's arguments and demands strategically — to increase the size of the law school (they said they needed another professor) as well as the length of the law degree.<sup>51</sup>

Accounts like these suggest that to understand the history of law as an academic discipline it is necessary to study the way that legal academics interacted with the profession, government and the broader university and to

<sup>46</sup> Ibid 142.

<sup>47</sup> Ibid.

<sup>48</sup> John Waugh, *First Principles: The Melbourne Law School 1857–2007* (Miegunyah Press, 2007) 112. Exactly what this means and what it entails warrants further exploration.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid 116–19.

<sup>51</sup> Ibid 124–5.

identify the initiatives they devised and attempted to inject into the curriculum. The intellectual commitments and ambitions of legal scholars and what happened to those commitments and ambitions form an important part of the history of law and more particularly the history of law as an academic discipline. Knowing what was the product of academic drive and what was the result of compromise or external dictates is important to any understanding, not to mention any evaluation, of academic law.

#### IV THE LENS OF LEGAL EDUCATION

Of course legal scholarship is already replete with literature on thinkers in law. Careful and detailed study has been devoted to influential scholars in works of jurisprudence, legal theory, biography, intellectual history and festschrift. While the prospect of making sense of past legal thinkers has always held the interest of theoretically inclined and reflective legal scholars, the vast increase in scholarship and schools of thought in law, enabled by the creation of a legal academy, has encouraged an even greater volume of studies. It seems wise to make sense of what has become a great tangle of ideas before adding another thread. With so much ink already spilt, what work could more exploratory studies of thinkers do to shed light on the trajectory of legal education? A further argument of this paper is that works devoted to legal thinkers are rarely executed in a way that promotes the fullest elucidation of the intellectual puzzles concerning legal education. Typical reasons for studying the work and life of a legal scholar include exploring how they advanced a particular field of disciplinary discourse,<sup>52</sup> reclaiming or reinterpreting their jurisprudence so that it excites renewed attention or garners attention it originally deserved but has not obtained,<sup>53</sup> or giving general appreciation for them and their work.<sup>54</sup>

<sup>52</sup> The examples are too numerous to set down a full selection here. By way of example, see H L A Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982); G Edward White, *Tort Law in America: An Intellectual History* (Oxford University Press, 1980); Michael Taggart, 'Prolegomenon to an Intellectual History of Administrative Law in the Twentieth Century: The Case of John Willis and Canadian Administrative Law' (2005) 43 *Osgoode Hall Law Journal* 223.

<sup>53</sup> For a recent example, see Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Hart Publishing, 2012). See also William Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson, 1973).

<sup>54</sup> For a recent example, see Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford Law Books, 2012).

While these are all worthwhile aims, supported across a range of disciplines in which studies of intellectuals can be found, they are not always compatible with the task of finding answers to the problem of university legal education. Here and in the next Part I argue: first, that a thinker's role in the trajectory of legal education can only be fully understood by studying scholars through the lens of legal education; and second, that taking this perspective can reveal fundamental insights into the scholar's endeavour that might be integral to any understanding of that scholar, no matter what the primary aim of the study may be.

To advance these arguments I should first explain what I mean by studying a scholar 'through the lens of legal education'. The type of study I have in mind is one that treats the contributions and endeavours of a legal scholar — the course of their scholarly career — as a form of evidence of how they, consciously or not, faced the challenge of either creating university legal education or furthering large-scale university legal education in their scholarship, in their teaching and in the administration of the law schools and research centres in which they worked.<sup>55</sup> While there may be some exceptions, it seems reasonable to assume that scholars who carved out their careers during one of the formative stages of Australian university education largely chose to conduct work that they believed was both important and necessary for the creation and furtherance of this enterprise. Their endeavours can therefore be treated as evidence of the role for Australian legal scholars they favoured as well as being indicative of the aspirations they held for both themselves and the academy. Their endeavours speak of the professional identity they sought, and tried to obtain, to move Australian legal education along one path rather than another.

Of course their careers may not have embodied all of their aspirations. Their ability to model the professional identity they favoured may have been limited for a number of reasons. For example, they may not have been able to realise their ambitions due to fiscal, political, practical, intellectual, personal or institutional concerns. The cooperation (or lack thereof) of colleagues and others and their own personality, intellect and drive are all factors which suggest that merely using their career as evidence of their preferences for the legal academy has its shortcomings. Any explanation of their contribution must therefore acknowledge these limitations and attempt to explain both a scholar's aspirations as well as how their career may have fallen short of their

<sup>55</sup> Two good American examples or models of the kind of study I have in mind are Laura Kalman, *Legal Realism at Yale 1927-1960* (University of North Carolina Press, 1986); Schlegel, *American Legal Realism*, above n 28.

ideal. In the type of study contemplated here, a scholar's endeavours should be examined to tell us what these say about the scholar's perception and ambitions for legal education rather than for working out how they advanced a particular field. What their contributions add to a field of study or to an understanding or advancement in law is only indirectly relevant. It may help explain what their contribution meant for legal education — in particular legal scholars and the legal academy — and whether it raised the profile of legal education or confidence in the enterprise, but it should not be prioritised at the expense of their broader endeavour or divorced from its broader context.

Explicit comments made by the scholar about their ambitions for themselves, law schools and the legal academy can be tested against their endeavours: to what extent did their career embody their aspirations? Were they advocating a model that suited them best or one which sought a goal they believed necessary for the legal academy? The gap between aspiration and reality may tell us something about the environment of legal education or the characteristics of the scholar. It is important that their published views are not taken as a substitute for a careful investigation of their endeavours. While some may preach what they practise, this is something that ought to be tested. Their published views may also contain an aspirational element of what a legal scholar *should* do. As I have argued in another context, we ought to be wary of legal meta-analysis that dresses up frustrations and lobbying as fact.<sup>56</sup> Therefore we must scrutinise scholarly endeavour alongside aspirations to capture a scholar's contributions and what it was they were attempting to do.

