The College of Law's criminal practice course is an exercise in developing repressive elitism and repressive fatalism. It teaches lawyers to distrust their clients and to trust the agents of the system. It teaches them to lose as graciously as possible; and of course, "first of all get your money from them before they're put away".

The conclusion from the analysis in this chapter is inevitable: the practical legal training provided to budding lawyers at the College is clearly class based. The analyses of the development of the College and of the *areas* of the course that are given the heaviest emphasis have both demonstrated that the major role of lawyers (and impliedly the law) is in class conflict; and more precisely, in the more effective management of the affairs of the capitalist class in a stage of capitalism where the state (and therefore law) is playing an increasingly interventionist role. Thus the major focus of lawyers' work and the major thrust of legal education is concerned with the process of the extraction of surplus value. A secondary role of law and lawyers is also clear from the analysis of the *treatment* of some of the areas that have less emphasis placed on them: in the more obvious areas of class conflict lawyers act on behalf of the capitalist class against the working class and are trained in arts of social control.

## RESISTING PEARCE : THE SIGNIFICANCE OF THE REVIEW OF MACQUARIE LAW SCHOOL - THE ROLE OF MACQUARIE'S PROGRESSIVES

**Gill H. Boehringer**

The report of the committee established in 1985 by Macquarie University to review its School of Law[1] has largely been overlooked in the wake of the subsequent publication of the more comprehensive report on legal education in Australia commissioned by the Commonwealth Tertiary Education Commission, and produced by the Pearce Committee in 1987.[2] Nevertheless, an understanding of the relationship between the two documents is essential if we are to fully grasp the implications of the Pearce Report for Australian legal education. The Macquarie Review can now be seen to have been one of the most significant events determining the impact of the Pearce Committee's determinations. Put briefly, the Macquarie Review saved the Law School from the destruction recommended by Pearce.[3] And by so doing the Review ensured a legitimate place for a Law School with an institutional

1 REPORT OF THE COMMITTEE APPOINTED TO REVIEW THE SCHOOL OF LAW, Macquarie University (Feb. 1987) [hereinafter MACQUARIE REVIEW].

2 REPORT OF THE COMMITTEE TO REVIEW AUSTRALIAN LAW SCHOOLS, A DISCIPLINE ASSESSMENT for the Commonwealth Tertiary Education Commission, 4 vols, A.G.P.S. (June 1987) [hereinafter PEARCE REPORT].

3 *Id.* at paras 22.61-22.71.

commitment to academic integrity in the face of government intervention largely on behalf of a sector of the legal profession increasingly aligned with corporate capital.[4] That is, the Pearce Report was a small but not insignificant part of the attempt by the bureaucratic state to transform - and rationalize - the higher education sector in the "national interest".[5] Interestingly, especially in view of Australia's mediocre economic performance and run down manufacturing sector, the next report of a discipline assessment for the government covered engineering.[6]

The wide-spread and successful resistance to Pearce's egregious proscription of Macquarie's "turbulent democracy" and thorough-going critique of the legal order meant that the hard edge of interventionism was blunted. Credit for that must go in no small measure to those who produced the forward looking Review Committee Report.[7] Of course those who made possible the Report, and those who subsequently used it against Pearce can share in the achievement. Such texts have to be used politically and this was done to great effect in many quarters, especially by Macquarie's Vice Chancellor, Di Yerbury, and the Law School's Professor Tony Blackshield.

One can only speculate on likely events if the Review had been negative towards the School; but it seems unlikely that the School would have survived if a committee containing five law professors from other universities after examining its program closely, had concluded it was substandard or ill-conceived. In such case instead of being on the defensive, Pearce could

4 *See* Morgan, *Pearce Report on Legal Education:Corporatist Strategy,* 12 LEGAL SERVICE BULLETIN 260-62 (1987).

5 *See* the Australian government's WHITE PAPER ON EDUCATION, HIGHER EDUCATION: A POLICY STATEMENT, A.G.P.S. (July, 1988).

6 *See* REPORT OF THE WILLIAMS COMMITTEE, REVIEW OF THE DISCIPLINE OF ENGINEERING, commissioned by the Commonwealth Tertiary Education Commission, 3 vols, A.G.P.S. (May, 1988).

