BROADENING THE DISCIPLINE OF LAW

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[This article argues for a more intimate and reciprocal relation of the law discipline to the humanities. This is because, first, the commitment to equality before the law has as its corollary that the voices of those who are not legal technicians should be heard in legal scholarship. Second, systematic attention to the ethical dimension of social regulation is possible only when technical questions are placed in the context of moralities, and the economies and technologies of power. Third, it is in the current changes in the humanities that the issue of how to hear hitherto silenced voices has been most effectively explored.]

I THE SUBJECT AND THE CONSTITUTION

The law discipline as it is frequently practised in Australian law schools may be understood as an element in a wider narrative about legality and citizenship. That wider narrative is problematic in so far as it is taken to be the only context in which law can be studied. This article makes a number of criticisms and suggestions for change in the discipline of law. One could hardly be unaware, of course, that changes have already occurred in academic legal culture — the publication of this paper in the *MULR* is testimony to them. Nevertheless, it seems clear that law as an area of study has not kept pace with the innovation and theoretical heterogeneity witnessed of late within the humanities. Scholars in law have remained disturbingly content with regimes of truth, designed within agencies of the state, which often naturalise or elide questions of oppression and inequality, and which, as Dr Johnson might have said, do not even permit a new kind of dullness. The aim of the paper is expansionary, not prohibitory: I should like to see new theoretical directions taken, not old ones entirely forsaken. In particular I should like to see alternatives to the still dominant positivist narrative proposed as contexts in which to theorise law.[1]

This narrative tells us that as legal subjects and cultural heirs of the Whig revolutions of 1688 and 1776, we enjoy equality of legal status with all other legal subjects; there are no special statuses for privileged subjects, and no-one is above the law. As political citizens and heirs of the more recent liberal democratic reforms, the discourse says, we have become 'the people'[2] in whose name the rules

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1 A draft research plan circulated recently at a university near the author described the school in question as being concerned with law in the real world. Of course: but whose real world, constructed by whom, from what intellectual position, for whose benefit?

2 Jacques Derrida, 'Force of Law: The "Mystical Foundations of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Carlsen (eds), *Deconstruction and the Possibility of Justice* (1992). And see the discussion of James Boyd White, Audre Lord and others in Angela P Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stanford Law Review* 581.

governing us are made. We are, in short, equal and self-governing according to a story which does not tell us that there may be exceptions for particular classes, genders, ethnicities or sexualities. Before we can draw any conclusions from this curious absence from the story, we encounter in the story a contradiction in the form of a prohibition. Not all subjects, the texts explain, have equal standing to speak reflexively about the nature of their constitution as equals.[3] Some humans, the jurist John Finnis explains, for example, are more practically reasonable than others.[4] Lawyers and mainstream jurists maintain that some subjects — certain private persons and officials,[5] or citizens with legal (but not philosophical or historical) training — have privileged knowledge about the configuration of subjects within the regime of legal equality.[6]

But there are other taxonomies of social order, those created by authors without legal credentials, and they cannot suffer permanent deferral to expertise without violence being done to the contexting narrative's central principle of equality. Dworkin's contention, that the knowledge of law claimed by a legally untrained person can be dismissed like an innumerate's history of mathematics,[7] bears uncanny resemblance to some of Hobbes' arguments.[8] Hobbes argued in both *De Cive* and *Leviathan* that good and evil were determined by the civil law author-ised (willed, intended) by the sovereign. To question the particular determination of good and evil was therefore to question the sovereign's authority, 'to desire even to be kings; which cannot be with the safety of the commonwealth.'[9] Dworkin merely substitutes the lawyer for the sovereign. There is, he says, 'initial agreement'[10] about what constitutes the practice of law: 'our culture presents us' with the appropriate canonical information.[11] In case we do not interpret the information in the authorised way, Dworkin warns us that we will not understand law unless we have a participant's understanding: to put law into a non-canonical context will produce 'perverse', 'impoverished' and 'defective' analyses.[12] There is, on this view, only one test of 'real' knowledgeability about law (and inferentially, about