What I am suggesting will, of course, amount to an arduous task. It requires a careful reading of a scholar's work, an exploration of their teaching practices and a study of the broader context of the university. It may also require a partial biography, searching for an explanation of the scholar's endeavours from what can be found out about their personal background. In this I not only agree with John Henry Schlegel that the intellectual history project should be abandoned and replaced instead with histories of *intellectuals*,<sup>57</sup> but add that this is the *best* way that learning about the contribution of

<sup>56</sup> Susan Bartie, 'The Impact of Legal Meta-Scholarship: Love Thy Navel' (2009) 18 *Griffith Law Review* 727, 743.

<sup>57</sup> See, eg, John Henry Schlegel, 'Langdell's Legacy: Or, the Case of the Empty Envelope' (1984) 36 *Stanford Law Review* 1517; John Henry Schlegel, 'The Ten Thousand Dollar Question' (1989) 41 *Stanford Law Review* 435; John Henry Schlegel, 'Talkin' Dirty: Twining's *Tower* and Kalman's *Strange Career*' (1996) 21 *Law & Social Inquiry* 981; John Henry Schlegel, 'Does Duncan Kennedy Wear Briefs or Boxers? Does Richard Posner Ever Sleep? Writing about Jurisprudence, High Culture and the History of Intellectuals' (1997) 45 *Buffalo Law Review*

legal scholars to the trajectory of legal education — as opposed to merely adding interpretive depth to a scholar's ideas on a field of law — should be advanced. The trajectory of legal education is made up of much more than the sum of its leading ideas on matters of legal theory or legal philosophy. By giving priority to the individual intellectual as opposed to their abstract ideas, Schlegel was advocating that scholars explore the full context in which the intellectual operated. He said:

The context may be actions or even texts, for the context of any text is not a given. Indeed, it is always arguable what the context of any text may be. Because words have no intrinsic meaning, because there is no lever and no place to stand outside of the conventions of a given hermeneutic circle, it is always the context that enables the text to have meaning. Without a context any text is, as I said at the outset, literally unintelligible.<sup>58</sup>

He suggested that the historian should be open to exploring all contexts through a process of trial and error because to be satisfied that one particular context established a

factual proposition at least one would have to give evidence of having examined other possible sources of illumination, that is unless the assertion works like an evidentiary presumption, either by rendering evidence to the contrary irrelevant and so conclusively determining the fact or by requiring that opponents first produce evidence to counter the assumption before the proponent may be asked to defend it.<sup>59</sup>

As a result, Schlegel advocated for an approach that is largely biographical and, in a review of Nicola Lacey's *A Life of H L A Hart: The Nightmare and the Noble Dream*,<sup>60</sup> suggested that Lacey's intellectual *biography* demonstrated the redundancy of the intellectual history genre.<sup>61</sup> Within an intellectual biography, evidence of what a scholar published is placed on an equal footing to their lives more generally in explaining their contributions to a body of thought and consequently such works comply with Schlegel's theory on how best to unearth the ideas of the past. While I do not wish to adopt Schlegel's

277; John Henry Schlegel, 'A Life of H L A Hart: *The Nightmare and the Noble Dream* — Nicola Lacey' (2006) 24 *Law and History Review* 679.

<sup>58</sup> Schlegel, 'The Ten Thousand Dollar Question', above n 57, 452.

<sup>59</sup> Schlegel, 'Does Duncan Kennedy Wear Briefs or Boxers?', above n 57, 314.

<sup>60</sup> Nicola Lacey, *A Life of H L A Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2004).

<sup>61</sup> Schlegel, 'A Life of H L A Hart', above n 57, 680.

position on the redundancy of the intellectual history genre, I do believe that to advance a history of legal education a scholar ought to be located in the context of a particular law school or research institution and at a particular moment in time of the history of legal education. The history should ask: how did the scholar's mediation of pressures marry with current understandings of the agendas of universities, government and the legal profession? I will call this approach 'the preferred model'.

The preferred model, with its focus on studying the endeavours of academics to understand the ways that law became 'academic', complements some existing histories of legal education while being incompatible with others. No one approach can provide a full understanding of the phenomenon of the birth and rise of legal education. The preferred model can stand alongside and test claims by rigorous critical institutional studies, such as Robert Stevens' *Law School: Legal Education in America from the 1850s to the 1980s*.<sup>62</sup> For example, it can explore how a range of intellectual agendas contributed — or failed to contribute — to the birth and rise of modern legal education that Stevens describes.

The preferred model can also supplement studies that have chronicled major events in a law school's history, focusing largely on matters of governance, such as John Waugh's *First Principles: The Melbourne Law School 1857–2007*.<sup>63</sup> Waugh's history provides impressions of a range of Melbourne's legal academics but, given the size and range of the work, Waugh was precluded from studying any one of them in detail. Waugh appreciated both the scale and importance of his task, acknowledging at the outset that his attempt to cover the whole of the law school's history meant that he could not provide a 'comprehensive record of people and events'.<sup>64</sup> The preferred model can add further clarity to such a study by, for example, explaining what scholars really meant when they said that they preferred certain models of scholarship and teaching. It can penetrate labels such as 'jurisprudence', 'theory' and 'practical subjects'. It can explore the extent to which the contribution of personalities and intellectual agendas really mattered in the creation of one version of legal education over another. It can further elucidate the differences between legal education in Victoria and New South Wales. Such studies may also explain how legal academics responded or adapted to changes in university governance and whether they ignored or were insulated from such trends. Such

<sup>62</sup> See Stevens, above n 5.

<sup>63</sup> See Waugh, above n 48.

