Chapter 5

Research in the corporatised university

> I'm not convinced that great ideas come out of universities. I'd like to produce some interesting ideas, but the trade-off is that you have to have some sort of income, a way to pay the bills, but I don't really see the university as a place to think up the most interesting ideas.
>
> (Lecturer, male, Redbrick, UK)

Contested knowledge

Research is a relatively recent function of the university and was not an integral dimension of Newman's *idea* of the university. However, it was associated with Wilhelm von Humboldt and the University of Berlin, which he founded in 1810 (Humboldt [1851] 1969: 54). Higher degrees by research also emerged from the Humboldtian tradition. Even then, research meant mainly empirical research associated with science and medicine. With the advent of the modern university, the understanding of research across disciplines has widened significantly, embracing a range of epistemologies and methods designed to contribute to the stock of knowledge in new ways.

Law was slow to become a research-active discipline. Provided that legal academics did their teaching and played the role of good university citizen, no one worried unduly about research (Cownie 2004a: 160–61; 2004b, Bradney 2003: 110–13). Training for the legal profession was the primary mission of the law school and if there were advertence to research at all, it was as a corollary of teaching or practice, although desultory publication occurred. The poor law collections still common in many university libraries attest to the marginality of research within the legal academy (e.g., CALD 2000: 18). When new law schools were established and LLB programmes formulated, their focus was similarly on teaching, not research

The conjunction of the New Knowledge Economy and the desire of the law discipline to be accepted as a legitimate member of the academic community have resulted in a scenario where virtually all academics are expected to be 'research active'. The fundamental ambivalence about the nature of legal research nevertheless remains. The problem is an epistemological one,

because of the way 'the common law mind' constrains how legal academics think about law (Sugarman 1986). Doctrinalism, inductive reasoning, exposition and precedent contribute to a culture of intellectual self-referentialism that is antipathetic towards the possibility that orthodox legal knowledge might be subverted.

Although the common law is far from being caught in a seventeenth-century time-warp, the adjudicative convention rarely traverses beyond *stare decisis* and the jurisprudential canon. Julius Stone (1968) addressed the conundrum as to how the common law simultaneously changes while essentially staying the same. He showed how judges are able to accommodate change, including criticism, through the leeways of choice and categories of illusory reference, which involve the selective use of precedent, analogistic reasoning and other hermeneutic devices.

Legal doctrinalism illustrates well what Gibbons *et al.* refer to as Mode 1 knowledge in their analysis of knowledge production (Gibbons *et al.* 1994). Mode 1 knowledge refers to traditional disciplinary knowledge, whereas Mode 2 calls into question the adequacy of orthodoxy. Mode 2 encapsulates the complexity of knowledge production in the context of contemporary social problems, thereby acknowledging that it is impossible for a single discipline to provide adequate solutions unaided. Mode 2 therefore adopts a holistic approach to social problems. Thus, to address an issue such as domestic violence, Mode 1 would rarely look beyond the traditional parameters of the criminal law, as appearing in codes, legislation and case law, whereas Mode 2 might look at the context of gender relations in light of feminist, criminological, sociological and public policy scholarship, which would include paying attention to the voices of the victims. It can readily be seen that the solutions and types of knowledge produced in each case are likely to be quite different and that a Mode 1 approach would offer little other than a short-term legalistic response. Rather than mono-disciplinary or even multi-disciplinary knowledge, Gibbons *et al.* suggest that the new incarnations of knowledge are better described as 'transdisciplinary' (Gibbons *et al.* 1994: 5). The descriptors associated with Mode 2 knowledge production – context, heterarchy, reflexivity, sociality, breadth and transience – all serve to corrode the certainty and stability associated with Mode I (Gibbons *et al.* 1994: 1).

Although there are many shades of legal positivism, the idea that law is a neutral body of rules that can be applied universally is central (e.g., Campbell 1996; Raz 1979; Hart 1961; Kelsen 1961). In claiming to be largely separate from politics, history, sociology and other social forces that animate it, the classic form of legal positivism endorses the idea that law is not only a closed system of knowledge but is also superior to other forms of knowledge. This defensiveness hints at the insecurity and fragility of the law discipline in the face of critique compared with the humanities and social sciences (cf. Arthurs Report 1983: 63; Twining 1994: xix). The fact that there has been

conventionally little interrelationship between legal scholars and other disciplines attests to law's isolationism. Law, nevertheless, can never be a truly autonomous discipline that is free of the social (Sullivan 2001–2: 1219). Its autonomy is a figment of the common law mind, which is dismissive, if not downright hostile, towards Mode 2 legal scholarship. The liberal law school has struggled to escape the thrall of the common law mind and secure acceptance within the wider academy. The conflict between academic and professional prescripts has induced a perpetual state of schizophrenia within the legal academy.

As suggested in Chapter 3, social liberalism was an important catalyst for modernisation. Wide-ranging inquiries were conducted into the discipline of law in the decade from the early 1980s in Canada (Arthurs Report 1983), Australia (Pearce Report 1987) and the UK (ACLEC Report 1996), which represented a watershed in terms of law as a scholarly discipline. All reports were critical of the way legal scholarship was diluted by the practical training of lawyers. The recent chronology of these reports underscores the fragility of the legal research culture and its tentative reaching out towards Mode 2 knowledge.

Spurred on by social liberalism, modernity and the desire by law schools to be accepted as fully-fledged members of the academic community, legal research and publishing burgeoned during the 1980s and 1990s in ways that were formerly unimaginable. A wealth of different perspectives, methodologies and theories animated a new generation of legal scholars, who were inspired by social liberalism and the correlative push towards modernisation.

In light of the struggle by the adherents of Mode 1 to hold onto traditional conceptualisations of legal knowledge in the face of exhortations by the adherents of Mode 2 to embark on new directions, new schools of thought emerged. There have been notable ideological rifts in university departments of economics, philosophy and English, as well as law, regarding the nature of knowledge. The control exerted by the legal profession in terms of the requirements for admission to legal practice has ensured the continued dominance of Mode 1 in law, despite the challenges produced by broader, reflexive and ethical approaches. If the legal literature moves too far away from the practical concerns of the legal profession, academics are quickly taken to task (e.g., Edwards 1992). The disciplining of the legal academy has been traditionally conducted by the profession, although students, university administrators and the media may all play a role.

Despite the contemporary ascendancy of Mode 1 legal knowledge, it too has a relatively short lineage. Andrew Vincent argues that law and politics were intricately interwoven for two millennia and were only decoupled at the turn of the nineteenth century (Vincent 1996: 122–23). Once professional law schools were established, the teaching of doctrine assumed centre-stage and the boundary between the legal and the social was vigorously policed,

although the social sciences had begun to affect the ivory towered law school in the US by the time of World War I (Stevens 1983: 134–35). Of course, the ancient field of jurisprudence has always been concerned to interrogate and disturb the technocratic carapace of law by adroitly raising issues of justice and morality. As William Twining points out, it is the one area of law that is genuinely multi-disciplinary (Twining 1994:116).

A notable challenge to what had become a closed and formalistic system of knowledge was effected by the Legal Realists in the 1920s, 1930s and 1940s in the US, particularly at Columbia and Yale, but was strongly resisted (Kalman 1986; Stevens 1983: 136–56; Twining 1967; Llewellyn 1951). Subsequent progressive movements have been similarly attacked by traditionalists in other common law countries. In the UK, socio-legal scholars were marginalised from the early 1970s, until they came into their own in the late 1980s (Thomas 1996: 1; Harris 1983). In Australia, the resistance towards critical socio-legal scholarship at Macquarie Law School during the 1980s and 1990s (AJLS 1988–90)) and La Trobe during the 1990s and 2000s was intense, resulting in the marginalisation, segregation or redundancy of disfavoured scholars.[1] The clear message for more than a century has been that law should be quarantined from the social.

William Twining suggested in *Blackstone's Tower* (1994: xix) that the study of law was being reabsorbed into the mainstream of intellectual life. A decade or so later, I am somewhat sceptical in light of the narrowing of legal knowledge that has occurred as a result of the neoliberal turn. While there are manifestations of vibrancy in social research and popular culture, legal writing generally remains a largely arcane field to those outside the discipline.

Law represents a highly contested terrain because of the way the presuppositions of doctrinalism (Mode 1) favour vested interests and the dominant capitalist ideology, while a critical socio-legal approach challenges those interests. Hence, there is hesitancy about going too far. As Fitzpatrick notes (1995: 106), the 'social' in socio-legal studies has been remarkably under-examined; as well as highly contested (Wheeler and Thomas 2000). Provided that the knowledge transcends the 'legal' in the Mode 1 sense, almost anything would seem to be admissible. However, the containment of the 'legal' is itself highly problematic as the tendency of Mode 2 is to reject a clear line of demarcation. In any case, law is necessarily a social practice (Sullivan 2001–2: 1220), which means that doctrinalism can never be immunised entirely from the social.

While the socio-legal may be subtly influenced by the ideas and methods of the humanities and social sciences (Bradney 2003: 124), it may go much further and view a problem through the lens of a specific discipline, such as philosophy or history. However, Mode 1 legal knowledge is dismissive of interdisciplinary perspectives, as Ian Duncanson (1996: 80) points out: 'To be authentic, an understanding of law must be from a lawyer's point of view and that that privileged perspective can probably be achieved only by

someone who has a lawyer's credentials'. The resistance to external critiques of law means that interdisciplinarity is halting and uncertain, as with the embrace of the social generally. It may be tolerated in an instrumental sense, such as the idea that law and psychology would produce a better criminal lawyer, or law and economics would produce a better commercial lawyer, whereas the critical outsider position, to which Duncanson adverts, is viewed with suspicion.

Sociology of law, associated primarily with the continental theoretical tradition (Treviño 2001; Harris 1983), critical legal studies (e.g., Kairys 1982) and law and society (e.g., Garth 1998) with the US anti-formalist traditions, represent other cognate perspectives, which are designed to illuminate and advance an understanding of law. These approaches are all multi-perspectival, and include Marxist, feminist, post-structural, as well as multi-disciplinary epistemologies and methods.[2] Travers (1993) has nevertheless suggested that sociology of law is a long way behind developments in, say, the sociology of health or the sociology of education. This may be due to law's resistance to external critique and the fact that internal critique by 'authentic' legal knowers is constrained by doctrinalism and instrumentalism. It is notable, however, that the leading nineteenth-century sociologists – Marx, Durkheim and Weber – all recognised the centrality of law and legal institutions to social ordering. In recent times, law and literature, law and economics, critical race theory, feminist jurisprudence and a host of 'law and … ' perspectives have enriched legal scholarship.