3 See Jane Flax, *Disputed Subjects: Essays on Psychoanalysis, Politics and Philosophy* (1993) ch 5.

4 John Finnis, *Natural Law and Natural Rights* (1980).

5 H L A Hart, *The Concept of Law* (1961).

6 Ronald Dworkin, *A Matter of Principle* (1982); Ronald Dworkin, *Law's Empire* (1986).

7 Dworkin, *Law's Empire*, above n 6, 14.

8 One is reminded of Brecht's depiction of Galileo's conversation with the delegates of the Pope. Galileo wanted to locate his sighting of the Jovian moons in the context of a theory of optics and the possibility of a universe which was not geocentric. The mathematician and the philosopher wanted to test the sighting in terms of whether the moons were 'necessary' to a 'participant's understanding' of 'the cosmos of the divine Aristotle': Bertolt Brecht, 'Life of Galileo' (translated by W Sauerlander and R Mannheim) in R Mannheim and J Willett (eds), *Brecht: Collected Plays* (1972) vol 5.

9 Thomas Hobbes, *De Cive* (1642) XII: 1. See also ch VI, and Thomas Hobbes, *Leviathan* (1651) part II, ch XXIX. A great deal of political theory remains within the Hobbesian problematic, generating terms for the institutional reconciliation of human dependency on society with the supposedly natural quality of human a-sociability. The authoritarianism of Hobbes is often considered to have been transcended by later liberalism, but it may sometimes be more accurate to see it as transferred or redistributed in other writings.

10 Dworkin, *Law's Empire*, above n 6, 15.

11 Ibid 90-1.

12 Ibid 14.

society, for an understanding of which, lawyers argue, a grasp of law is so crucial), namely the one administered by lawyers, who are people credentialed by other lawyers, who are also people credentialed by other lawyers (and so on until one reaches the 'mystical foundation' of authority).

In the texts of contemporary writers like Hart, Dworkin and Finnis, the politics of the current law discipline is summarily evident. Both conceptually and historically, the stories of legal and political equality need origins and subjects. Of law it is necessary to answer the question, 'what makes it legitimate?' Of government conducted in the name of the people,[13] it is appropriate to ask, 'Yes, but who are the people? Who is to be excluded?' There is at that point a momentary instability because the answers can only be decisions which, theoretically at least, are always open to negotiation and revision. The intellectual absurdity and circularity to which legal writers commit themselves are the consequence of the politics of denial of that negotiability and possibility of revision. I have remarked elsewhere on the oddness of Hart's account of authority's origin in a 'seance of self-designating officials gazing at a space and materialising a supreme rule'[14]: Dworkin's loose canon is noted above. Equally, the constitutional subject — collectively the 'We, the People of the United States' for example — cannot exist until after the United States has been constituted; Derrida articulates the circularity.[15]

There is no reason why, on the other hand, what the law 'is' could not be understood as constituted in the 'real' effects it has on differently positioned subjects among whom theorising 'reality' is a process of argument and negotiation.[16] On the question of the constitutional subject, Spivak writes, 'the history of higher lawmaking, the reality of normal politics, and changes in electoral mechanics show us that the connection between "We, the People" and a General Will is constantly negotiable.'[17] Conventional approaches to law have, in their attempts to privilege certain forms of knowledge, produced absurdity, incoherence and circularity. Then again, and perhaps more importantly, they have, through their closures and prohibitions, helped to disguise and sustain a narrow, 'official' politics both inside and outside the academy, which a broadening of the law discipline could help challenge.

II ACADEMIC PRIORITIES IN THE LAW DISCIPLINE

The academic study of law need not assume that its primary focus must be the discourse about law framed by 'authorised knowers', the official accounts of official practices and institutions. With the aim of exploring alternative knowledges, law studied at university could include forms of contextualised intellectual

[13] 'We, the People' prefigure the United States Constitution, but even a state with as vague a constitution as the United Kingdom's (see Samuel Edward Finer, *Five Constitutions: Contrasts and Comparisons* (1979) ch 4) invests its legitimacy in the Representation of the People Acts.

[14] Ian Duncanson, 'Jurisprudence and Politics' (1982) 33 *Northern Ireland Legal Quarterly* 1, 18.

[15] Derrida, above n 2.

[16] Ian Duncanson, 'Legality in Perspectives' (1991) LXXVII Heft 1 *Archiv fur Rechts und Sozial-Philosophie* 28.