<sup>64</sup> *Ibid* x.

works may test broader claims about the level of freedom and independence held and exercised by legal academics and the extent to which they created and led the model of legal education which then unfolded. The preferred model may also complement and draw from sociological studies that describe trends in societies and the pathology of institutions such as universities.<sup>65</sup>

Studies advanced in accordance with the preferred model will not, however, assume that such external agendas and changes in university governance automatically affected either law schools or legal academics. Instead they will explore the roles various factors played. The model reacts strongly against studies that, without reason, marginalise scholars in their explanation of the discipline.<sup>66</sup> The preferred model most forcefully rejects sociological histories that draw purely from secondary sources to devise normative theories about what legal education was and what it must become. Without wishing to enter into the debate about how sociologists in law or in other disciplines should study phenomena, it seems obvious that one should not attempt to theorise or draw prescriptions about a state of affairs when the most that has been done to investigate changes in that phenomena has been to draw from one's own experiences or what has been discussed in university corridors. Perhaps this is to exaggerate the undernourished state of exploratory studies of Australian legal education based on primary sources. But I would argue that it is only a small exaggeration. Impatience and the desire to at least say something about Australian legal education has led to the making of some dubious and misleading claims which, while doing little to enhance the intellectual core of the discipline, do much to harm it. In this I wholeheartedly agree with Sugarman and Rubin's condemnation of such work in the context of histories of law and economics:

Such work fails to produce new evidence or take old arguments further. Further, this tradition seems '... unaware that many of the simplest facts about capitalist development and the emergence of ... (new forms of law, ordering and organisation) still await research. There is an almost touching positivism in ... (their) belief that the "facts" can simply be read off from ... (one secondary

<sup>65</sup> See, eg, Thornton, 'Portia Lost in the Groves of Academe', above n 23; Thornton, 'The Dissolution of the Social in the Legal Academy', above n 23; Thornton, *Privatising the Public University: The Case of Law*, above n 15. For broader studies of universities, see, eg, Jack H Schuster and Martin J Finkelstein, *The American Faculty: The Restructuring of Academic Work and Careers* (Johns Hopkins University Press, 2006); Sheila Slaughter and Gary Rhoades, *Academic Capitalism and the New Economy: Markets, State, and Higher Education* (Johns Hopkins University Press, 2004).

<sup>66</sup> See Lancaster, above n 38.

source or another). High theorists ... who descend from their eyries for quick swoops over the empirical terrain are unlikely to return to their nests with anything more than the musty grain of cliché unless they are willing to settle down among the stubble to peck away with the rest of us pigeons.<sup>67</sup>

No matter how mundane, this paper is a call for more pigeons.

The preferred model also stands at odds with law school histories that present as mere aide-mémoires to those who inhabit the law school, rather than as contributions to the critical study of law schools and legal education. Decorated with photos, these works typically relate personal anecdotes of students and scholars, the movement of the law school into new premises, details of the law school's Deans and the occasion of the first woman graduate or legal academic.<sup>68</sup> It seems that larger soul-searching questions concerning why law schools have emerged have rarely been on the agenda and instead the works are compiled in the pursuit of far humbler goals. As Ellsworth explains:

A concept of education emphasizing formal institutions of instruction, as Bernard Bailyn noted nearly twenty years ago, will result in history by educational missionaries derived from their particular and professional interests. Studies of law schools like Harvard, Yale, Columbia and Notre Dame — to name but sev-

<sup>67</sup> David Sugarman and G R Rubin, 'Introduction — Towards a New History of Law and Material Society in England 1750–1914' in G R Rubin and David Sugarman (eds), *Law, Economy and Society, 1750–1914: Essays in the History of English Law* (Professional Books, 1984) 1, 120–1, quoting Michael Ignatieff, 'Theorising the Facts' (1981) 57 *New Society* 237, 237.

<sup>68</sup> For a similar argument with respect to American law school histories, see Alfred F Konefsky and John Henry Schlegel, 'Mirror, Mirror on the Wall: Histories of American Law Schools' (1982) 95 *Harvard Law Review* 833, 838–41. I will leave it to the reader to decide which of the following Australian law school histories fall within this category: Davis, above n 12; Alex Castles, Andrew Ligertwood and Peter Kelly (eds), *Law on North Terrace: 1883–1983* (Faculty of Law, University of Adelaide, 1983); Rosalind F Croucher and Jennifer K Shedden (eds), *Retro 30: 30 Years of Macquarie Law* (Division of Law, Macquarie University, 2005); Ruth Campbell, *A History of the Melbourne Law School: 1857 to 1973* (Faculty of Law, University of Melbourne, 1977); Waugh, above n 48; Peter Balmford, 'The Foundation of the Monash Law School' (1989) 15 *Monash University Law Review* 139; Yule and Woodhouse, above n 18; Dixon, above n 18; Michael White, Ryan Gawrych and Kay Saunders, *TC Beirne School of Law: 70<sup>th</sup> Anniversary, 2006* (T C Beirne School of Law, The University of Queensland, 2006); Tom Cain, *The Founding of the Queensland University of Technology Law School* (Queensland University of Technology, 1998); Bavin, above n 11; John Mackinoly and Judy Mackinoly (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991). Shorter pieces have been written on some of the newer law schools: see Eric Colvin, 'Bond Law School: Reflections on the First Ten Years' (1999) 11 *Bond Law Review* 162; Charles Sampford, 'Reflections on a Respectable Revolution' (2002) 11 *Griffith Law Review* 252. See also Michael White, 'History of the Garrick Chair at the TC Beirne School of Law' (2010) 29 *University of Queensland Law Journal* 335.

eral — have been essentially parochial. By faithfully recording details and internal facts, by virtually ignoring the relationships between the law schools and the universities, the profession, and society, the end product has been the glorification and justification of particular institutional traditions and practices.<sup>69</sup>