The indeterminacy of the socio-legal, emphasised by the multiplicity of perspectives that fall within its rubric, has induced Fiona Cownie to claim in respect of the UK legal academy that 'We're all socio-legal now' (Cownie 2004c: 1), echoing earlier refrains, such as 'We are all contextualists now' (McAuslan 1989: 313) or 'We are all Realists now', but never 'We are all crits now' (Gava 1988–89). While only half the respondents in Cownie's study described themselves as socio-legal, she felt that the proportion was in fact much larger but there was a hesitancy on the part of some respondents to describe themselves as such, as they equated socio-legal with empirical research (Cownie 2004a).[3] Provided that one adheres to a basic principle of the recipe: 'add a spoonful of social and stir', it would seem that the socio-legal descriptor applies and the critical ingredients are incidental. Shanahan aptly questions the extent to which legal academics invoke social theory knowingly or whether they are mere dilettantes (Shanahan 2002: 23; cf. Kerruish 1988: 169).

The degree to which socio-legal necessarily entails both a *theoretical* and a *critical* stance remains contentious. The contributors to Philip Thomas' edited collection of essays on the state of socio-legal research in the UK in 1997 were dismissive of the atheoretical, methodologically weak, empirical, bland and fund-driven phenomenon that passed for socio-legal, which is described as 'a poor shadow of the possibilities' (Bottomley 1997: 171). This

add-the-social-and-stir approach also fails to address how the corporatisation of universities has induced a move away from disinterested knowledge towards the commodification and exploitation of knowledge, as Richard Collier suggests (2004: 517–19). In deploying socio-legal as the key marker of methodological and epistemological diversity, Collier, like the contributors to the Thomas collection, implies that Bradney and Cownie may not have paid sufficient attention to the *critical* dimension of socio-legal scholarship.

I nevertheless agree with Bradney and Cownie that most legal academics would acknowledge that black letter law no longer suffices, despite the rearguard action to save it and that advertence to the social, however minimal, is challenging if not changing the nature of Mode 1 legal knowledge. At odds with this trend is the favouring of a depoliticised non-critical approach to legal scholarship as a manifestation of the neoliberal turn, the impetus of which discourages a focus on the social, as discussed in Chapter 3. Empirical socio-legal research may comport with the applied orientation of the corporatised university (Collier 2004: 525–28), although the time-consuming nature of empirical research is at odds with the neoliberal imperative to produce articles quickly (Hillyard 2007: 270). It is notable that the pendulum swing has occurred just when law was experimenting with forays into critique, which has inhibited, if not stifled the new imperative altogether.

The move to deploy the law school as an enterprise facilitator, along with schools of business and management, has been marked. The hard jurisprudential and ethical questions about the nature of corporate practice are no longer welcome, as I have suggested in discussion of the law curriculum. They are discomfiting in an institution itself committed to entrepreneurialism.

The amalgamation of law and business schools within mega-faculties has also had the propensity to contract the space accorded the social. Business schools themselves are experiencing a similar phenomenon as the prudential is sloughed off, and social science academics are also being cast aside as their subjects are shed (Butler 2006: 25). Thus, while we might all appear to be socio-legal now, the propulsion away from the social with its disturbing questions and space for an ethical sensibility is a powerful imperative on the part of the neoliberal state, as played out through government research policies and the practices of the corporatised university.

The divisions between doctrinalism and the socio-legal, particularly in the case of radical critiques, regarding what should be taught and what should be valued have sometimes been acrimonious.[4] While the liberal carapace of the academy occludes these tensions, they flare up at other times, such as in the process of curriculum review, the choice of research metrics in auditing schemes and the establishment of priority research areas.

The shift from social liberalism to neoliberalism illustrates the permeability of the dividing line between Modes 1 and 2 and its receptiveness to the prevailing political mood. In some institutions, the dominant doctrinal

perspective continues to prevail. One Canadian interviewee found the lack of critical perspectives at the British university where she undertook post-graduate study to be dispiriting, as class analysis and criminology were not considered to be legitimate dimensions of legal analysis. She found it a relief to return to a Canadian law school with its acceptance of a broader approach. Within some institutions, there were complaints that only doctrinal research received approbation, and applications for grants for Mode 2 scholarship were ignored. In contrast, proponents of doctrinalism were critical of the 'pointless articles' that no one reads because of their theoretical orientation, but which were thought to be encouraged by auditing schemes (Cownie 2004a: 141).

Regardless of the prevailing imperatives in favour of enterprise and capital accumulation, comparatively few legal academics have responded enthusiastically to commercial and business law as areas of research In Canada, the areas that predominate overwhelmingly in terms of funded research are human rights, First Nations and aboriginal law, constitutional and international law. Commercial law and property were well down on the list. These areas have failed to excite the imagination of researchers to the same extent as contemporary affective and social problems. Perhaps, for this reason, not all law schools have placed pressure on staff to alter the direction of their research.

It is paradoxical that just as legal research has sought to be accepted within the academy as a bona fide site of knowledge production, neoliberalism has sought to return it to its Mode 1 box, particularly so far as teaching is concerned. It is assumed that doctrinal knowledge will best facilitate the market and that is what law firms want. It is assumed that independent critical scholarship can only destabilise the primary vocational role. Of course, the critical space has not disappeared altogether as the evidence reveals and it cannot do so while there is both public funding of 'pure' research (albeit declining) and a nucleus of curiosity-driven researchers with a commitment to pursuing hard questions untrammelled by the exigencies of the market. Scholars who are passionate about their research do not care whether they have funding or not. Some will be so committed to their research that they may opt to pursue it as an independent scholar by taking a redundancy package or early retirement and 'living on bark', as one UK interviewee said.

It was probably once true to say that traditional legal scholarship was primarily associated with the older universities, and the more innovative with the newer institutions (Weisbrot 1990: 125). The generalisation no longer holds true, as the former have made a concerted endeavour to bolster their research standing and enhance their rankings. Hiring policies are geared to appointing the best researchers, which includes dynamic young scholars who are making names for themselves by challenging orthodoxy. In contrast, some of the News have consciously pursued a more traditional path in the

hope of winning the approbation of the legal profession and ensuring the conveyor belt to the corporate firms works for their graduates.

Generalisations about legal knowledge or the contemporary law school no longer hold. While the pressure to retain Mode 1 knowledge represents a powerful imperative in the teaching of law, as I have shown, research imperatives are simultaneously corroding it and contributing to diversification in Mode 2 terms. Although it is the applied end of socio-legal research that is favoured by the drivers of research policy, problem-solving requires much more than empiricism and doctrinalism. As one of Marginson and Considine's interviewees noted, 'Trying to harness the research effort is like trying to get butterflies to fly in formation' (Marginson and Considine 2000: 133). The competing policies, passions and imperatives that underpin legal research produce ongoing creativity and contradictions in legal knowledge as legal academics pursue original lines of inquiry or subvert orthodoxy, while simultaneously paying lip service to the new corporatism.

The new environment

Neoliberalism has transformed the character of research, which is now valued less for its contribution to scholarship than for its value to end users, which is assessed primarily by means of 'knowledge transfer'. Rather than merely adding to the stock of knowledge, research is expected to solve a contemporary social problem, generate income or serve some other functional purpose. Realising the 'use value' of knowledge requires a high degree of control. As suggested, technoscience is favoured as the most lucrative source of academic capitalism (Slaughter and Rhoades 2004: 53; Slaughter and Leslie 1997), while the law discipline is generally valued less for its research effort than for bringing high-quality undergraduates into the university:

> I constantly have to reinvent the wheel and explain to the university what the discipline of law is and what research in law means. The stereotypical perception that all we do is train people to learn rules by rote or look up answers in a book is completely wrong and it astonishes me that the stereotype exists because you only have to think for a microsecond about the role of law in society to equate it with any of the other social sciences or humanities. Why is it not an intellectual discipline in its own right like political science or sociology or history or philosophy, but there's this stereotype of it being a practical trainer of people?
>
> (Dean, male, Redbrick, Aus)

Legal academics are sensitive to the criticism of academics in the sciences and the humanities that they do not do 'real' research:

> We do well with empirical research. A lot of our research feeds routine policy on legal education, advocates and their rights to high courts, and so on … and a lot feeds into the teaching, especially at the masters and PhD level. We're in the process of producing the very knowledge we're going to teach and that's absolutely vital. Does the university understand that? No; it hasn't quite grasped it yet.
>
> (Prof, male, New, UK)

'Publish or perish' has long been the aphoristic injunction associated with life in the academy and an essential prerequisite for individual career advancement. Now, the institutional value of research productivity transcends individual good, as research funding and research training places are directly related to the cumulative research effort of a law school, despite the ramifications for quality that intensification has brought with it:

> I think the volume of research has increased but, as one vice-chancellor advised me some years ago, if you have got an idea, a good set of data is like salami, you want to slice it as thin as you can to get lots of different articles out of it, but I think that meant that the quality in the sense of the originality and the kind of significance of individual articles has tended to drop.
>
> (AsPro, fem, Generation3, Aus)

Formal mechanisms of audit and accountability designed to foster research entrepreneurialism and research outcomes have dramatically affected attitudes towards research. It can no longer remain at the margins of the everyday life of the typical legal academic where the immediacy of teaching and administration have traditionally taken priority. Having to do more with less has consequences for the calibre of the research that is produced. Schools have responded to the shortage of funds by attempting to transform themselves overnight into entrepreneurial units. As a result, academics may find themselves being directed to secure research grants and consultancies. The prevailing equation is that research productivity leads to grants and more grants, as well as increased outputs – publications and more publications – because these activities not only generate government money for the university but enhance its reputation in terms of brand name and league table rankings. Within the market paradigm, it is entrepreneurialism and quantification rather than original research or the gift of knowledge that are most highly valued.

Paradoxically, however, the increase in competition has accompanied an overall decline in state funding of research which is a corollary of the neoliberal withdrawal of support for public goods and is marked in the US (Tombs and Whyte 2003: 18–19), as well as the UK, Canada and Australasia. With government as the driver, the emphasis is on securing private funding and consultancies, which accentuates the trend towards the privatisation of

knowledge. If the big corporations fund research, the expectation is that they will be more likely to take out patents and capitalise on the research. It is hoped that the overall effect of harnessing the total research effort will augment the GNP and enhance the position of the nation state as a New Knowledge Economy on the world stage. Research partnerships with industry are therefore highly desirable.

The orchestration of research by the state has been a notable characteristic of the neoliberal transformation of universities. Substantial funds have been injected into earmarked research as a stimulant. High-profile programmes have been established in nation states to encourage the best and brightest researchers, such as the Canada Research Chairs. The 'excellent' and 'world-class' descriptors associated with these programmes are designed to enhance the standing of nation states and deflect attention away from the dross that is all too often produced in the name of research within corporatised universities. High-profile initiatives also deflect attention away from the massive under-funding of the less glamorous everyday operations.

The role of research and publication accentuates the tension between managerial imperatives and academic norms in the neoliberal university, as discussed in Chapter 4. The rhetoric emphasises quality, but the reality emphasises quantity. The more frequently research data is collected, the greater is the pressure to produce more outputs for the sake of satisfying audit exercises. UK academics complain about a 5-year auditing cycle, New Zealanders a 3-year cycle and Australians a 2-year cycle. An annual data collection system, which operated in Australia prior to the Excellence in Research for Australia (ERA), has the effect of encouraging less taxing forms of legal writing, such as doctrinal exegesis and practice-oriented work, rather than time-consuming empirical and theoretical projects.