[17] Gayatri Spivak, *Outside in the Teaching Machine* (1993) 270.

inquiry in which the stories of judges and others might be subject to more rigorous socio-theoretical scrutiny than has hitherto been the case.[18] The enormously expanded number of law school places in Australia may provide an opportunity.[19] This is because, first, half of law students are now women, some of whom are feminist women expecting to hear new perspectives in law. Some of the new places are occupied by students from ethnic and class backgrounds not usually encountered in law schools. From the perspectives of people who are not anglo, male and middle class, the invitation to 'think like a lawyer' may look like an invitation to collude in alienating practices.[20] Second, when the majority of future law graduates cannot anticipate careers in conventional practice at the bar or as a solicitor, a framework for the study of law which is not restricted by the narrow technicism of professional training may be desirable. Already there is evidence that students with broader academic experience find conventional law programs intellectually unchallenging, and demanding only in terms of the volume of descriptive material required to be learned.[21] Third, discussions of higher education trends have suggested that the law discipline may come to replace 'arts' in popularity as the standard post-secondary course outside the natural sciences.[22] Demands for more intellectual rigour may emerge from this.

If legality is to be studied academically then it should be the theoretical framework considered useful in the study, not the preoccupations of a judge, solicitor or barrister, which determines the context and the politics of the study.[23] Neither the 'add women (or minorities, or indigenous people) and stir'[24] nor the 'rent-a-psych/rent-a-soc'[25] approach is satisfactory because both reproduce the structure of the lawyer looking at the other. The non-user of legal services and the exponent of the 'foreign' discipline are constituted in the lawyer's gaze, understood from the lawyer's perspective and assimilated to the lawyer's priorities. One consequence of this in the 1970s was the policy of deploying lawyers to solve the problems of structural poverty and inequality, necessitating a large and, as it turned out,

[18] Much is made of the need to produce competent technicians, but this may be a coded way of speaking of people with the correct attitude toward official explanations of the world. Non-academic lawyers often want both to scrutinise the content of academic law courses in the name of relevance to their own professional preoccupations and simultaneously to tell their new recruits to forget their university training because it is irrelevant.

[19] David Weisbrot, 'Recent Statistical Trends in Australian Legal Education' (1990-91) 2 *Legal Education Review* 219; 'Higher Education Supplement', *Australian* (Sydney), 12 October 1994 (law student numbers up 58% from 1987).

[20] This is not to fetishise the superior 'truths' generated by the experiences of less privileged people (see Pheng Cheah, 'Staging of the Margin: The Limits of Critical Race Theory' (1994) 2 *Australian Feminist Law Journal* 13) but to welcome the possibility of new perspectives, different politics and broader contexts in which to discuss legality.

[21] Alex Ziegert, 'Social Structure, Educational Attainment and Admission to Law School' (1992) 3 *Legal Education Review* 155.

[22] Craig McInnis and Simon Marginson, *Australian Law Schools After the 1987 Pearce Report* (1994) ch 2.

[23] Ian Duncanson, 'Legal Education and the Possibility of Critique' (1993) 8(2) *Canadian Journal of Law and Society* 59.

[24] Sandra Berns, *Concise Jurisprudence* (1993) ch 3.

[25] William Twining, 'The Grand Juristic Bazaar' [1978] *Journal of the Society of Public Teachers of Law* 185.

unsustainable expansion of legal aid and producing nothing in the way of structural amelioration.[26] A second consequence was a collection of curricular options in law schools conceiving legal subjects without social contexts; imagining, for example, poor people as rich people without any money, despite a voluminous literature on poverty which indicated the need for quite a different approach.[27]

Even now many 'contextual' law courses envisage lawyers borrowing insights and familiarising themselves with the perspectives of other disciplines in order to apply these to the already existing practice of law.[28] The object of lawyers' knowledge, in other words, is still taken to be ontologically prior to, and merely clarified with the addition of, other perspectives. All that is sought is the rearrangement of lawyers' narratives within lawyers' practices. There is no examination of the political (for example, class, gender, ethnic etc) presumptions which make those narratives appear plausible, of what other kinds of stories might be told and of what form law and lawyers' stories might take within those different stories.[29] It is assumed that the structure which forms the basis of each aspect of the law discipline must be isomorphic with the structure with which barristers, solicitors and judges are familiar in their practices.[30] It seems to me that this assumption conceals a choice not to depart from, or even seriously engage with, the politics of those practices.

It is clear, as Yeatman puts it,

> that if an academic expert claims his knowledge reflects rather than constitutes reality, and if we accept ... the claim, our critical scrutiny concerns only the adequacy of his method or procedure.