7 Note the view of the MACQUARIE REVIEW expressed in the PEARCE REPORT, *supra* note 2, at 22.60.

have relied on the Review to support its position that, essentially, the School was a waste of public funds. In such circumstances, whether the University and the Vice Chancellor in particular could have fought so successfully to save the School must be open to considerable doubt. Indeed, it would seem fair to suggest that the School very likely would have been destroyed - either closed or transformed into another traditional institution, simply a pale shadow of Sydney, or perhaps a minor clone of the University of New South Wales.

That members of the School had an understanding of the tactical importance of the Review within the University, where conservative elements wished to tame it,[8] is clear from the bargaining which occurred with the University administration over the procedures and composition of the Review Committee,[9] and by the extent of involvement in the Review by members of the School, students and graduates,[10] members of other Schools,[11] and, finally, by the nature of documentation presented to the Committee.

As often occurs in political conflicts, the majority blamed the minority and the minority blamed the system. The traditionalist majority had previously launched a vitriolic attack on the progressives in 1984 when the Third Chair in the School was to be filled. Thus, writing to the University Council, they poured scorn on those who belonged to "(T)he narrow American based movement which has abrogated to itself the title 'critical

8 In particular the then Deputy Vice Chancellor (Academic), who was largely in control of the University on a day to day basis, had been active over the years in supporting the traditionalist leadership in the School and opposing the progressives. With others in the academic/administrative hierarchy he had been at the centre of numerous controversies over tenure, promotion and appointment issues arising from the School, as well as more general issues of academic standards and participatory democracy in Schools and in the University generally. For an account of some of these battles fought by the progressives in the Law School, *see* NEWCITY, BOEHRINGER, DEMICHIEL, FRASER AND STEPHENSON, COMPLAINT TO THE NEW SOUTH WALES OMBUDSMAN (Sept. 1984) (in the writer's files). *See also* BOEHRINGER, FRASER, KAVANAGH AND NEWCITY, SUBMISSION TO THE MACQUARIE UNIVERSITY COUNCIL COMMITTEE OF ENQUIRY CONCERNING SELECTION PROCEDURES (the Kirby Committee) (March 1985) (in the writer's files).

9 In view of a lack of consultation with the School by the University Administration in setting up the Review, the School established an ad hoc Law School Review Consultation Committee in February 1985. This Committee generated proposals for the Review (composition, procedures, terms of reference) which were then the subject of negotiations with the Administration. The School's position was consistent with that of the national academic union, FAUSA, which, as often has been the case over the years, gave valuable support to the School. When the Administration accepted most of the demands, the School agreed to participate in the Review (documentation in the writer's files). Later not all of the agreed procedures were adhered to, for example, no secret meetings with members of the School, no privileged access to the Committee to be given to the Head of School; nevertheless, the Review is generally considered to have been the most comprehensive, fair and open of all the regular School reviews at Macquarie.

10 A large number of submissions, amounting to nearly 2000 pages, were presented by staff, students and graduates; many of these were followed by personal appearances. Lists of these are contained in Annexures B and C, MACQUARIE REVIEW 85-91. All submissions are in the REVIEW COMMITTEE DOCUMENTS, Macquarie University. The School also met in open session with the Committee present, for discussion of their INTERIM REPORT. The Committee met 13 times and received "comprehensive documentation" from the University and School, a list of which appears in Annexure A, *id*, at 82-84.

11 Thus in oral testimony Prof J. Rose (School of Earth Sciences) and Mr P. Gillies (then Head of the Business Law discipline in the School of Economics and Financial Studies) jointly submitted a proposal that the Business Law discipline be merged into the Law School, which of course would have ensured a marginalization of the critical legal scholars; for Gillies' views, *see* his written submission in the REVIEW COMMITTEE DOCUMENTS.

legal studies'. This is simply a minority movement of academics who are attempting to destabilize and politicize the legal structure and the basics of legal scholarship in accordance with Marxist or neo-Marxist doctrine".[12]

When the opportunity came with the Review, they went a step further (with even more venom) and suggested that the School be split and the progressives located in other Schools.[13]

The general thrust of the progressives' submissions can be adequately judged by several documents published (in revised form) in this volume.[14] A moderate group of 10 members of the academic staff which came to be referred to as the "Centre-Left" also presented a submission to the review[15]

While the strategic importance of the Review, in light of the forthcoming Pearce Report, was generally understood, it is also clear that few in the School appreciated the danger represented by the national assessment.[16] If they had, some at least certainly would have taken a more active role in defending the School to the Pearce Committee.[17]