The overall effect of auditing regimes based on quantifiable outcomes has been to delimit the ambit of legal research at the very moment that the law discipline began to secure a modicum of acceptance within the university as a scholarly discipline. Despite the many downsides of performance-based research schemes, an emphasis on quality may restrain a rampant entrepreneurialism:

> If you are looking for commercial contracts to bring in money, teaching suffers, you are not doing research and you are undermining the whole purpose of the university … The performance-based research funding is making the university say, 'Oh, we have to focus on research now'. It is a good thing because it means there is a little bit less pressure to be doing those entrepreneurial things which aren't necessarily research.
>
> (Dean, male, NZ)

A duty to produce papers quickly, for the sake of a measurable outcome in a managed environment, can only stifle creativity, as Polanyi noted (1951: 43).

A highly regulated system privileges the production of applied knowledge or, even worse, large 'outputs' that have no value other than the competitive funding that might attach to them:

> Quality is hard to measure, but to measure it in terms of how many journal articles you have done can be counterproductive because it forces people into publishing for the sake of it. If there is something they really care about and really want to work on and they drop it because they think it's going to take a couple of years, that is bad because the best researchers are the ones that have a passion and interest in something. Even if no one wants to publish their work for a while, as long as they're writing and researching, even if it's not united or on track, that is what a university is about.
>
> (Dean, male NZ)

The phenomenon of publishing pedestrian work is a notable manifestation of the McDonaldisation of the university, as noted by Ritzer: 'The overproduction of routine scholarship is one of the most egregious aspects of contemporary academic life. It tends to conceal really important work by sheer volume; it wastes time and valuable resources' (Ritzer 2000: 70).

The science template is the research model for all disciplines but it has been a source of aggravation for law. Legal research and writing, as with the humanities generally, tends to be interpretative rather than empirical. There is little appreciation of this substantive difference by research administrators. The Australian Research Council's nomenclature of 'Discovery Grants' for its primary large grants scheme illustrates the point. Legal research – both Mode 1 and Mode 2 – is not so much in the business of 'discovering' knowledge, but exploring, explicating and interrogating it. Law schools are nevertheless anxious to develop their research cultures in more conventional terms because the research reputation of a school is a key source of positional goods, which can be directly correlated with league table rankings. Research reputation attracts top scholars and postgraduate students, as well as boosting the chances of financial success in national competitive schemes.

Academics are conscious of the pressure to 'churn out stuff' regardless of whether they are ready to publish or not but feel compelled to conform to the edicts of line managers:

> I find that research now is getting squashed into the corners. I don't have the time any more to sit with a piece and go over it and think about it. I've just got to get them out; they are not as thoughtful as they might have been in the past … It's very difficult to expect to get high-quality research because what they want now is quantity, not quality. They don't want one good piece; they want ten crap pieces; any ten pieces, they

> don't really care and I think, as a result, the standard of refereeing is going down.
>
> (Snr Lecturer, fem, Generation3, Aus)

The pressure to be productive highlights the power of the audit culture that has effectively supplanted the traditional concepts of critical thinking and scholarly excellence. While called 'research', this is something of a misnomer if the aim is merely to produce an auditable output with scant regard for substance or intellectual worth. Nevertheless, if not produced on demand, appointments and promotions are jeopardised and even disciplinary proceedings or redundancy may result:

> I found here there were so many demands with the bureaucracy and teaching that my research output went down substantially. In the end a stick was raised: 'Where is the research ?' I was engaged in a long-term project involving philosophy and psychology which I'd been thinking about and trying to build a foundation of something original. I had to suddenly leave that and get cracking on something short-term … I was essentially threatened for not having produced enough material and given some stark options between resigning or doing only teaching and the way I got out of it was to produce research … I think it's disgraceful but I decided the only rational thing to preserve my position was to produce in a relatively short period a piece of research … Without that threat and intimidation, I would've carried on with what I thought was a serious intellectual endeavour.
>
> (Lecturer, male, Redbrick, UK)

Research entrepreneurialism

By a certain sleight of hand, the emphasis on productivity, the pre-eminent institutional focus of research is no longer so much on 'outputs', that is, publications, but on 'inputs', that is, money from grants and consultancies in order to conduct the research in the first place:

> Every once in a while someone will express an interest in my research – not in the research itself but the funding – because obviously the university gets a pat on the back if I run around with this pot of money to do the research, but I don't think there's any interest in the research itself.
>
> (Lecturer, male, Redbrick, Aus, UK)

In accordance with the market ideology, research is viewed as an investment opportunity rather than a social good. Although the money generated to

conduct the research receives the most approbation, at the same time, institutions are keen to garner outputs in the form of 'esteem factors', such as prizes and fellowships, which enhance national and international rankings.

Although the mission of all universities is to be research active, the positional goods of the Olds inevitably skew the outcomes in their favour (Doherty and Leighton 2004). The status of the News is made more difficult by the fact that the absence of a research culture, coupled with scarce resources, has compelled them to increase undergraduate enrolments in lieu. The News then become caught up in an endless spiral: the more students they have to teach, the more elusive is the hope of establishing a research reputation.

The entrepreneurial research culture is subtly changing the manner in which legal research is undertaken. In order to attract international kudos and competitive funding, the ambit of projects has been expanded to justify applying for larger and larger grants. Instead of the modest project, in which academic researchers undertake the research themselves, proposals may now involve a team of investigators and cross-country comparisons, as well as multiple research and technical assistants. Academics then become project managers rather than researchers, with junior research assistants, who may be postgraduate students, making judgements about what is relevant. Many academics rue the passing of the hands-on researcher in favour of the research manager:

> I think there is a change in the character of what is expected of research. There is a much stronger expectation that legal research should follow the science paradigm and be based on grants, fairly large grants. The research should be financially expensive so that there is almost a consumption index of research excellence. I am a researcher who has for the last 15 or 20 years not needed a great research budget, for I do most of the research myself. I use the research assistant to do some citation checking and other basic things but I have not needed a big budget. Now, if you are a researcher who is not seeking and obtaining grants then there is something wrong.
>
> (AsPro, fem, Redbrick, Aus)

Most law schools now have a director of research, often aided by a bevy of support staff, whose role it is to encourage research activity and assist with grant applications. The possibility of the overnight transformation of someone who has never published or undertaken research into someone who is internationally competitive – preferably world-class – would seem to be fanciful, particularly as the success rate for major competitive grant schemes is very low. Nevertheless, a great deal of money and effort has been expended in the belief that such a transformation is feasible. As well as being expected

to perform magic within an inchoate research culture, change agents may run workshops on research methods, play a supervisory role in cementing linkages with outside bodies and draft grant applications. Initiatives of this kind have considerably increased the actual cost of research, but are rarely factored into productivity audits.

Experienced academics who have managed to carry out modest research projects for years without funding resent being told to reinvent themselves as entrepreneurs, although the opportunity for students to work as research assistants to senior academics may be a valuable source of research training:

> You know I think it's a waste. A lot of time applying for a grant itself and it's not worth it. I had half an altercation with the dean and he was apparently very disappointed in my attitude when I basically said I didn't see the point because the research that I do tends to be kind of theoretical and it's fairly important for me to have this feel of the literature and what the scope of the literature is, which means I need to do my own research. I don't have anything for a research assistant to do, so I don't use them and don't apply for grants. I just need time … I was completely chewed out over that.
>
> (Snr Lecturer, fem, Sandstone, Aus)

The dominance of the market means that unfunded research is now held in low esteem even though, as one interviewee put it, 'you might do the most important research rather than the most funded research' (Snr Lecturer, fem, Generation3, Aus). The market imperative demands that all legal academics become entrepreneurs, regardless of what else they might do. They resent 'the tragedy' of being pushed into an area because it is financially rewarding, rather than because it is where their passion lies:

> It's not the way my brain thinks; it's not the way my curiosity responds – by offers of money. But you talk to more junior members of faculty and they know from the first day they walk in the door what the name of the game is – building the research profile as an attractor of grants.
>
> (Prof and former Dean, fem, Can)

They also resent the culture of research entrepreneurialism and grantsmanship, including having to effect liaisons with potential industry partners, which are inordinately time-consuming:

> I find now, I seem to spend a lot of time, a lot more time, talking about research and research culture and how we are going to move towards this than actually doing it any more. I feel like I used to have more time

> to actually sit down and write, whereas now I seem to be in meetings every second day about the possibility of a grant.
>
> (Snr Lecturer, fem, Generation3, Aus)

The orientation in favour of large grants reveals how the scientific template is the driver of research norms, which has the effect of compelling legal academics to undertake empirical research, for which they may be ill-trained. It tends to emphasise the 'science' in social science, rather than the 'social' (Lee 1997: 82; Thornton 2008b: 6). As with the technocratic approach to teaching law as a body of rules, the 'social' in socio-legal recedes into the background or disappears altogether. Researchers are expected to suppress the critical voice because it expresses a point of view, subjecting them to charges of being 'unscientific' and partial. By requiring researchers to neutralise the self, funding regimes are subtly able to underscore Mode 1 research which invariably privileges dominant interests.

Most theoretical and doctrinal research requires – not money, but the most precious research commodity of all – time, which has to be bought within a commodified regime. Despite the sea change in the culture of legal research, one UK law school concluded that a focus on securing grants had either no effect at all on the quality of the research or a negative impact:

> Those law schools that were most noted and prolific in bringing in outside funding didn't appear to score any better in relation to the overall ratings. The conclusion we reached was that bringing in money wasn't really being rated of such great importance by the panel. This was a bit of a kick in the teeth for me having spent all this time on funded projects to find that I would probably have been better off writing books or journal articles in terms of being more highly regarded. The reality is that funded projects mean that people are taken off to work on those projects don't have time free to produce the kind of top-rated journal articles you'd likely to score most highly … If you are trying to achieve international excellence, it's easier to do it in short articles than a long book first of all. What you're looking for is an article which would be publishable in one of the leading national journals or some of the international journals, so you can conclude that enterprise at the very least is a double-edged sword.
>
> (Prof, male Redbrick, UK)

In her study of legal research in Ontario, Shanahan (2002) found that 65 per cent of projects were in fact unfunded. My sense is that this would be roughly the norm elsewhere.

Publish or perish

The most common forms of publishing by legal academics have conventionally been student textbooks, guides for practitioners and journal

articles of an expository nature, which reified the idea that law schools were adjuncts of the legal profession. This type of publishing no longer suffices; the focus is now on publication as performativity – how many? how often? where published? with whom? what impact? incidence of citation? A research quality audit will also want to know what is new and original about the work.