We miss, in that event,

> the patriarchal investment in this kind of monorational universalism and its exclusion of all those who are not accepted within the club of rational patriarchs.[31]

If law academics wish to question traditional assumptions, they may question the realities which other kinds of lawyers wish to impose on them. Law academics are not, in their role as academics, legal advisers, advocates or adjudicators — nor their amanuenses — but practitioners of another sort of profession. There is no reason why the practitioners of diverse activities should not understand each others' conversations or sometimes work on overlapping narratives. But

[26] Ian Duncanson, 'Legal Need in England and Wales in the Sixties and Seventies: A Retrospect' (1981) 4 *University of New South Wales Law Journal* 113. The Access to Justice Advisory Committee report, *Access to Justice: An Action Plan* (1994), may suggest a return to the 1970s.

[27] See Peter Townsend, *Poverty in the United Kingdom* (1979).

[28] See, eg, Richard Johnstone, 'Rethinking the Teaching of Law' (1992) *Legal Education Review* 17, 21.

[29] Duncanson, 'Legal Education', above n 23. Even some of the more progressive 'history and philosophy of ...' courses seem to me to fall into this category insofar as they purport to explain how we got here. But where is 'here', whose 'here' are we talking about?

[30] David Sugarman, '"A Hatred of Disorder": Legal Science, Liberalism and Imperialism' in Peter Fitzpatrick (ed), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (1991).

[31] A Yeatman, *Postmodern Revisionings of the Political* (1994) 42-3.

there are advantages in respecting the different priorities of different professional practices. After a recent seminar at La Trobe University, for example, there was some discussion about the introduction of the so-called 'battered women's syndrome' into the trials of women who kill their violent partners. Whilst men who kill in response to what they claim to have experienced as intolerable incitement can raise a defence which constructs their action as strength out of control (the provocation defence to the homicide charge), women are constrained, some of the academics present maintained, to reinscribe themselves in the discourse of victimhood by the syndrome plea.[32] Feminist solicitors in that particular discussion took the view that when the defence of a woman charged with murder was being constructed, the long term and more abstract consideration of the battered women's syndrome had to take second place to questions of tactics: how best to succeed in persuading a judge and jury in concrete circumstances that the woman should not be treated as an unmitigated murderer. And from that premise, the solicitors characterised the academic treatment of the topic as 'impractical'; 'it's all very well in theory but ...'

This is to overlook that what is practical depends upon what we decide is appropriate to the nature of the practice. In their capacity as researchers, academics do not hire themselves out to advise or defend clients, but they do seek practical engagement with, for instance, the assumptions, the gendered practices and the material relations within which male violence may occur and be legitimated, and resistance to it by women officially policed, and within which certain kinds of defence — for example, the battered women's syndrome — may serve to exclude women from 'interpreting and naming social experience'.[33] The politics of investigating an improved subject position leads each profession quite legitimately in opposite directions. The solicitor must respond to the crisis affecting the individual while the academic examines the social practices out of which the crisis, and others like it, arose.

III HARD LAW, SOFT LAW, SEXISM, MYTH AND CLOSURE

Once we escape from the 'monorationality' to which Yeatman refers, it is possible to make theoretical sense of the experience many of us have that social orders are far from homogeneous or consensual. The experiences of others, many of us assume, and the collective, cultural theories in which experiences are both made sense (of) and made the basis for social action, will vary considerably. When genders, ethnicities, sexualities and classes have all been made and made to register in hierarchies of prestige and power, we would expect the subjects within them to

[32] See the discussions in Adrian Howe, 'Provoking Comment: The Question of Gender Bias in the Provocation Defence — A Victorian Case Study' in Norma Grieve and Ailsa Burns (eds) *Australian Women: Contemporary Feminist Thought* (1994); Stella Tarrant, 'Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws' (1990) 20 *University of Western Australia Law Review* 573; and Sue Lees, 'Lawyers' Work as Constitutive of Gender Relations' in Maureen Cain and Christine Harrington, *Lawyers in a Postmodern World: Translation and Transgression* (1994).

[33] Tarrant, above n 32, 577.

understand social regulation in different ways. What it is appropriate to do, how one is regulated and therefore the reality and meaning to one of the regulatory environment, will vary according to how one has learned to live with, and act in relation to, the specifications of one's subjectivities.