The limitations of such studies have been recognised in several places<sup>70</sup> and some law schools are endeavouring to take a different, more probing, approach that involves assembling, preserving and examining numerous law school records and capturing the experiences of former faculty members and students through carefully crafted interviews.<sup>71</sup>

My point is that a history of university legal education ought to be the sum of something more than nostalgic recollections and the chronicle of facts. And they ought to do something more than merely refer to the ‘past’ or accounts of the past that draw purely on secondary sources. Resorts to history ought to be founded on genuine inquiry as opposed to the desire to use history strategically as a platform for other academic arguments.<sup>72</sup> What I am pursuing are illuminating histories of educational and scholarly philosophies and action based on primary sources and written in ‘imaginative microscopic fashion’.<sup>73</sup>

## V THE JURISPRUDENCE OF LAW AND THE JURISPRUDENCE OF LEGAL EDUCATION

As I suggested in the previous Part, there are numerous studies of legal thinkers that may feed into and out of studies of the trajectory of legal education, but which are not adequate in and of themselves as explanations of the trajectory of legal education. Studying a legal scholar’s career to discover what it says about the trajectory of legal education requires a different set of questions and a different selection process to a study which explains contributions to a field or seeks new or reclaimed appreciation of a scholar’s work. While there is overlap, it is important to guard against slippage between the jurisprudence of legal education and the jurisprudence of law. There has been

<sup>69</sup> Roy M Mersky et al, ‘The Proposed Legal Education Library’ (1978) 71 *Law Library Journal* 619, 624 (citations omitted).

<sup>70</sup> See, eg, Konefsky and Schlegel, above n 68; Tilbury, above n 2, 259.

<sup>71</sup> Waugh’s history of the law school at The University of Melbourne is the first of this kind: see Waugh, above n 48. A similar work has been compiled with respect to the law school at Monash University: Yule and Woodhouse, above n 18.

<sup>72</sup> See Bartie, ‘A Full Day’s Work’, above n 10, 67–9.

<sup>73</sup> Mersky et al, above n 69, 625.

a tendency to conflate the two, ignoring the distinction and separate importance of a jurisprudence of legal education. This leads to error and misunderstanding.

The conflation of the jurisprudence of law with the jurisprudence of legal education has the potential to shut out many of the questions that should be asked about the discipline of law and legal education. It brings with it the risk that many of the theories about 'law' may be mistaken for theories about academic law. For example, it might be thought that because legal scholars generally agree that the views and theories of scholar or movement X have largely been defeated or superseded by scholar or movement Y, and so generally follow in the tradition of Y over X, they therefore know and understand the way that scholarship and scholarly ideas move from one generation to the next. Even if we restrict ourselves to pure jurisprudence and theory in law, the mere 'doing' of theory tells us little of why theories have come about. To understand why theorist Y — say, Dworkin — prevailed (in some senses) over theorist X — say, Hart — we need to ask what it means to be 'superseded' in academic law, why the ideas of X and Y came to the fore in the first place and what it is that legal scholars do with the ideas of their contemporaries and predecessors. We might wish to learn about the institution in which the scholar based their career and how that contributed to their status and, conversely, how they contributed to the status of the institution. We might also want to ask how the scholar's perceptions of themselves and their aspirations fed into and perhaps were legitimised by the ideas and agenda of scholar/movement X or Y. We might also want to consider the importance of timing and context to the success of a scholar or their ideas. And we might want to ask whether scholars wrote on particular subjects addressed to particular audiences to further legal education or to achieve some other end. Saying that the ideas of scholar/movement Y are better than X and explaining the logic or reasoning for that assessment — as many scholars do — adds little to the jurisprudence of legal education. It tells us little about whether, how and why scholarly conventions changed the nature of legal education — added or subtracted strength and took legal education down one path rather than another. Instead what is required is meta-analysis — we need to treat scholars as separate objects of study and their scholarship as a form of 'alien' practice. In other words, we must step outside the community of practice in order to investigate it.

The importance of studying legal scholars through the lens of legal education begins from the moment one selects a subject to study. One feature of the

discipline of law is that — for whatever reason — it is rare for a scholar to be remembered or eulogised.<sup>74</sup> Lists of great legal scholars — those who are known throughout the world for their contribution to the discipline — are relatively short. They have generally been males from elite institutions and of a particular scholarly persuasion. I know of no studies of an Australian woman specialising in tax or contract law at a regional Australian university. Most often the subject of study, like the scholar studying them, devoted their careers to the history, theory and jurisprudence of law. The scholar is characterised as exceptional, most often ‘brilliant’. While there are also histories of scholarly ‘failures’, this description rarely suggests that the relevant scholar sunk without a trace. Usually what is meant is that the scholar has not been recognised to be quite as exceptional as the handful of greats that dominate the citation charts.<sup>75</sup> Even when the purpose of the study is to reclaim or reignite interest in a particular scholar, it is unlikely that a wholly unknown or marginalised scholar will be selected.

The questions upon which the selection is based often include: Who has influenced legal scholarship and developments in the field? Who has laid down or challenged orthodoxy? Who is cited often? And, who has inspired my career and work? In the context of attempts to discover more about the history of legal education these questions and the answers they yield are limiting. Instead, what should be asked in order to learn more about the birth and rise of legal education is who was in a position to contribute vitally to the birth, expansion or change of identity of legal education on a local, national or international scale. This question should identify cohorts of scholars who established their careers at particular times (moments of formation and expansion); who were based at certain elite law schools whose lead others followed or who were based at radical law schools that challenged orthodoxy; who were the first members of a culture or gender (women) to join the legal academy; or, who held Chairs in Law that were likely to attract prestige. This selection too may leave out important figures — perhaps teachers who left a

<sup>74</sup> I thank John Waugh for making this point plain to me.