The publication route is strewn with anomalies that impact deleteriously upon the law discipline. The benchmark for what counts as research and publication in the academy is the *international* refereed journal, a model borrowed from the sciences and one that sits somewhat uncomfortably with the largely domestic focus of the law discipline. Internationalisation is also a reminder that kudos for those on the periphery is derived from recognition by the metropole (Connell 2005). From the perspective of an Australian or a New Zealander, there is a residual colonialism associated with the privileging of northern hemispherism and the devaluation of the local. As Jenny Stewart says, 'Americans can write about their domestic situation and it is international. When Australians do the same, it is parochial' (Stewart 1999). The phenomenon may have been accentuated by international journal rankings with a single benchmark of excellence.

The introduction of the refereed journal has significantly altered the landscape of legal publishing. Few law journals were in fact peer refereed until the neoliberal turn when it was determined that the international *refereed* journal was to be the auditable norm for all disciplines. The typical US law review, emulated in Australia and elsewhere, comprised a student editorial board which made all decisions. Neither the Harvard nor Yale law journals, for example, are refereed. They do not seem to need the imprimatur of peer review to be accepted as legitimate because of the prestige of their host institutions.

Legal publishing has been compelled to accommodate the refereed mode for auditing purposes. As community and practitioner-oriented writing does not fit the model, some professional publications have moved to refereed mode because academics no longer wished to write for them (cf. Cownie 2004a: 136–37, 200). The refereeing process may nevertheless be cursory as the aim seems to be to fill an issue, rather than publish cutting-edge research. From the perspective of university management, the short refereed article fostered by such journals is nevertheless preferred to maximise the monetary return. When competitive government money is based on satisfying basic criteria, many low-grade articles are produced.

In order to provide outlets for publication, there has been a huge proliferation of refereed law journals, with every law school, including the News, having at least one flagship journal and, in some cases, several specialist journals as well. As Twining (1994: 111) observes, while it is not difficult to get published, it may not be so easy to be read! Not only do academics no longer have time to read the flood of publications, but universities can no longer afford to subscribe to them.

Posting online or 'self-archiving' is now widely used. Web-based publication is cheap and expeditious, which some libraries have opted for over hard copy, although it brings other problems in its wake, such as 'link rot', in which the URLs disappear, and content instability, where the content changes without warning (Rumsey 2002). An even more ephemeral form of Internet publication is that of blogging, which is affecting the production and dissemination of legal scholarship (Harvard Law School 2006). Even though the Web is a relatively recent phenomenon, reliance on it has increased exponentially (International World Stats. Online 30/1/2011).

Text books do not count in research audits unless it can be established that they contain 'research', that is, original knowledge. Despite the shift in favour of know-how, the explication of doctrine does not count. As textbooks for the undergraduate market have long constituted the staple fare of academic legal publishing, the way they are discounted by audits is a source of grievance to their authors. However, in the eyes of the more traditionally research-oriented parts of the university, the prevalence of legal textbooks in lieu of original research publications underscores the perception that law is a derivative discipline. The textbook market is lucrative for publishers, which has led many of them to abandon the scholarly monograph, just when the legal academy was in desperate need of it. A prescribed legal textbook, despite a short shelf life, is assured of substantial sales and numerous legal academics are willing to beaver away on a new edition every few years, albeit unacknowledged in terms of audits.

Few scholarly legal monographs sell well because they rarely appear on undergraduate lists of prescribed reading, thereby underscoring the limited interest in creative legal scholarship. While the publication of a scholarly monograph is respected by one's academic peers, few are likely to purchase it and it will have little currency outside the discipline of law (Twining 1994: 112), unless popularised in some way. The smaller the print run, the more expensive the book and the lower the sales, which heightens the risk for the publisher. Despite the pressures induced by governance practices and the pronounced effort expended on the production of legal research, there has been a notable contraction in the publication of scholarly books in Australasia and an increasing reliance on books from the northern hemisphere with their assured markets. The effect can only underscore the derivative reputation of law and revive neo-colonial deference to the metropole. Electronic publishing, including books downloadable on demand, is moving into the breach, although not yet fully accepted in the prestige stakes.

Applied research

As discussed in Chapter 2, perpetual under-funding has compelled law schools to look beyond competitive government funding to entrepreneurialism. This is referred to in the UK as 'third strand activity', in addition to

teaching and research. Consultancies and contract research have become favoured forms of research entrepreneurialism, which is no longer an *ad hoc* activity conducted by the few, as everyone is expected to be active in seeking out opportunities:

> There is another kind of entrepreneurial activity which is coming up very fast in this institution and it is the theme of consultation. The policy that's emerging is that you will not be allowed to act as a consultant in your own right, but only for the university, which will take the proceeds, making some gesture in the way of incentive payment to staff … It has to be recognised that the core job is teaching and research, but we have what we call now 'third strand activity' and that includes overseas recruitment. It includes acting as a consultant on behalf of the university to draw in profits, costs and continuing professional development activity at market rates. We are expected to do all of these. My short-term response to this is that it is impossible to be all these things and deliver at the levels demanded.
>
> (HoS, male, Redbrick, UK)

The market is able to skew research in particular ways. A consultancy is available to support research only if it possesses use value in the market. Hence, in legal research, tax policy, corporate governance and intellectual property issues are more likely to be funded than legal history, law and literature, social justice and jurisprudence.

Of course, researchers are always going to maximise their opportunities by shaping their project according to the specifications laid down by funding bodies. The trend away from free enquiry to specific programmes and problem-solving is one of the characteristics of knowledge production in contemporary society identified by Gibbons *et al.* (1994: 78). As a result, the specifications laid down by government granting bodies have progressively become more prescriptive. Not only are priorities now appearing, but substantial funds are being set aside for designated areas. To harness the research effort in the interests of the knowledge economy, the focus is on applied rather than pure research. Bradney is critical of the extent of government intervention in the UK because it threatens the traditional *idea* of the university (Bradney 2003: 128), an *idea* that appears to have already been subverted. Universities have progressed too far along the path of commodification for research in the neoliberal law school to be 'carried out for its own sake' any longer.

One of the most blatant manifestations of direct interference by government related to funding decisions made by the Australian Research Council (ARC) in the 2005 round, when the then Minister for Education, Science and Technology, Dr Nelson, declined to ratify three projects and another seven in the 2006 round (Illing 2005a: 35). Ratification was normally

unproblematic because it was preceded by a rigorous process of peer-review. It was subsequently reported that three high profile lay people had been appointed to an ARC standards committee to scrutinise the titles and 100-word summaries of projects recommended for funding, in light of their ability to deliver 'national benefit' (Illing 2005b: 21). In appointing non-experts to the Scrutiny Committee, the Minister signalled that he wanted 'greater community representation' in the grants process. The process of appointments 'shrouded in secrecy' (Macintyre 2005) was roundly condemned by the academic community (Haigh 2006). As a result of the attacks, scholars felt that they had to water down and depoliticise their research proposals.

It is notable that all the impugned projects were in the humanities and social sciences, where law and legal studies grants are administered; the hard sciences were perceived to be unproblematic. Reflecting the Mode 1 and Mode 2 binarism, the 'hard' approach, which is technocratic and depersonalised, is assumed to be neutral, predictable and certain, whereas the social is questionable, for it is perceived to be unruly, subjective and uncertain. It subsequently transpired that the impugned projects dealt with feminism, sexuality and green politics. In ways such as this, the deployment of the research effort for the benefit of 'end users' has rapidly become more overt.

The encouragement of consultancies by government is notable, for they are treated in the same way as pure or basic research for the purpose of institutional financial reward. The superficial veneer of equal treatment disguises the way the production of applied and policy-oriented research has contributed to a dilution of critical and theoretical research (Tombs and Whyte 2003: 207). A by-product of consultancies is that the results are also likely to be privatised. Principals may impose contractual conditions, including claims to the IP in any report produced, thereby preventing researchers from using the data in scholarly publications. The research, despite being conducted by publicly funded academics in a supposedly public university, may never see the light of day.

Despite these drawbacks, deans may be seduced into favouring consultancies as a short-term fix for their budgetary problems, particularly as contract research is generally more lucrative than national competitive research grants and easier to obtain. Consultants are also caught by the economic rationalist traps of the market in that successful tenders have to be prepared to do their work cheaply but, at the same time, they are expected to do the best job possible. Once a percentage is built in for central university and faculty administration, the costing may no longer be competitive, especially as principals object to the idea of paying university infrastructural costs.

In some law schools, academics are expected to spend their time generating funds by conducting research and writing opinions for law firms. While

lucrative for the school, pressure to undertake this work has caused resentment on the part of individual researchers, as such activities are not viewed as career-enhancing. Law firm consultancies may also raise ethical issues of the kind discussed in Chapter 2 under the rubric of 'Looking a gift horse in the mouth'. That is, how can academics be free to critique professional practices when they are acting as retainers for law firms? However, the small number of competitive research grants secured by the law discipline and the ready availability of consultancies has served to make the latter an attractive proposition for law schools.

Perhaps of most concern in the constitution of knowledge is the way consultancies tend to favour predetermined outcomes. Instances have been recounted of principals declining to pay researchers because they did not care for the findings, as well as threatening legal action against both paper presenters and the university hosting a conference (White 2001; Presdee and Walters 1998). The hope that future consultancies may emerge from a particular arrangement encourages an uncritical stance on the part of researchers towards their principals. Polanyi's idea that freedom is central to the pursuit of knowledge is completely disrupted by consultancies because of the epistemological constraints that end users impose. As suggested, the market metanarrative has a propensity to displace or cloak academic and ethical concerns, and the financial rewards and lower levels of competition associated with consultancies seduce academics away from basic research, which is far less likely to be funded. The depoliticising effects of the shift to consultancies on the law discipline are profound.

The perennial pressure to generate money and produce an outcome favours short-term consultancies. The preponderance of research positions are created only for the life of a grant, so that researchers are always subject to the vagaries of the next grant application or consultancy tender, which causes them to self-censor (Hillyard and Sim 1997: 67). Casual researchers produce reports for 'end users' rather than refereed publications that are going to advance their own careers. As a result, they are less likely to be able to compete for funds to enable them to pursue independent critical research agendas, thereby reifying the way that neoliberalism has served to depoliticise the academy. Tombs and Whyte liken the casualisation of research to a new binary divide within universities involving a 'deskilling process that increasingly separates academics from the research they produce, akin to the classic Marxist process of alienation' (Tombs and Whyte 2003: 25). Thus, while élite groups of 'research capitalists' manage the projects, researchers are permitted to undertake only a designated part of the research.

Tombs and Whyte (2003) also argue that entrepreneurialism has created a binary divide within the higher education sector itself as old universities have successfully reasserted control over state-allocated research funds, which has left New universities overwhelmingly reliant on 'utility research'. The lion's

share of funding designed to facilitate the transfer of knowledge to business and industry also goes to élite institutions.

The intermediate position in funded research between independent research and entrepreneurial activity is represented by what the ARC refers to as 'Linkage Grants', whereby one or more industry partners support research and the financial and in-kind contributions are matched by government. While applied research is favoured, the outcome is not owned in the same way as the results of a consultancy, although approval of the partner to publish is necessary if it provides access to data in its possession. Nevertheless, if the research appears too critical, the partner could withdraw from the project, and refuse to enter into a further relationship. The Canadian Association of University Teachers has noted the conservative bias that inheres in private sector co-funding, a bias also found in social science and humanities grants, which favour technology and communication (CAUT 2005b: 14). This factor would undoubtedly inhibit the development of innovative interdisciplinary applications.