In this context, the Australian university law school curriculum's claim to unique knowledge about the nature and meaning of 'the most important institutionalised system to which (society) is subjected'[34] not only coerces its students into conformity and hierarchy,[35] it also drowns alternate truths originating elsewhere in the social order. As a practice, the curriculum resembles the Anglophone determination to shout at 'foreigners' in English instead of learning their language. It is an aggressive and authoritarian practice, serving to accomplish, through the silencing of the other, the hegemonic position of the speaker.

With what taxonomic and ontological truths does the pedagogic silencing and closure effected by the standard law school curriculum confront its students? Classically, the practical, 'hard', apparently rigorous courses, compulsory for the professions of advising and advocacy, and concerned with property, business and finance, are held to be based upon rules governed by a logic, or form of reasoning peculiar to law.[36] 'Soft' courses, in doctrinalists' terminology, are optional, being about people, poverty and human relationships. This contrast ensures, Thornton says, that 'a very clear message as to what is important is emitted, (namely) those areas which sustain contemporary corporatism.'[37]

A second message, implicit in the sexualised oppositions of the compulsory mainstream — hard, rational and abstract — and the adventitious options — soft, specific and concerned with human relationships — communicates the correspondence of legality and a certain construction of masculinity.[38] The practice of classifying law in terms which are professed to have universal application, and then again in terms of people who are different from the universal subject — usually women, the poor, Aboriginal people — is symptomatic and supportive of the same white, upper-class, male culture that is institutionally inscribed in the patterns of judicial selection,[39] law firm partnerships,[40] university law school hierarchies[41] and the bureaucracies that produce them.[42]

34 Joseph Raz, *The Authority of Law: Essays on Law and Morality* (1979) 120.

35 Australian law schools are not unique, of course: see Duncan Kennedy, 'Law School as a Training for Hierarchy' in David Kairys (ed), *The Politics of Law: A Progressive Critique* (2nd ed, 1990); Richard Kahlenberg, *Broken Contract: A Memoir of Harvard Law School* (1992).

36 'In Coke's most characteristic passages the common law itself was "the perfection of reason" and therefore the measure of it: and this meant an *artificial* perfection, "gotten by long study, observation and experience, and not of every man's natural reason"': J Stone, *Legal System and Lawyers' Reasonings* (1964) 237, quoting 1 *Co Litt* 97b.

37 Margaret Thornton, 'Portia Lost in the Groves of Academe Wondering What to do About Legal Education' (1991) 9 *Law in Context* 12.

38 Terry Threadgold, 'Critical Theory, Feminisms, the Judiciary and Rape' (1993) 1 *Australian Feminist Law Journal* 7; Ngaire Naffine, 'Windows on the Legal Mind: The Evocation of Rape in Legal Writings' (1992) 18 *MULR* 741. See also Ngaire Naffine, *Law and the Sexes* (1990).

39 Threadgold, above n 38.

40 David Weisbrot, *Australian Lawyers* (1989) ch 4: 'The Australian legal profession does not reflect the socio-economic class, ethnicity or gender composition of ... society as a whole ...

Unsurprisingly, having encountered little in their education to prompt critical reflexivity about the privileged nature of their origins, the credentialed lawyers destined, so Weisbrot's research suggests, to lead their professions, have traditionally displayed a fairly deep conservatism, buttressed by an incapacity to see beyond the doctrines in which they are expected to be expert. The possibility that viewed from a position other than that of social privilege the authoritative manipulation of doctrines may appear not to be part of the working through of a special form of rationality, but instead to be one more instance of oppression, is not given much space in the hard, compulsory, areas of legal education.[43]

Little in the mainstream, black letter tradition of legal education challenges doctrinally embodied politics. Sugarman writes:

> The black letter tradition is the ... bearer of an important political message ... that the law (primarily through case law) and the legal profession (centrally the judiciary) play a major role in protecting individual freedom ... the form and content of the law become synonymous with our very definitions of individual freedom and liberty ... The world as pictured within the conceptual categories of legal thought, is basically sound. It is more or less the best that is realisable. Insofar as a better world is possible, it would not fundamentally differ from the present.[44]

The law discipline may have become the last refuge of positivism.[45] Its traditional substructure furnishes a vocabulary of certainty and procedures for precluding dialogue; technologies apt, one might say, for the justification and maintenance of domination. As has been argued, such ' ... structures and forms of thinking ... [have been] used to naturalise the current social and economic disadvantages

[and] the social background of young lawyers is, if anything, more exclusive than in previous generations.'