<sup>75</sup> Yale law librarian Fred Shapiro has identified in several studies that only a small number of elite American law professors attract a high citation count. In 2000, from a review of American publications, he identified Richard A Posner (7981 citations) followed by Ronald Dworkin (4488 citations) as the most-cited legal scholars: Fred R Shapiro, ‘The Most-Cited Legal Scholars’ (2000) 29 *Journal of Legal Studies* 409, 424 (Table 6: The Most-Cited Legal Scholars). See also Fred R Shapiro, ‘The Most-Cited Law Review Articles’ (1985) 73 *California Law Review* 1540; Fred R Shapiro, ‘The Most-Cited Articles from *The Yale Law Journal*’ (1991) 100 *Yale Law Journal* 1449; Fred R Shapiro, ‘The Most-Cited Law Review Articles Revisited’ (1996) 71 *Chicago-Kent Law Review* 751.

considerable mark on students but received little prominence and few trophies — but nonetheless may more accurately embody the scholars who contributed to the foundation and expansion of academic legal education. The basis of selection avoids the assumption that we already know who played an important part in shaping and influencing the academy and legal education.

David Rabban's recent monograph, *Law's History: American Legal Thought and the Transatlantic Turn to History*, devoted to American legal education in the late 20<sup>th</sup> century, shows the benefits of selecting legal scholars through the lens of legal education rather than by traditional methods.<sup>76</sup> His work both shines a spotlight on, and reveals the richness of, a period of legal education in America that has largely been ignored, while in contrast much attention has been lavished on the American sociologist and realist schools of the 20<sup>th</sup> century. His work consists of detailed case studies of twelve American legal scholars, some well-known (for example Oliver Wendell Holmes and Roscoe Pound) and others less so (Christopher G Tiedeman and Francis Wharton), to reveal that historical legal thought dominated American legal scholarship from the 1870s until 1950.

By exploring how each of these scholars 'understood their own work' and by 'trying to understand these scholars on their own terms' Rabban hoped to

strip away a century of distortions and oversimplifications by twentieth-century commentators often more interested in their own political and intellectual agendas than in recovering what their predecessors actually thought and achieved.<sup>77</sup>

He also hoped

to restore a deservedly prominent place in the history of American legal thought to its founding generation of professional legal scholars. More cosmopolitan, more learned, and more internationally respected than many of the people who have misrepresented or neglected them, they should be recognized and engaged as part of a rich intellectual tradition.<sup>78</sup>

Rabban's method is of the onerous kind described above, '[c]ombining transatlantic intellectual history, legal history, the history of legal thought, historiography, jurisprudence, constitutional theory, and the history of higher

<sup>76</sup> See David M Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press, 2013).

<sup>77</sup> *Ibid* 1.

<sup>78</sup> *Ibid*.

education'.<sup>79</sup> By concentrating on some of the founders of American legal education and taking them on their own terms Rabban reveals the centrality of historical and evolutionary legal thought, particularly that of German scholars, to American legal scholarship and dispels many of the misconceptions about this period. Some of the discoveries that he makes about this period are startling and demonstrate the dangers of making assumptions about who or what is important in legal education. For example, Rabban notes that biographers of one of his subjects, Henry Adams, attached little importance to the seven years Adams spent as an academic at Harvard.<sup>80</sup> In contrast, Rabban argues that this period of time is crucial in any explanation of the field of American legal history and that 'Adams and his students virtually created the field and provided a model for subsequent legal historians in England as well as in their own country'.<sup>81</sup> Given the amount of attention American legal scholars have received, it is both startling and telling that such new and important insights could be revealed by approaching these scholars through the lens of legal education; by selecting scholars based on their placement in law schools at a particular moment rather than by the way their work was subsequently remembered and incorporated into works of legal scholarship.

Duxbury's study of the Corpus Christi Chair of Jurisprudence, Sir Frederick Pollock, also demonstrates that traditional reasons for studying a thinker in law will mean that scholars who have been significant in terms of the trajectory of legal education will be left out.<sup>82</sup> In the opening to his monograph on Pollock, Duxbury said:

Initially I was disinclined to accord Pollock much attention: there seemed to be a fairly obvious message in the fact that legal historians had not bothered all that much with him. Yet the more I encountered Pollock the more he puzzled me.<sup>83</sup>

By exploring the whole of Pollock's career and thickly describing his endeavour Duxbury came to discover that Pollock was a great pioneering scholar; that even though Pollock did not devise a grand jurisprudential theory he nonetheless provided an intellectual model of a legal scholar; and that Pollock

<sup>79</sup> Ibid.

<sup>80</sup> Ibid 153.

<sup>81</sup> Ibid.

<sup>82</sup> Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004).

<sup>83</sup> Ibid xi.

created a template for English legal scholarship — carving out a field of orthodox scholarship through his relentless case notes in the *Law Quarterly Review* — that has continued throughout English legal scholarship until the present day. Duxbury said:

Pollock was no mediocrity. He was one of that great late nineteenth-century group of legal writers who determined, with very little in the way of indigenous precedent, what inquiry into law from an academic perspective should entail. As compared with any contemporary English academic lawyer, he was remarkably driven, creative, prolific, and bold, his interests strikingly diverse. Within the field of law there can be little he did not turn his hand to; outside of it, there is an astonishing amount to which he did. ...