The relationship between researcher and partner in linkage grants is reminiscent of that of a patron and client. The client occupies the status of supplicant, reliant on the good graces of the patron, the possessor of power and influence, whose support can be withdrawn at will. While useful empirical research can emerge from linkage grants and its availability for higher degree scholarships is valuable, the scheme militates against independent critical knowledge. It would therefore appear that the intrusion of the market into research encourages a cautious middle-of-the-road orthodoxy in applied research

Auditing performance

> I am audited out of my brain.
>
> (Dean, male, Sandstone, Aus)

A research outcome has to be objectified and quantified; a brilliant theory alone no longer suffices. It is only when it has been presented in an auditable form that it passes muster. In this way, the researcher establishes his or her bona fides as an academic subject in the new marketised context. An 'outcome' is the necessary predicate to future grant success, as well as being the logical conclusion of a funded project because an unsatisfactory 'track record' does not bode well the next time around. If academic subjects do not remain on the performative track, they face exile to a metaphorical Siberia from where it is difficult to return.

In a calculable world, shaped by audit and league tables, law schools are anxious to enhance their status as productive sites of excellence. They are proud of the 'substantial increase in output' that has occurred over the last few years, but the pressure to research produces irresolvable tensions:

> For a long time, students were an interruption to our work. You know, you'd say, 'Have you read the case? Okay, go away and read it and when you've read it come back and I'll talk to you'. Now, we say, 'The students are our business' and we do research when we can, so it's been a complete change of attitude. I often used to hear people saying when someone would go up for promotion, 'They just have to chase the students away so they can do their research'. So that was typical and I suppose for some it still is. It's very difficult to teach well, support the students well and get time to do research.
>
> (Prof and HoS, fem, New, Aus)

Competitive bidding enables governments to create a culture of research compliance with minimum effort, as it devolves responsibility to universities (Marginson 1996: 90). Canadian universities agreed to double the amount of research they performed and triple their commercialisation within eight years for an additional financial investment (Rock 2002). In this way, universities were able to pass the burden of compliance down the hierarchical chain to academics themselves.

The role of auditing on research productivity in Australia has been profound. The initial research data collection exercise was primarily a quantitative one, but the Research Quality Framework (RQF) (2006) included quality and impact. However, given the notorious susceptibility of higher education policy to the political whims of the day, the RQF was replaced with the ERA in 2008 following a change of government so that impact was out and journal rankings were in. Conversely, in the UK, a focus on quality in the Research Assessment Exercise (RAE) has been upstaged by quantification and impact (HEFCE 2009). The criteria are constantly changing, not only because of political change, but because of the propensity of the subjects of audit – universities in this case – to manipulate whatever criteria are in vogue. Academics are therefore perennially beset with uncertainty and insecurity arising from the need to reinvent the self. The instability of the criteria also precludes long-term monitoring of the auditing process.

The ranking of journals within a single international league table is highly problematic as an indicator of quality in the discipline of law because of the jurisdiction-specific and diffuse nature of legal publishing. Concerns have also been expressed about generalist versus specialist journals, the legitimisation of an Anglocentric northern-hemispherist bias and the halo effect of a journal being located in a prestigious Ivy League university, even when student-edited and non-refereed (Svantesson 2009; Thornton 2009a: 26).

Indeed, as Macdonald and Kam clearly show (2007a, 2007b), attempts to define quality are doomed from the outset. Not only is any definition circular, peer review is all too often an exercise in gamesmanship, 'clubbiness' and élitism, while all the while a fiction is maintained that 'merit will out' (Macdonald and Kam 2007b: 646). It is the adjectival 'international' that is

most highly valued. Given the domestic nature of most legal scholarship, 'internationalisation' tends to favour certain areas and to disfavour others. If rewards are associated with publishing in the most highly ranked journals – however determined – law schools will quickly adapt their behaviours accordingly. Thus, some Canadian law schools expect staff to publish in US law journals in the hope of securing the 'international' descriptor, regardless of the significance for areas of specialty and their readers:

> We have great people in Canadian family law who don't publish in the US because no US journal wants to publish Canadian family law, so that stuff gets de-emphasised and those people are seen within the institution as kind of second-rate citizens, and people who can get into the [US Third Tier] Law Review are seen as the stars.
>
> (Prof and former AsDean, male, Can)

While the details of auditing are clearly volatile, the performative imperative requires academics to prove constantly that they are productive and worthwhile university citizens. If they prided themselves on being excellent teachers, they must now reinvent themselves or face being declared redundant. Despite the rhetoric of quality, the performative focus is still primarily on quantification, which has the effect of eliding the vast differences between, say, an original piece of scholarship that genuinely advances knowledge and the doctrinal analysis of a case. The pressure is to publish what is quickest and easiest, including the adaptation of teaching materials:

> The case note from the lecture becomes the published case note.
>
> (Lecturer, fem, New, Aus)

> One of the conflicts between professional and critical research is the time involved. I wrote a piece two months ago in 45 minutes for a professional journal which will get me one workload point. I could do six of those articles in a week and get six points or I could write a critical article, which takes months to put together and get one point … but there doesn't seem to be any recognition of the difference.
>
> (AsLecturer, male, New, Aus)

Provided that such a piece is acceptable to a refereed journal or recognised publisher, the dictates of audit are satisfied by compliance with form. One legal academic, for example, was upbraided by his executive dean for publishing one 20,000-word theoretical article rather than dividing it into two or three articles. The essence of performativity is 'minimum effort for maximum effect':

> The people who are in the more black letter areas only ever churn out doctrinally oriented stuff, nothing that remotely relates to any sort of a

> critique, and they can churn out that sort of thing relatively quickly. One of them said, 'Writing is easy, you know; you just need the time and you churn it out'. It always struck me that anybody who said that, can't be writing very well at all … There was an instance a couple of years ago where one person on staff was promoted to Associate Professor who I thought hadn't deserved it … He had published a book but it was very low level stuff, but all that was looked at was that he had published a book. Nobody ever seemed to look at what was inside the cover.
>
> (AsPro, male, New, Aus)

Most serious scholars want the approbation of their peers. While they might comply with the production of potboiler pieces that suit their institution in the productivity stakes, it is not what they aspire to in the long term. They recognise that it takes time to accumulate academic capital and distil ideas (Bourdieu 1988: 87–95). One of the negative by-products of the focus on research performativity is that the ancillary collegial activities are undervalued because they are 'invisible to audit' (Blackmore and Sachs 2007: 120). Thus, refereeing and editorial work no longer command the status they once did. Similarly, reviewing books, a valuable assessment of research outputs, is also now largely disregarded. Anything that does not fit into a designated performative box tends to be discounted.

In gearing up for a research assessment exercise, the norms of academic life are invariably subverted. The next assessment round becomes the driver of teaching policies, including course offerings and class sizes, as well as the institutional and individual choices regarding topic, type of research and publication destination. So great are the financial stakes for the institution that legal academics in the UK find they are subjected to constant pressure to ensure that their research comports not only with the university's corporate research plan, but with what it is that the RAE assessors are thought to be seeking. The mounting pressure to perform in the next auditing exercise becomes relentless and was identified by one UK academic as a kind of market brutalism:

> The first RAE I was returned with, the assumption was, 'You're at entry level so these pieces can be more modest'. That's okay, but when the second round came, the message was a sterner one: the overall level of performance has to go up. Now that we're at a '5', the message is sterner still: the performance has to go up again. There is a kind of brutally instrumental character to what's going on. Here is our target and here's what you must do and other things have to be deprioritised or compromised to get them to this point … There are incentives not to write a book if you couldn't write one quickly.
>
> (Lecturer, male, Redbrick, UK)

In weighing up the pros and cons of the RAE, Fiona Cownie's respondents were divided (Cownie 2004a). On the debit side was the focus on the short-term project and quick result, whereas painstaking empirical and scholarly work that required deeper thinking and trialling through conference presentations was implicitly discouraged. On the credit side was the boost that the system gave to critical and theoretical legal scholarship (Hillyard 2007: 275). A positive effect in the early years was to invigorate a department by bringing in new staff and encouraging the research inactive to leave. Some of my interviewees made similar observations but were more scathing about the personal cost to individuals of the relentless focus on competition:

> There are certainly more outputs but we still have the same old hierarchy there in journals that ties up with institutional hierarchy. There's no question of the human costs … In some institutions, that may have been dealt with more sensitively than in others, but the RAE has undoubtedly been destructive nevertheless – the emotional energies, the time, the anxiety that has gone into it over the years, not just in routines but in exchanges and people's concerns about the New hierarchy of law schools. If you've come from one that was originally a '2' and was then a '3', one feels that it's been stamped on one's forehead in going to conferences or seminars. What is interesting is the enthusiasm with which many academics embrace the hierarchy. The prestigious institutions knew what they were but there was much of a muchness about the provincial Redbrick. Now, they are happy to use the language of the élite law schools which is disparaging to those that are not.
>
> (Prof, male, Redbrick, UK)

The UK's move away from a quality framework and back to a metrics-based system is highly contentious. The Society of Legal Scholars (2006) has criticised the privileging of quantity over quality, the way in which current bibliometrics are unfavourable to law and the absence of a ranking of law journals. More fundamentally, as Wes Pue points out (2006: 17a), bibliometrics 'too often follow fashion rather than merit'.

Whether the focus is on quality or quantity, auditing exercises a destructive effect on collegiality (Cownie 2004a: 138–41). In order to maximise the ranking of a school, a decision has to be made as to which staff should be included. This entails a small panel of academics (sometimes a single person) reading their colleagues' work, ranking it and deciding whether it comports with national standards of excellence. Work deemed unacceptable is excluded from the audit. While some are philosophical about this, others are scathing and embittered, especially when the rankings are made public. Academics are compelled to accept the 'new model of the auditable, competitive performer' (Shore and Wright 1999: 569). There is little space for collaboration within this social Darwinist ethos.

Some schools have incentive schemes, such as bounties and staff development moneys for the publication of articles and the submission of grant applications. For example, a few hundred dollars may be paid into an academic's research account each time a refereed article is published. Other schools endeavour to delimit routine work in order to enhance research profiles. Teaching may be reduced on condition that a regular rate of publication is maintained. The minimum rate in most law schools is modest, usually one or two refereed articles per annum.

Other enhancement strategies include an informal push to re-orient research into areas likely to attract funding. This may include an expectation that all members of a school belong to a designated stream, interdisciplinary grouping or area of strength. Strategies normally favour the 'carrot' rather than the 'stick' approach, although one school publishes and circulates a list of publication points earned by each staff member in the previous year, which is then used as the basis for the distribution of staff development funds. The competition that inheres within the market is thereby mapped onto law schools in respect of rewards systems, encouraging staff to equal or exceed the output of the highest performer. Such a system places a heavy burden on those trying to balance home and work, reifying the idea that the paradigmatic academic subject is autonomous (and male). Competition between academics within the one school also keep at bay collegial norms based on trust and a sense of common purpose. Divide and rule is an age-old strategy that ensures alienation and promotion of the self.