In the period 1983-92, the proportion of women solicitors who had partnerships declined from one in seven to one in eight; for men the proportion was two in five: Liz Porter, 'Prospects in decline for women lawyers', *Age* (Melbourne), 13 February 1992. For a similar story about the English bar, see Helena Kennedy, *Eve Was Framed: Women and British Justice* (1992).

41 Margaret Thornton, 'Discord in the Legal Academy: The Case of the Feminist Scholar' (1994) 3 *Australian Feminist Law Journal* 53.

42 See Bernt Huppauf, 'Reforming Research and Higher Education — the example of the Federal Republic of Germany' (1989) 32 *The Australian Universities' Review* 26; I Lowe, 'The Dying of the Light' (1990) 33 *The Australian Universities' Review* 13. Stephen Knight comments that 'when a senior educational administrator [the then chair of the Australian Research Council!] can describe humanities researchers to their faces as "wankers" you have an idea of the depth of feeling and shallowness of mind': Stephen Knight, *The Selling of the Australian Mind: From First Fleet to Third Mercedes* (1990) 179.

43 As an example of the flexible use of legal doctrines to maintain gender boundaries, Carol Smart notes a recent UK House of Lords decision that the express consent of the submissive partner in male sadomasochistic sex will not excuse the dominant partner. On the other hand, the mere belief that she consents, constructed in the appropriate way, will provide a heterosexual rapist with a defence. Carol Smart, 'Law, Feminism and Sexuality: From Essence to Ethic?' (1994) 9(1) *Canadian Journal of Law and Society* 15.

44 Sugarman, above n 30, 35.

45 'The observation made by Menger as early as the last century is proving true again: "Jurisprudence is the most backward of all the cultural sciences, in which the discarded fashions of the palace continue to be worn as the latest thing"': Sibylle Tonnies, 'Is Law an Eco-System?' (1992) 1 *Social and Legal Studies* 345, 346.

suffered by women',[46] and, one might add, by others positioned as subordinate in terms we can understand to be related to class, ethnicity or sexuality. This could be called the social justice issue. A second issue — which is not entirely unrelated — is the intellectual and academic price which the law discipline has paid for its active collusion with the political status quo.

IV COOPTATION AND THE LAW DISCIPLINE.

In a monograph about the social sciences and Western imperialism, but which ought to provoke rethinking in all disciplines in proximity to authorised state narratives, Furedi points to some unedifying consequences. Resurgent imperialism, he suggests, has recruited battalions of academic experts to demonise non-white regimes and sound alarms about the menace of third world nationalism, extremism, fundamentalism, terrorism (delete as appropriate).[47]

And though the tactics of groups like the IRA, Baader-Meinhof, the Red Army Faction and others can scarcely be justified (one should, of course, notice the amplification and political use made of non-state 'terrorism' as a technique for surveillance and discipline[48]), whilst they have killed hundreds, state-sponsored terrorist killings since World War II have accounted for millions. Estimates by Chomsky and Hermann and ex-CIA colonel, John Stockwell put at around three million the carnage associated with the US-backed coups against Sukarno and Allende, the CIA destabilisations in the Congo, Mozambique, Angola, and Nicaragua and the murderous regimes maintained in much of Central America during the last two decades.[49] A sense of proportion about threats to global stability, the loss of innocent lives and the stultifying of economic and political autonomy would lead us to Langley, Virginia and other nodes in the networks of neo-colonialism before it led us to the Libyan training camps and the refugee shelters in Palestine.

The general point to be made is that when social scientific frameworks are defined in terms of their 'relevance' to the economy or government policy (in other

[46] National Agenda for Women Round-table (Canberra, 9 September 1994), Submission by the Australian Feminist Law Foundation, 1.

[47] Frank Furedi, *The New Ideology of Imperialism* (1994). In a recent example, expert Colin Rubinstein tells *Age* readers about Iran's 'covert war of subversion throughout the Middle East and beyond.' Iran, we are told, 'is the most active state sponsor of terrorism, either directly or through extremist groups'. Should one ignore Israel's Palestinian policies, US support for Latin American and African terrorist groups and terrorist governments, US mining of Nicaraguan ports, the US blockade of Cuba, Indonesian terror in East Timor and the Chinese in Tibet? Reminders are often unwelcome: see T D Allman, *Unmanifest Destiny: Mayhem and Illusion in American Foreign Policy From the Monroe Doctrine to Reagan's War in El Salvador* (1984); Howard Zinn, *Declarations of Independence: Cross-Examining American Ideology* (1990) ch 11; Noam Chomsky, *The Culture of Terrorism* (1988); Noam Chomsky, *Deterring Democracy* (1991); Alexander George (ed), *Western State Terrorism* (1991).