We find in Pollock's writing no compelling conception of legal science. Those writings illustrate, none the less, that such science need not be committed to the idea that law is fundamentally rational, coherent, and amenable to thorough systematization. Indeed, Pollock appreciated — as many English jurists have appreciated — that the law will sometimes, and to no obvious disadvantage, defy rationality. Neither do we discover within Pollock's writings the affirmation of any particular theory. But we do encounter his commitment to reason, his disposition towards nuance, his unwillingness to make grand claims, his talent for understated prescription, and an intimate, seemingly effortless grasp of legal systems and problems.<sup>84</sup>

Duxbury expressed one of the theses of his work as follows:

Certainly a core argument of this book is that it is often mundane, unremitting donkey-work — the successive editions of a treatise, say, or the dripping tap of a case note campaign — that can have as deep an impact on the long term development of the law as can the insights of any genius.<sup>85</sup>

By choosing to study a scholar on the basis of their role in the history of legal education, rather than because they have attracted ongoing respect in legal theory circles, Duxbury too was able to reveal something new about our understanding of the trajectory of academic law. He was also able to suggest that an individual legal scholar can contribute fundamentally to the role and professional identity of legal scholars.

<sup>84</sup> Ibid 326–8.

<sup>85</sup> Ibid 326.

## VI BASE MOTIVES

My final argument is that not only is studying a legal scholar through the lens of legal education essential to any understanding of the trajectory of academic law but that failing to do so may mean that you miss ‘all that matters’<sup>86</sup> about that legal scholar. For many legal scholars over the past 150 years, the growth of legal education was not simply a phenomenon forming part of the context of their work but rather was a fundamental preoccupation that drove and dictated the form and nature of their work. To ignore this connection is to misunderstand their motivations and to misinterpret their contribution.

A scholarly article, monograph or textbook not only represents the culmination of study, interest and creative endeavours, it is also forms evidence of how the scholar answered such questions as: How should I educate lawyers? And, how can I make a case for university legal education, showing it is both necessary and worthwhile? As Krygier recently brought to our attention, Williams once defined the concept of personal integrity as follows:

the person in question has, as seriously as possible, tried to think about the standards or the fundamental projects which are sustaining him or her. If he has done that and if, in the light of the thought he has displayed there, he comes out and does say, this is what I do most fundamentally believe in, and this is what I am going to do, then that person is displaying integrity, even though you do not agree with whatever it is that is sustaining him.<sup>87</sup>

I believe that it is fair to expect that within the work (scholarship and broader endeavours) of any legal scholar of integrity we will find this link between the scholar’s general ideas and their views on legal education. They will think about the connection between the work that they do and their role. Their work can be viewed, at least in part, as a manifestation of what they believe legal education needs and what they believe a legal scholar ought to do, particularly as this was a major point of focus for scholars writing at particular times. If we ignore this link we both misrepresent the scholar and the basis on which their integrity rests.

<sup>86</sup> Krygier, above n 54, 1, quoting Philippe Nonet, ‘Technique and Law’ in Robert A Kagan, Martin Krygier and Kenneth Winston (eds), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Rowman & Littlefield, 2002) 49, 50.

<sup>87</sup> *Ibid* 280–1, quoting Donald McDonald, ‘The Uses of Philosophy: An Interview with Bernard Williams’ [1983] (November/December) *The Center Magazine* 40, 49.

### A Founding University Legal Education

During various periods in the history of university legal education its form, content, survival and growth have been central concerns for scholars. There are three pivotal periods in the growth of modern-day Australian legal education. The first period covers the original establishment of law as a university discipline during the founding of Australia's first universities. Although there is some contest concerning the ordering (which largely depends on the date you place on the birth of legal education at The University of Sydney), the teaching of law in Australian universities can be traced back to the 1850s. While in some places, such as The University of Melbourne, the move was encouraged by rules that meant that law graduates were exempt from the admission exams of the Victorian Supreme Court,<sup>88</sup> law schools in Australia generally remained small until after the Second World War. There were no more than a handful of full-time academic law staff at each of the schools, and in some places lone professors sought to create the curriculum largely on their own, coordinating part-time practitioners to do much of the teaching. These professors were learned men, with liberal educations and qualifications from English universities. While their resources may have been meagre, their ambitions were often grand. From their pursuits — their teaching, scholarship, organisation and contribution to public life — we can detect the first versions of Australian legal theory. During this time we find several examples of scholars speaking directly to the issue of university legal education.<sup>89</sup>

Writing of the equivalent early formative period in England, Stein has similarly argued that a scholar from this period, in his case Sir Henry Maine, must be understood through the lens of legal education. He explained:

Maine's basic ideas about law were closely linked to the particular needs of legal education in England in the 1850s, as he perceived them. That was the period when Maine was giving the lectures which became the basis of *Ancient Law*, and his perception of what students of law should be taught coloured what he

<sup>88</sup> Waugh, above n 48, 7.

<sup>89</sup> See, eg, W Jethro Brown, 'The Purpose and Method of a Law School' (Pt I) (1902) 18 *Law Quarterly Review* 78; W Jethro Brown, 'The Purpose and Method of a Law School' (Pt II) (1902) 18 *Law Quarterly Review* 192; W Jethro Brown, 'Law Schools and the Legal Profession' (1908) 6 *Commonwealth Law Review* 3.

included in his lectures. So our first concern is with the state of legal education at that time.<sup>90</sup>

In another chapter on Maine in the same book, Twining set out a list of the types of studies that could be conducted on Maine:

It could refer to Maine's views about legal education; the relationship of those views to his general ideas; the influence of either or both of these on the subsequent development of legal education in England; and Maine's ideas as a subject of study within legal education.<sup>91</sup>

These are precisely the kinds of studies that I believe are needed to understand this early period of Australian legal education.

The context of legal education is critical to understanding both a scholar's teaching and their scholarly practices during the founding of legal education. Whether, for example, a scholar believed that legal education was best supported on the grounds that its methods and subject matter were akin to the methods and aims of natural science may have been of crucial importance to that scholar, dictating the method, findings and presentation of their work.<sup>92</sup> Attitudes of the profession — both real and perceived by the legal scholar — may also explain why they chose to write and teach in accordance with model A rather than model B. Such things might explain the 'conservative' underpinnings of a scholar's work or else suggest that the scholar was taking a real gamble in advancing ideas and approaches for which they would most likely be condemned, perhaps in the hope of one day encouraging change. As Cosgrove argued in his work on jurisprudence from Blackstone to Hart: 'many of the controversies that have beset legal speculation since the time of Sir William Blackstone in the middle of the eighteenth century originated in issues of motivation and audience, not just definition and

<sup>90</sup> Peter G Stein, 'Maine and Legal Education' in Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press, 1991) 195, 195.