In order to maximise their rankings, leading universities favour the appointment of 'stars' – super-scholars – who spend half the year in residence and the other half attached to another internationally prominent institution, preferably a US Ivy League university. There is little teaching involved in these positions, which may be agreed upon beforehand, or the 'stars' decline to teach undergraduates when they arrive. Teaching is then relegated to junior teaching fellows, casual staff and those evincing less stellar qualities, thereby enabling the super-scholars to focus on research.[5]

Deregulation in Canada has seen big pay increases to 'people who are perceived as stars in the faculty, which has nothing to do with being a very good teacher, but everything to do with being a very productive researcher' (Prof and former Dean, fem). The creation and rewarding of 'stars' in this way further corrodes collegiality, for it 'creates an environment in which everybody is looking over their shoulder to see whether somebody else has been treated better than they have for the purposes of these salary increases'. The lack of transparency underpinning the 'star' system contributes to the competitive culture that now characterises the legal academy. Such schemes also underscore the growing tension between teaching and research:

> The more one puts into teaching the less opportunity for research, and government does not fund us at all for our teaching. So we have this

> curious position where there's a great thrust on teaching quality and yet there is no incentive to deliver anything that is measurable that will effect resources. Our resourcing critically turns on our research prowess or otherwise.
>
> (HoS, male, Redbrick, UK)

This tension between teaching and research is likely to increase as ever more competitive models of funding are introduced. If the top institutions are designated 'research institutions', the remainder will become, either *de jure* or *de facto*, teaching institutions, thereby reinstating the binary system that ended in Australia and the UK less than two decades ago, or they will have to focus on generating funds for their basic survival. If they fail to do this, they will wither and die. This is social Darwinism at its baldest.

The technologies of research governance effectively manage academics and disrupt the norms of collegiality and ethical conduct. The research audit rewards universities for the sheer volume of corporate and external funding secured which, as Tombs and Whyte point out (2003: 24), is perverse, because it is capital that has 'the power to enhance the status and credibility of an institution simply by making a donation'. University norms have been turned upside down by capital accumulation replacing excellence as the basis of reward, despite the obsession with the rhetoric of excellence displayed by quality audits.

While excellent research has always been produced by academics in middle-tier law schools, this has become more difficult because of the inequitable distribution of resources, onerous teaching loads and short-term publication demands. In contrast, league tables artificially boost the calibre of research of those from high-ranked universities, which are invariably the Olds. These factors are contributing to the widening gap between institutions. Fiona Cownie's UK study bears this out, as she found that legal academics working in the Olds were subject to increasing pressure in respect of research and publication, whereas those working in the News were subject to increasing pressure in terms of teaching (Cownie 2004a: 160). This pattern is replicated elsewhere, with the rider that institutions in the middle are pressured from both directions, so that it is impossible to satisfy either. They are desperate to be recognised for their research, but as this does not generate sufficient discretionary income, they are forced to take in more students. The resolution may well result in a revival of separate research and teaching institutions, with a category of comprehensive institutions in the middle.

Despite institutional pressures, many academics publish solely because they want to research and write, just as they have always done: 'The view is that as long as you let academics get on with their research, they'll live on bark; they'd eat bark' (Lecturer, male, Redbrick, UK). Regardless of the demands of audit, they persevere with their research and writing 'at great

personal cost': 'I get no research done except late at night and not very often and only when I'm committed to doing something and have to produce it' (AsDean, fem, Sandstone, Aus). Most academics have their own standards, so their primary concern is about meeting those expectations rather than those that are institutionally imposed. Hence, they object to the perennial pressure to publish for the sake of publishing before they are ready:

> I've not really wanted to serve up what I considered my best ideas until I thought they were fully formed … Now, the pressure is to produce sometimes work of indifferent quality. As long as it satisfies the threshold it hasn't got to be particularly fantastic. I don't want to sort of suggest that there are some fantastic insights that have been held back; quite the contrary, but I think it just takes time to generate what you're talking about.
>
> (Lecturer, male, Redbrick, UK)

The reality is that everyone is not a productive researcher, as audit outcomes confirm. One must ask whether productivity is in fact maximised when legal academics with no taste for research and little skill are compelled to 'churn out' articles. The result is that a great deal of dross is published in the name of research The relentless pressure to publish has the same 'dumbing down' effect on legal scholarship and legal publishing that the pressure of the market induces on legal education more generally, because substance is rendered incidental. The simplistic idea of productivity as quantity reveals how the academy has become the captive of the audit culture in the hope of financial reward. Some interviewees were nevertheless of the view that the incentive to publish is a good thing as there were too many people who had been able to get away with 'doing nothing' year after year.

In contrast to academics who are reluctantly compelled to publish, others are frustrated because they wish to spend more time on research but are unable to do so because of the pressures of teaching and administration. The performative milieu is also resistant to taking risks and moving into a new field as this academic of colour shows:

> I feel that I've been hoodwinked a little because one of the reasons I elected to enter academia rather than test the dollar as most of my fellow students did (because, as you may have noticed, you won't see many law academics of colour, or practitioners for that matter) was that I could contribute more in shaping the lawyers of the future by teaching and researching and contributing to the literature. Research is minimal and one wonders whether it's because one hasn't managed one's time properly – an element of self doubt there – then there's another one, if I'm really capable. Well, I don't know because I don't feel I've been given a good run yet to find a research field to make my own under these

> pressures. You're not supposed to flit like a butterfly between research topics. I don't know why, but it's not considered the done thing. You must carve out your furrow and stick to it. An area that didn't interest you a few years ago suddenly interests you now and you think, 'Oh, I've got something to say', but you're not permitted to say it because it's a new field.
>
> (Lecturer, male, Redbrick, UK)

It is difficult to feel other than equivocal about the contemporary emphasis on performativity as it has resulted in less time for reflection and debate (Connell 2005: 21). Neoliberal legal researchers want to have an impact on the field, but, basically, they are writing primarily to be counted rather than to be read, which means that the pedestrian and the mediocre may rate just as highly as the brilliant and the original. This vacuous idea of performativity suggests that academics may as well be producing widgets on an assembly line as engaging in what passes for scholarship.

Academic freedom

Academic freedom is a form of free speech that operates as an essential corollary of research but, as applied knowledge production has assumed the dominant position, it has become more elusive. Its rationale is to enable academics to exercise a critical role in their research and writing without fear or favour. Individual academics have conventionally been free to pursue their research interests and conduct their academic life as they thought best:

> Academic freedom means the freedom of student and teacher to do research in their own way and teach as they see fit. As for the actual subject matter, that the state leaves to each individual. This defines the freedom which it guarantees against all interference, including its own.
>
> (Jaspers 1960: 142)

Academic freedom is closely linked to the principles of intellectual rigour, scientific enquiry and research ethics. In the absence of that freedom, only subordinated knowledge is possible according to Polanyi (1951). Academic freedom authorises academics to take issue with the way things are and to envision the way they might be.

Academic freedom is rarely articulated with any precision, being raised mainly in the breach. However, the New Zealand *Education Act 1989* is a radical exception and a rather strange emanation from a neoliberal environment. Section 161 defines academic freedom as the right of staff and students 'to question and test received wisdom, to put forward new ideas and to state controversial and unpopular opinions'. Also notable is ss. (4)(a)(v) which specifies a university's acceptance of its 'role as critic and conscience

of society' (Jones *et al.* 2000: 1). Other enabling acts do not go this far, although the promotion of 'critical enquiry within the university and the general community' was a new aim added to all Victorian University Acts of Incorporation in 2003.[6] It is not clear from the Parliamentary record why the provision was included when the corporatisation of universities was in the ascendancy.

If there is reference to academic freedom as a value underpinning the university, it is not statutorily defined. In a study conducted by Jim Jackson of academic freedom in Australia (2005: 129), he found that only one university, the University of Adelaide, subscribed to a robust view of academic freedom.[7] Jackson (2005: 128) also found that the inclusion of an express provision in support of academic freedom in both contracts of employment and enterprise agreements has generally been qualified and uneven.

The reaffirmation of a commitment to academic freedom within university Acts of Incorporation, enterprise agreements and codes of conduct is paradoxical at a time that corporatisation has engendered research policies constraining freedom. However, the reality of academic freedom is somewhat different from the rhetoric. Pressures from both within the university and beyond have sought to shape research directions to ensure that they are functional and strengths maximised. It is clear that academic freedom and utility do not sit easily together. The deans of several Australian law schools have encouraged and sometimes directed staff to engage in business/commercial/corporate law research to complement the enterprise concentration of a mega-faculty.

While, strictly speaking, staff cannot be stopped from researching in areas of interest in their own time, discretionary moneys for travel, research and scholarships may be earmarked for use in designated priority areas. Preferences may also operate through appointments and promotions, pay loadings and the bestowal of honours and rewards. Interviewees strongly objected to institutional attempts to channel them into particular areas of research. Self-determination in research is seen as the last bastion of academic freedom. Heavy-handed tactics usually result in disaffected academics either ignoring the injunction or departing. Others reinvent themselves to survive.

For the most part, however, institutions are less concerned with particular research agendas than with the use value of the research, whether it is in terms of productivity, income generation or esteem:

> I'm not conscious of there being an anti-critical or theoretical position here. The experience as I've experienced it has always been what's the value? You show the value to the law school and if you do, then you get to do what you want to do.
>
> (Snr Lecturer, Fem, Sandstone, Aus)

Even scholars engaged in research in contentious areas, such as sexuality studies, have stated that they have not been aware of institutional pressure to change their research focus. The concern is that the more controversial areas are unlikely to attract funding *because* they possess comparatively little use value in the market:

> Universities aren't stupid enough to use sticks, so they use carrots instead. So we have a couple of institutes and programmes around here that are incredibly well financed and they happen to line up with some of the more popular topics where public-private partnerships can be worked out. If you are working on intellectual property, you take your pick of sources from which you can be funded. If you work in health law, similarly there are all sorts of funding available. If you are working on poverty law, there doesn't turn out to be very many – certainly no internal sources of funding and there aren't many external sources of funding either, so nobody ever tells you that you can't do something that you want to do, but certain kinds of research are much easier to not only get funding for but also to be praised for doing it, as well as being profiled in promotional literature and glossy brochures.
>
> (Prof, fem, Can)

Thus, while critique is permissible, the freedom to do so is circumscribed, for it must not challenge the fundamental presuppositions of market orthodoxy. This means that there are constraints, usually implied, regarding the degree of criticism permitted of a funding body, the government or one's own university. In this way, the independent voice of academics as public intellectuals is inhibited (Collier 2004: 511; Shanahan 2002: 33). Critique destabilises the corporate carapace. While some interviewees felt that there had been no attempt to restrict what academics say or write so long as they brought in the money, the repressive tendency is subtle and insidious. It is effected through practices of governmentality, which are shaped by prevailing government and university research priorities. I have also suggested that the resiling from a critical pedagogy insidiously creates the conditions for a broader acceptance of corporatism. Academic entrepreneurialism thereby has the potential to legitimate a dangerous element of totalitarianism.