Historically, legal education in Australia has been dominated by the practising profession,[18] its content and culture reflecting the interests and perceived needs of lawyers, in particular those in traditional private practise. Macquarie Law School was the site of a concerted attempt to break out of that subservient position and to establish a degree of autonomy consistent with academic traditions in other University disciplines.[19] That attempt was continually stymied by their formalist colleagues who emphasized, indeed gave priority to the "professional" function of legal education. Thus, in confronting the Review of the School, progressive scholars felt compelled to address the dichotomy which their colleagues had raised between professional and academic approaches to law teaching.[20] We print

12 PEDEN AND FOURTEEN OTHERS, SUBMISSION TO MACQUARIE UNIVERSITY COUNCIL: THE THIRD CHAIR OF LAW 2 (June 1985). *Compare* AD HOC COMMITTEE OF THE SCHOOL OF LAW, SUBMISSION TO UNIVERSITY COUNCIL: THIRD CHAIR OF LAW - A RESPONSE (July 1985).

13 *See* the SUBMISSIONS TO THE SCHOOL REVIEW COMMITTEE BY: PEDEN AND TEN OTHERS; ENRIGHT; and RANSOM (who referred to the critical legal scholars as "academic brown shirts"). *See also* GOLDRING, SUBMISSION TO THE SCHOOL OF LAW REVIEW COMMITTEE ( March, 1985). *Compare*, Craig, SUBMISSION TO THE LAW SCHOOL REVIEW (August 1985); and Newcity, MEMORANDUM TO THE SCHOOL OF LAW REVIEW COMMITTEE: INTOLERANCE AND FANATICISM IN THE SCHOOL OF LAW: A REBUTTAL TO PROFESSOR J L GOLDRING (July, 1985).

14 Fraser, *Turbulence in the Law School : Republican Civility vs. Patrician Deference?* and Boehringer *et al*, *An Argument for a Contemporary Legal Education.*

15 *See* BOER, *et al*, A SUBMISSION TO THE LAW SCHOOL REVIEW COMMITTEE (June, 1985) (Four members of the "Centre-Left" group had also signed, with one reservation, the FRASER document, TOWARDS CIVILITY.)

16 Although those traditionalists and their allies, which included the two Professors, one of whom was Head of School, in putting the case for dividing the School presumably hoped that the Pearce Committee would endorse such a move, it is unlikely that they anticipated a proposal to close the School.

17 Although this may not have been possible in any case; while the Pearce Committee, on a brief visit to the School, listened to an informal presentation of grievances from several of the traditionalists and the Head of School - said to have been the basis for the Committee taking up the "conflict in the School" theme - the letters of two members of staff responding to reports of that discussion and offering to meet with the Committee were never acknowledged (copies of letters held by the writer).

18 *See, e.g.*, PEARCE REPORT, *supra* note 2 at para 1.51, 2.2, 15.5, 15.6. For an historical discussion, see Martin, *From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales*, 9 U.N.S.W.L.J. 111-132 (1986).

19 On the nature of the older tradition in legal education, see Stewart, *Forward Among the Backward: A Document with Comment*, 2 MACQUARIE LAW STUDENTS JOURNAL 51-54 (1990).

20 *See, e.g.*, Goldring and Peden *et al* SUBMISSIONS TO THE REVIEW, *supra* note 13.

here the introductory summary of the issue taken from their submission to the Review Committee:

> We believe, with others in the School ... that this dichotomy is false. Legal education at a University ought not to be conceived of as practical training for the legal profession. Such practical training has historically been provided outside Universities, and can still be obtained in New South Wales outside the University sector. In large measure, the commitment to professional training, and the anti-intellectualism which goes with it, has been the source of conflict in the School over appointments, promotions, tenure, and a variety of curriculum issues.
>
> Legal education leading to a University degree should be, quite simply a University education. The reasons are clear. We are educating people at a University primarily (1) for the purpose of filling a role as a citizen and human being; (2) so they will be capable of fulfilling some more specific - but yet undetermined - human task beyond the universal task of citizenship and humanity. Given the rapidly changing world we live in, one which is in many areas of sociality becoming far more complex, we must provide a *general* legal education in order to provide our graduates with the basis for coping with that world in whatever citizenship role they adopt and whatever occupation they may wish to enter.
>
> Thus, there is a need, unfulfilled by traditional/professional approaches to legal education, to develop in students proper intellectual skills and habits - essentially the capacity to analyse and reflect systematically upon problems, drawing on a store of knowledge and experience of their own - and others' - culture; they also need to develop a critical mind, one which requires authority to justify itself, one which looks beyond the obvious and taken-for-granted world of "common sense" or legal doctrine and precedent. It is a mind which is open intellectually, flexible and innovative. A "professional" approach to legal education cannot aspire to those goals.
>
> Many of our graduates will choose to enter the legal profession. Our understanding of the profession, and of the legal order in this complex and rapidly changing world, indicates that lawyers are at a great disadvantage if they have not developed the intellectual capacities which a University legal education can provide. We believe this is becoming more obvious throughout the legal profession. For those of our students wishing to practice law, a narrow and short-horizoned professional training is a great disservice. It does not prepare students to think for themselves unburdened by the deadening effect of unexamined tradition, formal authority, the normal, the fixed and given. It cannot prepare students for the future - for the unknown, the changing, the new, the ambiguous.
>
> Thus we contend that we have a *public duty* as law teachers at a public University, to provide an education that offers (we cannot ensure) students the opportunity to prepare themselves adequately for lawyering in the future and citizening in the present. Since we cannot know precisely what that implies, our students must have developed the intellectual capacity to adapt to that changing world. Why else should public funds be expended on a University degree program - certainly not to train professionals for law, as that job can be and is done elsewhere.

> Many of our graduates will not enter the legal profession. Some who do will not remain in it. Others will enter the profession but choose not to work in the traditional areas (or mode) of practice. Others will enter the profession, even the traditional areas and in the traditional mode, and then find everything has changed, requiring them to adapt to new problems, choices and laws. For all of these students, a "professional training" with its mind-deadening legacy, constitutes a lost educational opportunity and is, quite literally, a disservice to those who have passed through the experience, and to the community.
>
> Graduates who wish to become lawyers have two post-degree experiences which should provide them with the professional training necessary to meet the requirements of contemporary lawyering: the College of Law, and their early period of on-the-job learning. If it is thought that the latter in particular is somewhat haphazard, the fault does not lie with the Universities nor should the solution, if there really is one. One learns about law at University. One learns to be a lawyer by becoming one.[21]

In this issue of the journal we are publishing in revised form, other material submitted to the Review. In the first, *Towards Civility*, a group of progressive scholars, led by Drew Fraser, attempted to analyse the structural and cultural sources of "problems in the Law School" as they came to be characterized in the University and wider community (with no little help from the media). In the piece which follows, from *The Way Forward*, a smaller group from the progressives, led by Gill Boehringer, sought to explain and justify the academic program which had been evolving in the School over the previous decade. That program had come under criticism from conservatives both in the School and in other sections of the University; and the academics responsible for its particular cast condemned as being disinterested in *legal* education. They therefore made very clear their purpose at Macquarie Law School, as the following extract indicates:

> We wish to make it clear that we are committed to University legal education. We have chosen to teach in, to make our careers in, University legal education. We have deliberately chosen not to teach legal studies in a program which does not lead to a law degree. We have also deliberately chosen to teach at Macquarie Law School because of the opportunity it presents to educate rather than to train, and to do so in an interdisciplinary mode.
>
> We believe that a sound academic legal education is the best possible preparation for law work, as well as being an academic preparation for life (citizenship, occupation) equivalent to other University degree programs. We believe that the "professional" approach of Peden et al and of Goldring is misguided ... We believe there is an increasing recognition amongst legal academics and even in sections of the profession, of the validity of the position we hold. Lawyers for the year 2000 (in Professor Nygh's phrase) must be educated now to be able to adapt

21 BOEHRINGER, FRASER, THOMAS, DEMICHIEL, SUBMISSION TO THE COMMITTEE TO REVIEW THE SCHOOL OF LAW: THE WAY FORWARD 4, 5 (Nov. 1985).

> to conditions they will then face, rather than trained now in a legal order which they will, in significant measure, out-live.[22]

The approach of these progressive scholars was essentially endorsed by the Review Committee. It recommended[23] that:

> The School should continue to direct its efforts towards a coherent, broad-based and interdisciplinary legal education, which is likely to make it distinctive amongst law schools in New South Wales. It should not be professionally oriented in the sense that a narrow, homogeneous short-term concept of professional activity should impose stringent imperatives to instruct students in the detailed content of large segments of the law (even in the so-called professional subjects), or in professional skills to any substantial degree (bearing in mind that post-university training caters for this explicitly). It should be confident in the existing willingness of professional recognition authorities to leave considerable autonomy to the Law School to determine its objectives and the contents of courses.
>
> In pressing forward with the aim of instilling a coherent, broad-based, interdisciplinary approach into the whole range of its teaching of law, the School should endeavour to infuse relevant background material (historical, sociological, etc) and critical analysis into the so-called professional subjects, as well as into earlier subjects within the curriculum, such as Standards of Legal Responsibility and Notion of Property.