<sup>91</sup> William Twining, 'Maine and Legal Education: A Comment' in Alan Diamond (ed), *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal* (Cambridge University Press, 1991) 209, 210.

<sup>92</sup> For example, Stokes argues that H L A Hart ignored both the central place that the natural science approach played in the work of his positivist predecessors of the 17<sup>th</sup> and 18<sup>th</sup> centuries as well as the challenges posed by the removal of that approach from positivism. Stokes argues that this led Hart to neglect a central challenge to his version of positivism: Michael Stokes, 'Positivism and the Science of Humanity: The End of the Revolution?' in Elspeth Attwooll (ed), *Shaping Revolution* (Aberdeen University Press, 1991) 17, 20–1.

analysis'.<sup>93</sup> An explanation of a scholar's work that does not recognise the significance of this context simply will not make sense and will mistake the scholar's role in history.

### B *Founding the Legal Academy*

The second important period in the history of Australian legal education was the significant growth in Australian university legal education. In the second half of the 20<sup>th</sup> century universities became the dominant providers of legal education.<sup>94</sup> While this created an obstacle to practice insofar as it required aspiring lawyers to gain entry to a university law school and successfully complete three and a half years or more of full-time university study, it also liberated the practice of law. Admission to practice no longer depended on the ability or willingness of the profession to employ articled clerks and the prejudices once associated with such choices. Instead it depended on a student's ability to succeed along the more egalitarian path of university study. The creation of new universities, new law schools, lower cut-off scores, and Commonwealth funding led to a dramatic increase in the number of student places and lawyers and has also meant that many law graduates now seek employment outside traditional practice. Law graduates have become a distinctive and growing body of the Australian labour force operating in a range of different sectors. Not only have these changes brought about a new type of university graduate, they have also created a new vocation: the professional university law teacher. Since the mid to late 1950s a community of full-time legal academics has emerged, supplementing the handful of existing full-time teachers and replacing many of the practising lawyers who taught at law schools on a part-time basis. They represent the birth of modern Australian legal education.

This second period can be further divided into two parts. First, we have the transformation of the original law schools, founded prior to the Second World War (Melbourne, Sydney, Adelaide, Tasmania, Western Australia and Queensland) from relatively small affairs (a small number of students taught by a small group of teachers) to much larger professionalised bodies. This provided opportunities for the new professionalised group of law teachers to

<sup>93</sup> Cosgrove, above n 9, 3. See also Nicola Lacey, 'Analytical Jurisprudence versus Descriptive Sociology Revisited' (2006) 84 *Texas Law Review* 945, where it is argued that philosophical analysis of law needs to be placed in its historical and institutional context.

<sup>94</sup> For an account of this development, see David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) ch 5.

realise some of the ambitions of their predecessors while adding more of their own. Interestingly, in this early period we also find the creation of a Chair of Law in a body created as a Research School of Social Sciences, providing yet another opportunity to conceptualise the university study of law.<sup>95</sup>

The second part of this second period is the creation of new law schools in the 1960s and 1970s, fuelling the further expansion of university legal education. Five new law schools at relatively new universities were created at this time: Monash, UNSW, Macquarie, Queensland Institute of Technology (now Queensland University of Technology) and New South Wales Institute of Technology (now University of Technology, Sydney). A legal studies school was also created at La Trobe. While only presented with 10–20 years of a so-called ‘orthodoxy’ in Australian university legal education, many of these law schools sought to distinguish their approaches from the older schools. Several of the schools were staffed with teachers from the older schools who treated their move as a fresh start, a way to break away from some of the entrenched practices of the old. The large pool of funds given to several of these schools, relative to funding at existing institutions, brought with it further opportunities to realise some other ambitions for Australian legal education and, in some instances, to ‘outdo’ the existing law schools by attracting staff with the offer of more favourable working conditions. Again it was a period of change and re-creation bringing with it the necessity to develop new legal theories and to think again about what and how to write and teach.

In this second period we find legal scholars writing directly on the issue of university legal education. For example, Professor David Derham of The University of Melbourne, then of Monash, made Australian legal education a central concern of his scholarship.<sup>96</sup> Professor Geoffrey Sawer, the first Professor of Law in the Research School of Social Sciences at the Australian National University, published several pieces on legal education and about his role as a ‘research-only’ professor in a school of social scientists. In these works he explained that he conceptualised his role as being of a narrow compass, being subsidiary to, and in servitude of, the social scientists.<sup>97</sup> His

<sup>95</sup> Geoffrey Sawer began his appointment as the first Professor of Law at the Research School of Social Sciences at the Australian National University in 1950. His position was the first research-only position in law in Australia.

<sup>96</sup> See, eg, Yule and Woodhouse, above n 18, ch 2; Ayres (ed), above n 18.