Higher degrees

By research

Until recently, a legal academic was expected to be a 'good generalist' who would be able to teach across a number of subjects within the LLB. The focus was on legal doctrine – the basic principles of contract, tort, criminal law and so on – not on independent critique. The ability to conduct research

was a desirable but not a mandatory skill. Thirty years ago, a PhD in law was sometimes derided as an overly narrow specialisation that would not assist in the teaching of the undergraduate programme. The contemporary pressure to obtain a PhD, masters by research or MPhil arises out of moves to modernise the law discipline, liberalise legal education, enhance credentialism, raise the standard of law in the eyes of the academic community and contribute to research entrepreneurialism.

The previously under-developed nature of the legal research culture in Australia, New Zealand and Canada meant that postgraduate degrees – normally an LLM by coursework – was undertaken elsewhere, commonly in the UK or the US (Shanahan 2002: 19). These degrees were criticised as they often comprised a suite of subjects selected from the basic LLB or JD programme. In the twenty-first century, there is pressure to undertake a higher degree at home, not only as a predicate to appointment or promotion, but to generate income, as PhD completions have become another source of competitive government funding:

> I have tried to encourage some of our staff who don't have PhDs to enrol in this law school on a part-time basis because of the funding formula that gives you credit for PhD completions, plus they will spin off publications as well, so we get double the credit.
>
> (AsPro and Dean, male, Generation3, Aus)

Competition for international postgraduate students, as for undergraduate students, is intense, as full fees are mandatory:

> I was surprised about a month ago to get an email from the university, via their agents in Indonesia, saying they had found three 'clients' for us, which I thought was amazing – that the university now has people out there beating the bushes and that the finders of these students are paid on some pro rata basis, saying, are we interested in these 'clients'?
>
> (Snr Lecturer, male, Sandstone, Aus)

Foreign students may lack language skills and basic knowledge of common law legal systems, thereby requiring enormous dedication on the part of staff to ensure that they successfully pursue postgraduate study. As a source of income, one dean said, 'They are just not really worth the effort'. The students themselves are not well served as few universities provide adequate language, translation or editing services, the responsibility for which falls to individual supervisors to manage as best they can. Regional universities are particularly poorly placed in this regard. While being pressured by their universities to take in more higher degree students, regional law schools are less likely than metropolitan schools to provide infrastructural support. Law schools complained that, far from providing assistance, their universities

created 'road blocks'. Interviewees also complained about the calibre of some of the students admitted, which adds to the pressure on staff, all too conscious that their institutions cannot afford attrition.

With the running down of the research component of LLB programmes, the concern is that there will be a correlative impoverishment of higher degrees by research. The removal of theory and research methods subjects from LLB and masters programmes attests to this. The SJD (Doctor of Juridical Science) or some variation of it is a watered down version of the PhD, which includes an abridged thesis and a suite of coursework subjects. These subjects, usually designed for masters level but also available to LLB students, are undertaken in intensive mode, as discussed in the context of undergraduate education. The less intellectually demanding and applied focus of the SJD has caused it to become an attractive form of credentialism for legal academics. An applied orientation is also creeping into doctoral theses in order to augment value on completion.[8]

Despite institutional pressure to increase the number of PhD students, the prospect of pursuing a higher degree has become less appealing to law graduates (cf. Collier 2004: 533). Even though research degrees may involve a fee waiver, the receipt of a meagre scholarship, an income contingency loan or no financial support at all may mean that the repayment of an undergraduate education debt will have to be deferred for years. Even then, there is no guarantee of a job, certainly not a desirable academic or research position on completion. Attaining a financially lucrative position in legal practice on completion of an LLB may be preferable to years of penury and uncertainty. Some enrol part-time but there is a high attrition rate for busy lawyers. For the preponderance of law graduates, the coursework masters is viewed as a more attractive form of credentialism than a research degree.

By coursework

Postgraduate coursework programmes are a lucrative source of income for established law schools as they operate in a deregulated market. High fees do not engender the same scruples regarding access or standards as undergraduate programmes because they generally do not have to be certified by admitting authorities. The pressure to develop new coursework masters programmes has therefore been a powerful driver for change in the neoliberal law school. Some law schools, such as my own – the ANU College of Law – have more postgraduate than undergraduate students.[9]

For most coursework masters programmes, the primary market is downtown lawyers – 'middle life persons with money' – who wish to upgrade their skills. In some cases, law firms pay employees' fees. Hence, the threshold question in designing new programmes is, 'What do law firms want?' The secondary masters' market for traditional law schools is the international student market. There is also a third smaller market, comprising students

without a law degree who want to enhance their knowledge in specialised areas such as dispute resolution or the enforcement of justice. The result is enhanced credentialism, which facilitates the commodification of the degree and endows it with a cachet in the market.

The downtown practitioner market is a more reliable constituency than the international market, as it is less likely to be subject to the vagaries of exchange rates, international disasters and political volatility. The focus tends to be mainly on commercial law, international business and taxation because these are the staples of international legal currency, the areas of expertise that are valued by the big law firms, corporate clients and their go-betweens – the merchant banks – a network of relationships that can afford to pay:

> The more universities have to depend upon earning income rather than being provided with that income through the tax system or through the government, the more they have to respond to those people who have the money to buy what they sell and the people who have that money are people in commercial, tax and corporate law. They work for companies who will support them, who will pay their fees to do postgraduate work – postgraduate coursework – and pay for them to do in-house training, whereas people working in public interest areas don't have that.
>
> (Prof, fem, Sandstone, Aus)

Market demand also legitimises the exorbitant fees that can be charged by the old downtown law schools. Their age, reputation and proximity to the legal precinct endows them with an edge in the market. Other law schools cannot match their fees without deterring students. However, if they do not raise their fees, they fear the stigma of 'third-ratedness', thereby bowing to the myth 'the more one pays, the better the product'. The knock-on effect enhances the market status of the élite schools in relation to the rest. The regional News struggle for a share of this lucrative full-fee market. In an endeavour to overcome geographical disadvantage, they commonly acquire a city campus, which international students prefer.

There is some diversification in masters programmes, with specialisations, such as environmental law, medical law and international law. Jurisprudence, legal theory and legal education degrees may be offered by schools anxious to capitalise on their strengths and establish a niche market. Overwhelmingly, however, masters coursework degrees have an applied business orientation, a focus that is deemed to be economically rational. 'Boutique programmes' with small numbers of students can no longer be countenanced because they are resource-greedy. Economic rationality and consumer demand determine the context:

> There has been a huge increase in those areas in the graduate programme that are very responsive to demand. There is a constant

> monitoring of the design and configuration of the graduate programme, and the demand for different subject areas. We now have 19 streams of specialisation. We are teaching over 100 subjects every year when about 20 to 25 subjects drop off the list and another 25 come onto it, so it is changing all the time and very responsive to our perception of demand.
>
> (Dean, male, Sandstone, Aus)

One English regional university indicated that out of approximately 100 coursework students, 60 were enrolled in the international commercial law programme with only small numbers in European law, environmental law, criminal justice and medical law. Socio-legal studies and feminist legal studies were on the books, but not offered because of low demand:

> Women and the law has bitten the dust, simply because it is not recruiting strongly enough. It's been a loss for those people who created and nurtured the programme. Dispute resolution still struggles to establish itself, not because of any inherent weaknesses in the programme, but it doesn't seem to have the student recognition like international and commercial law. It is very much those areas that are the boom areas for us. To some extent, the international and commercial law masters programmes are supporting the less successful ones that we have at the moment.
>
> (HoS, male, New, UK)

The popularity of business-oriented courses reveals the seductive force of the market in determining what is valuable and what is not. Pedagogical soundness within the norms of liberal education or the production of well-rounded educated citizens is of incidental interest. Once a law school has decided to go down the coursework masters path, the generation of income rather than the provision of a first-class academic programme becomes the primary driver:

> They are a marketing thing rather than an academic thing … They are sold on the basis of education, but really people are paying big money to get something in a short course. I think that it's ridiculous. A masters should be a long-term thinking about a project, not a short course for monetary reasons.
>
> (Dean, male, NZ)

If an institution cannot make a claim to prestige, it will seek to emphasise something that will give it an edge in the market, such as the practical training component required for admission to legal practice:

> Just having a masters degree without any carrots would mean that we would end up with no students, so the way to entice them might be to

> make College of Law count for part of their masters … If we only have it as a quarter we cannot compete, so we have to make our degree easier for them to get by making it count for half … We hear a lot about markets but we don't hear anything about the academic integrity of the degree … I did College of Law years ago and I know that all it involves is basically form-filling and a few little trials; it has no academic quality to it.
>
> (Lecturer, male, New, Aus)

The focus on quick-fix coursework masters programmes that defer to markets and credentialism has undoubtedly debased the currency of the degree, a concern that goes to the heart of the commodification thesis. Reliance on intensive teaching has done nothing to enhance the status of masters degrees by coursework.

To appeal to the international constituency, as well as to those in full-time employment, the requirements of the degree have been reduced so that there are typically six subjects rather than eight in the Australian variation and the minor thesis has virtually disappeared. The retention of the dissertation component in UK masters underscores the continuing importance of esteem factors despite the tensions generated by the pressure to produce income:

> We want to be seen as a leading law school and, to do that; you need to show you can offer something beyond the basic undergraduate LLB. You want to show that you've got people in particular areas, who can provide a higher level of teaching and research supervision, and one of the ways of doing that is to be able to offer these specialist masters programmes. On the other hand, we are conscious that in resource terms, they are probably very much less efficient than undergraduate teaching … If you want to run a programme in environmental law, for example, you've got to put on these four modules that are quite specialist and they are not going to attract great numbers of students, so the benefits are in terms of reputation rather than money.
>
> (Prof, male, Redbrick, UK)

This last-mentioned law school had as few as four students enroled in one masters programme but was prepared to support it because it believed that a scholarly programme enhanced its reputation. Nevertheless, because 'enterprise' had been included as an explicit mission of the university, the department was under pressure to rationalise its course offerings and bring in more money. It was about to wrestle with a dilemma already encountered by Australian law schools, in which case economic rationality would dictate that the course be wound up.