And, in agreement with the argument put to it by these progressives, recommended that "A law course established in accordance with those objectives should be viewed as legitimate within the School because it is *both* scholarly *and* appropriate for pre-professional training in the 1980's"[24].

The material which follows comes from the submissions by the smaller group of progressives to the Review Committee, and constitutes a major statement of their position on legal education.[25] In the first section, the argument for a broad based or traditional *academic* education (referred to as a "liberal education" in the document) is supported by an analysis of the development of legal education in the United Kingdom. Clearly this appeal to historical precedent and contemporary reality in the country which has been *the* significant other for Australian legal educators and University administrators,[26] was an attempt to establish the legitimacy of the Macquarie project. The following sections bring the debate back to Australia, attempting to justify the progressives' approach by linking it to the historic argu-

22 *Id.* at 2.

23 MACQUARIE REVIEW, 19-20. *Compare* the negative view taken by the PEARCE COMMITTEE of Critical Legal Studies and the conflict at Macquarie, *see* PEARCE REPORT, *supra* note 2, at paras 1.106, 1.117-18, 22.54-60.

24 MACQUARIE REVIEW, at 20.

25 *See* BOEHRINGER *et al*, *supra* note 18. More generally see, G. BOEHRINGER (ed) LEGAL EDUCATION, ASSESSMENT AND THE BUREAUCRATIC UNIVERSITY: SOME DOCUMENTS, (Macquarie University June 1986).

26 And, not least, in the legal profession. On attitudes in nineteenth century Australian legal circles, see the collection of course materials in A. FRASER, P. KAVANAGH, G. BOEHRINGER (eds) HISTORY AND PHILOSOPHY OF LAW, Chap. 7, (Macquarie University, 1988); *see also* MARTIN *supra* note 15; and more generally *see* A. FRASER, THE SPIRIT OF THE LAWS: REPUBLICANISM AND THE UNFINISHED PROJECT OF MODERNITY (U. of Toronto Press 1990).

ments for a liberal education, providing authoritative criticism of the formalists' approach to legal education, and by discussing examples of what the progressive approach entails.

In the article which follows this material, Kavanagh discusses in more detail the nature and purpose of the School's foundation course: History and Philosophy of Law. The course was created and has been taught by progressives in the School for about a decade.

## AN ARGUMENT FOR A CONTEMPORARY LEGAL EDUCATION*

**G. Boehringer, A. Fraser, R. Thomas and Y. De Michiel**

### Trends in Legal Education: An Historical International Perspective

As part of its brief, the Review Committee has been directed to consider contemporary trends in legal education; our focus here is on the United Kingdom experience. We will show that thinking about legal education there largely supports our fundamental proposition that university legal education - even for students who will enter into legal work - is properly an academic, or liberal, education. Thus what we are proposing in our submission is not new. Important statements of this position were made in the United Kingdom as long ago as the 1950s. Nor are we proposing a radical departure from standards accepted in other Anglophone countries. That such an issue needs to be debated at all would be surprising in those European countries - France, Italy, Germany, Scandinavia - of which we have some knowledge. In such countries political economy, legal history and jurisprudence are the traditional part of a student's law studies, as are major research projects in law and/or humanities/social science.

The current debate about legal education at Macquarie reminds us of the earlier debate in the United Kingdom. A major contribution to that debate came from Northern Ireland. We refer to the interventions by three significant figures in British legal education: Professors Montrose, Twining and Sheridan. These three developed and consolidated numerous innovations in law teaching at Queen's University, Belfast. Two of them subsequently played important roles at Warwick (Twining, now at University College, London) and Cardiff (Sheridan), among the finest contemporary law faculties in the United Kingdom.

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* From SUBMISSION TO THE COMMITTEE TO REVIEW THE SCHOOL OF LAW: THE WAY FORWARD, (Macquarie University Nov. 1985). Revised for publication here.