<sup>97</sup> Geoffrey Sawer, ‘Legal Education in the United States’ (1950) 1 *University of Western Australia Annual Law Review* 398, 398; Sawer, *The Place of a Lawyer*, above n 7; Geoffrey

contribution to the school must be viewed in light of this narrow conception. Sawyer believed that even when located in a research institute, law ought to retain a strong educational focus (in this case, postgraduate) to retain relevance.<sup>98</sup> The legal academics at Macquarie filled an entire volume of a journal with thoughts on legal education, signalling a desire to challenge the traditional paradigm of legal education and to motivate other scholars to ask more searching questions about their role.<sup>99</sup> And at the Faculty of Law of UNSW we find similar, though perhaps not as radical, questioning.<sup>100</sup>

While the academics in the second wave of Australian law schools no doubt had a growing sense of security about the existence and entrenchment of university legal education as opposed to mere professional training, they also had something to prove. Their reputations depended on attracting bright students — not just the spillovers from the sandstone universities — and on demonstrating that their ‘new’ approaches to the study of law were worthwhile. They also needed to satisfy the profession that their graduates were worth employing. Just how far they departed from the so-called orthodoxy — as opposed to merely marketing themselves in this way — is worthy of further exploration. Such exploration must involve the study of both the aspiration and academic endeavour of the legal academics at these universities and must compare it with their contemporaries at the sandstone institutions. It must penetrate the labels of ‘new’ and ‘old’ and ‘critical’ and ‘positivist’ to describe what was actually done or contemplated by individuals. While the introduction of small group teaching and the introduction of new subjects may provide some indication of change and difference, what these changes really meant can only be understood by studying the intellectual agenda of scholars. Were they simply trying to create points of difference or did changes fit within an academic agenda which was accommodated by and played out within the new environment? And where did their inspiration come from, given that many came from the older establishments? Again, as with the founders of university education, one would expect that the context would be extremely important. How did their academic agendas fit within this context?

Sawyer, ‘Law at the Australian National University’ (1959) 5 *Journal of the Society of Public Teachers of Law* 20, 20.

<sup>98</sup> Sawyer, ‘Law at the Australian National University’, above n 97, 24–5. As one of the anonymous reviewers pointed out, Sawyer does not seem to have been successful in building a large postgraduate body in law. I note that he did, however, supervise students in other disciplines and this failure may be attributed to his conception of law within the Research School of Social Sciences as a service department.

<sup>99</sup> Volume 5 of the *Australian Journal of Law and Society*: see above n 18.

<sup>100</sup> Kelsey, above n 18; Boehringer, above n 18; Dixon, above n 18; Carrigan, above n 18.

As Laura Kalman's study of American legal realism shows, one should not assume that there is a relationship between scholarly ambition and teaching. In her history of a group of American legal realists at Yale, Kalman discovered that many of the central ideas of the leading jurists were not translated to the curricula and classroom.<sup>101</sup> A range of other factors born from the context of legal education (funding, personalities, promotions and so on) explained why her professors ended up teaching particular subjects in particular ways. This contributed to an explanation of why American legal realism did not overthrow American law school orthodoxy.

### *C Large-Scale University Legal Education*

This brings us to the most recent period, which I will say less about first, because it seems too early to write a history of the past 20 or so years, and second, because in the current period my argument that a scholar's endeavour is best viewed through the lens of the history of legal education loses some of its force. It is a period that consists of the creation of yet more university law schools and the further rapid expansion of legal education. It marks the full professionalisation of Australian legal education where the existence and growth of such education is taken largely for granted. As such, it may have also brought with it, at least partially, the severance of the connection between scholarly endeavour and serious thought about the form and nature of legal education. As university legal education is now largely (rightly or wrongly) taken for granted, scholarly endeavour may take on a life of its own and the pioneering spirit that marked a large proportion of the 20<sup>th</sup> century has largely vanished. While this has not curbed innovation — with interdisciplinary and sociological perspectives increasing in popularity — it is more difficult to analyse new initiatives through the lens of what they say about the enterprise of legal education. It may be that new scholarship says nothing at all about what the authors think about the role that law schools or legal education should play. Or perhaps it is the more orthodox scholars, who had previously taken their roles for granted, who are now engaging in greater soul-searching about what it is they do. Just as the law graduate who does not wish to practise law has emerged, so too has the legal academic who conceptualises their role as being something other than the education of future legal practitioners or

<sup>101</sup> Kalman, above n 55, 229.

even law graduates.<sup>102</sup> Taking the place of the Australian legal scholar for granted, works of scholarship speak of a sense of freedom felt by their authors rather than a sense of obligation or responsibility to create a particular model of legal education. Whether this freedom is helpful or harmful will perhaps one day be viewed and analysed through the lens of a history of Australian university legal education.

## VII CONCLUSION

When the masterful foreign histories of legal education are known to few, when local equivalents lack the critical muscle and depth of their overseas counterparts, when vague and misleading impressions of history have been used strategically to suggest a radical new course for teaching and scholarship, where enthusiasm for history in law is lacklustre at best,<sup>103</sup> and when scholarship and theory about legal education is treated within the academy as a specialised pursuit and shunned by many of its brightest, it is easy to appreciate why convincing others of the need for a certain kind of robust inquiry into the history of law as an academic discipline will be difficult. Nonetheless, that is what I have tried to do in this article. More should be done to work out what Australian legal education is and what it has been before more claims are made about what it ought to be. If it ever occurs, the writing of a body of such Australian works may further convince others of the importance and role of such works. My purpose has been to suggest ways that legal academics can be studied through the lens of legal education to benefit both our understanding of the trajectory of academic law and university legal education as well as our understanding of those scholars. Not only does this open up a large field of subjects to study, it also encourages methods of scholarly inquiry that locate legal ideas within their context. Far from being an esoteric indulgence, I hope to have shown that the history of the scholarly agendas and endeavours of the legal academy should be of primary interest and concern to all legal scholars of integrity — those who think hard about what and how to write and teach — and is important for rational discussion about both law and legal education. Effectively responding to and outwitting some of the curious

<sup>102</sup> See Stephen M Feldman, 'The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)' (2004) 54 *Journal of Legal Education* 474; Bartie, 'The Lingering Core of Legal Scholarship', above n 31, 364–5.

<sup>103</sup> I am not suggesting that there are few historical works in law. There are plenty: see Kercher, above n 2, ix–x.

demands presently being made within Australian universities requires such integrity.