Some masters programmes, designed to upgrade the skills of legal practitioners, for which they receive credit from their local law societies, have been

described as 'lacking scholarly merit' and entry standards may be relaxed for them, as for international students. One UK law school enjoined by its central administration to develop full-fee graduate programmes was expressly told that there was 'no problem' about lowering admission standards.[10] Lecturers may then find themselves tutoring in English and counselling for stress, marital and financial problems, to say nothing of wrestling with plagiarism:

> There are sometimes issues over plagiarism and one doesn't know whether one's dealing with plagiarism or someone's cultural misunderstanding. Trying to inculcate some ideas about research methods is a hard task because most of the students have never seen or read a research proposal, don't understand the idea even of a research question, a topic or a literature review; these things they've never come across or been taught.
>
> (Prof, male, New, UK)

In addition to offering general masters programmes, universities are being approached by organisations to design and run special purpose programmes. One new university in the UK revealed that it had been approached by multinational corporations to design courses for emergent economies in Central Asia. The proposal had the backing of the World Bank. The expectation was that they would teach students the role of English law, especially contract, in order to facilitate business within the global economy. This was seen by my interviewee as a clear illustration of 'McDonaldisation'.

Some law schools are more advanced in the facilitation of global business than others, with off-shore campuses and twinning arrangements, which involves part of a degree being undertaken in the home country and part off-shore. The off-shore marketing of courses to students in countries such as China, Malaysia, Singapore, Taiwan, Thailand, India and Jordan is now well established. The names of the countries change year by year, although the push towards rapid development in China and its perceived potential has made it a favoured destination for Western countries. Whether international joint venture programmes in law (unlike business) make money or not has been described as an 'obscure and opaque question', although substantial resources have been poured into their development:

> There is a lot of marketing that goes on in the School. I've had involvement in marketing our masters to Chinese law students. A group of us went over there to convince the 20 million Chinese law students that they should come and study here. That wasn't particularly successful.
>
> (Acting HoS, fem, Generation3, Aus)

The franchising of fully-fledged courses to off-shore institutions represents another growing source of revenue (Tombs and Whyte 2003: 24), despite

concern about their neo-colonial and potentially exploitative underpinnings, but the market metanarrative effectively quells dissentient voices.

The targeting of the two discrete masters markets – downtown practitioners and international students – has resulted in favouring a commercial orientation over theory, critique and social justice. The assumption is that international students and local legal practitioners are prepared to outlay top dollars for a masters degree. Thus, what is taught becomes a question for providers as to what generates the most profit, rather than what may be socially beneficial or academically worthwhile. Individual egos also become caught up in ambitious and sometimes foolhardy projects in foreign countries. When it is apparent that the venture is unsustainable, it is propped up by other programmes, instead of being closed down (Foster and Bradach 2005: 98).

Coursework masters degrees are a clear manifestation of the shift that the market has induced towards private good. Although I am mindful of Marginson's thesis that credentialism contributes to the totality of public goods within the nation state (Marginson 2005), the consumer orientation and the revenue-raising emphasis of the masters degree has confounded the idea of the public good. Some years ago, Allan Bloom bemoaned the advent of the MBA (Master of Business Administration) as an illiberal means of ensuring a lucrative living rather than a mark of scholarly achievement (Bloom 1987: 369–70). The acquisition of an LLM may not carry with it the same potential for monetary reward as an MBA, but commodification has similarly displaced the aspiration to scholarship within a marketised context. The interest of university managers in the masters degree is that of cash cow – one that produces maximum return for minimum effort. While the offering of masters degrees by coursework is undoubtedly related to a university's education mission, the allure of additional income may determine what is offered. I have suggested that the seeds of invidiousness lie at the heart of the entrepreneurial parasite which threatens to consume the educational good that hosts it as a result of compromises in quality. The result is that a coursework masters in law may now be regarded as less valuable than a bachelors degree.

Conclusion: teaching or research?

In light of the emphasis on research productivity, the possibility that research and teaching might be de-linked threatens the status of law teaching at both the individual and the institutional level. I have already adverted to the resurgence of a *de facto* binary within the higher education sector as a result of funding inequities and competition policy. In addition, there is a move by the top universities for a triadic schema involving research-only, or primarily research institutions, at the top, followed by comprehensive teaching and research institutions, and then teaching-only institutions. Needless to say, the

élite institutions would receive most of the research money. It is therefore in their interests to support rankings and inequitable allocations. A competitive market-based system encourages institutions to focus on what is best for them individually, not on what is in the public interest (cf. Marginson 2002: 3).

There is strong feeling about the de-linking of teaching and research in new universities, which have devoted considerable effort to becoming research active.[11] Because law does not do particularly well in the receipt of competitive grants and there is an almost unstoppable demand for law places, more legal academics could find themselves assigned to teaching-only positions, while those who are successful in securing grant income focus on research. Nevertheless, despite the sharp tilt towards massification in undergraduate education and the fact that teaching is the primary driver of law school policy, research is what is most highly valued in international league table rankings.

Within law schools themselves, there is a growing gulf between research-oriented and teaching-oriented institutions that replicates the former binary system. The élite = research + teaching and the rest = teaching split now masquerades under the rubric of diversity but the social Darwinist policies of governments have revived élitism and inequality within the sector:

> For all the claims of the present government, what I can see actually happening are the same old institutionalised advantages of an élite emerging. Far from opening up the academy, I can see it closing down. I can see a clearer split between teaching and research institutions. There'll be the élite institutions where I'm quite sure it will be possible to carry out the critical independent research that will be wonderful. The philosophical work will take place and there'll be the intellectual academic stars who'll be located in these institutions … I think there is not just a rejigging of the élite, the Russell Group, which is splitting, but the top of the Russell Group … For the rest, it's survival of the fittest. We can look at ministerial statements at different levels in government and you'll find that phrase again and again: 'In the free market, only the fittest will survive'.
>
> (Prof, male, Redbrick, UK)

Despite having to transmit a body of orthodox knowledge to large numbers of students, academics in teaching-oriented institutions can nevertheless expect the disapprobation of their superiors if they are not research active. As well as 'carrots' to encourage research, a range of 'sticks' may be used, such as higher teaching loads for those deemed to be 'research inactive', which contribute to the construction of teaching as an inferior second-order activity. This is borne out by a UK study on the impact of the RAE in which it was found that '71 per cent of unit heads reported the RAE's positive

impact on research, while 62 per cent report its negative impact on teaching' (Atkinson-Grosjean and Grosjean 2000: 13; cf. White 2001). Even without a comparable government auditing scheme in Canada, the pressure to demonstrate research performativity results in minimal time being devoted to students and administration, much to the chagrin of older academics. Kissam (2003: 214) also notes the diminished attention paid to teaching in the US legal academy as a result of the new privileging of scholarship.

As well as a deleterious impact on teaching, an audit culture has deflected the attention of legal academics away from activist sites, in respect of which they once devoted a great deal of attention. Working voluntarily for law reform and social justice was deemed to be an acceptable form of legal practice, as opposed to routine practice for personal gain. No performative boxes are available to tick for this kind of work within any of the auditing regimes. One UK legal academic suggested that the omission was a deliberate strategy of depoliticisation under Thatcher. When academics must spend all their time satisfying the individualised performative goals of the audit culture in order to survive, there is no space for altruism and collective good.

Despite such efforts at depoliticisation, legal research disrupts the idea of law as a paradigm of Mode 1 research. As a result of new currents in scholarship, legal knowledge has become more diffuse and diverse over the past two decades. Despite the rearguard actions to reassert the dominance of doctrinalism, the changed research imperatives are rapidly changing the cartography of legal knowledge again. Law represents a notable dimension of the disintegration and reorganisation of knowledge in modern society (Gibbons *et al.* 1994: 72), although corporatisation has sought to rein it in, confine it within traditional parameters and ensure its functionality.

The basic premise of the new political economy of higher education is acceptance of the commodification of knowledge. The greater the financial value commanded by the knowledge, the better, regardless of substance and its social or ethical value. The market in knowledge is fostered by the state and research is subjected to more regulation than ever before. As well as directly funding research, government is also the driver of privatised research fostered through public/private partnerships and linkage grants. Similarly, we see that it is the generation of grant income rather than the substance or even the research output that is now deemed to be of most significance, unless there is lucrative technology transfer involved. The maximisation of profits is the end of all economic activity. While law is taking the research imperative seriously, the primary source of income generation continues to be undergraduate students. Ambivalence therefore continues to attach to other activities, including research, in the legal academy.

Massification, privatisation and bureaucratisation has brought about an end to serious thinking in the university (Evans 2004). Despite the effort

devoted to inducing the production of vast quantities of research, together with the process of harnessing, commodifying and measuring it, there is no evidence that the multifarious initiatives have improved the actual quality of research. How could that be when many interviewees complained that they no longer had time to reflect on what they were doing? The neoliberal turn, with its predilection for applied research, in conjunction with direct interference in the conduct of research generally, is already beginning to exert a conservatising effect on the production of legal knowledge and the market is insidiously eroding academic freedom.

Nevertheless, there is a ray of sunlight within this rather bleak landscape that cannot be discounted. Even if there is a lack of support for their work and a dearth of resources, there are still academics who remain passionate about their research and writing and who spend every moment they can on it. This is particularly the case when animated by a concern for social justice. If there is a critical mass of like-minded people within a school, that is all the better. As one academic of colour expressed it: 'Writing for social justice in the hope of making a difference gives one such a marvellous feeling that it overcomes any resentment about the lack of resources' (AsPro, fem, Can).

Notes

1 The writer was the foundation head of the law programme at La Trobe University. See my inaugural and valedictory addresses (Thornton 1991; 1996).
2 The hostility between socio-legal and sociology of law scholars in the UK has been marked. The sociologists have portrayed the socio-legal scholars as atheoretical empiricists, while the socio-legal scholars have attacked the sociologists of law as theorists disconnected from 'law' who are uninterested in critiquing the legal order (Hutter and Lloyd-Bostock 1997).
3 Cownie, *Legal Academics*. Shanahan poses the question as to what extent legal academics invoke social theory knowingly or whether they are mere dilettantes. See Shanahan, *A Report on Legal Scholarship*, p. 23; Kerruish, 'Barefoot in the Kitchen', p. 169.
4 The case of Macquarie University Law School became infamous in the Australian context as the Pearce Committee recommended that it be closed down (Weisbrot 1990: 130–35).
5 When a London School of Economics academic suggested to prospective students that they would be better off studying at London Metropolitan University (a New university), he was reprimanded and resigned soon afterwards (Shepherd 2006).
6 *University Acts (Amendment) Act 2003* (Vic), s 3(b) *et seq.*
7 Macquarie University prepared a stronger statement in support of academic freedom following an incident involving alleged incitement to racial hatred by an academic (Allport 2006; Cowlishaw 2006; Lattas 2006; Rutherford 2006).
8 An example is the APRU Enterprise Business Plan Competition, hosted by the National University of Singapore, whereby students are encouraged to include an extra chapter in their dissertation outlining a business plan for its application.
9 In 2010, the figures were around 1,800 postgraduate and 1,400 undergraduate students. See ANU College of Law, 'Facts and Figures 2010'.

10 An impoverished masters degree in Europe runs the risk of 'Bologna incompatibility' (Bologna Declaration).
11 The University of Westminster School of Law, a UK post-1992 university, was able to raise itself from a '2' rating in 1996 to a '5' (excellent) in the 2001 RAE, although it performed less spectacularly in 2008.