[48] Keith Ewing and G Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (1990) ch 7; Paddy Hillyard and Janie Percy-Smith, *The Coercive State: The Decline of Democracy in Britain* (1988) ch 7; Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (1993).

[49] John Stockwell, *The CIA Tapes, The Other America's Radio* (1981); *Wartime Interview* (1991) (Open Magazine Pamphlet Series, Westfield, NJ).

words in terms of their usefulness to the rich and the powerful), social scientists become government spokespersons and propagandists.[50] Alternative versions of reality become unthinkable and bizarre and the slide from inegalitarianism to oppression and atrocity can begin. More specifically, the implication in the resurgent imperialism of the discursive practices embodied in the law discipline should not be overlooked. The law of the West has replaced the culture and the history of the West as the icon of Western superiority and the justification for Western intervention elsewhere.[51] Why this has happened may be found in the conjunction of economic, political and social forces and their construction of a certain kind of militant nationalism.

By the mid-twentieth century, however, the great game of expansive and muscular Christian manliness contained in the Progressive history of the European nation-state seemed to be over. It was no longer possible to imagine the expansion of imperial frontiers as a remedy for disorder. Historic missions collapsed in confusion as the white man was forced on to the defensive in the homelands of the metropolis. The secret of order and the justification of dominance were no longer to be found in the historical trajectory of the nation and the class born to rule, but in the equally disembodied, legal, promise of objectivity and neutrality.[52] Jurisprudence and law have replaced history as the narrative of national genius and symbol of racial superiority.[53] Like the stories of empire — and Dworkin's title, *Law's Empire*, a story about the American way of judging, neatly makes the connection — the stories of law provide a rationality of order by purporting already to embody self-determination and democracy in the 'Western' nation-state.

Writing about imperialism in the context of Joseph Conrad's novels, Edward Said says

> Conrad encapsulates two quite different but intimately related aspects of imperialism: the idea that is based on the power to take over territory, an idea utterly clear in its force and unmistakable consequences; and the practice that essen-

[50] One thinks, for example, of the way in which the looting of social resources, like water and energy supply, has been dignified by economic stories which deem higher prices, higher profits, hugely enhanced CEO remuneration and lower quality to be efficiency: see Peter Ellingsen, 'More *Major* Blundering', *Age* (Melbourne), 1 December 1994. Kennett Government asset stripping is discussed in J Ernst, 'Privatisation, Competition and Contracts' in John Alford and Deirdre O'Neill (eds), *The Contract State: Public Management and the Kennett Government* (1994).

[51] Commenting on the Gulf War to reimpose the rule of law on the lapsed middle east, Said comments:

> [a] number of European Left intellectuals ... said that in a conflict between imperialism and fascism one should always pick imperialism. I was surprised that none of the formulators of this ... unnecessarily attenuated pair of choices had grasped that it would be quite possible, indeed desirable on both intellectual and political grounds, to reject both fascism and imperialism.

Edward Said, 'Gods That Always Fail' in G Papaellinas (ed), *Republica* (1994) 3.

[52] Stuart Hall *et al*, *Policing the Crisis* (1978) neatly juxtapose the 'rivers of blood' appeal to racial/cultural purity in England and the use of legal institutions, 'law enforcement', to control Afro-Caribbean young people made unemployed by economic recession.

[53] History and jurisprudence as myths about national identity (and superiority) have long been associated: see Peter Goodrich, 'Poor Illiterate Reason: History, Nationalism and Common Law' (1992) 1 *Social and Legal Studies* 7; see also J Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the 17th Century* (1957).

> tially disguises or obscures this by developing a justificatory regime of self-aggrandizing, self-originating authority interposed between the victim of imperialism and its perpetrator.[54]

Conrad seems also to have encapsulated two different aspects of the current law discipline and its jurisprudential rationalisation. The role of the victim/subject is to do what s/he is required to do by the order/tradition to which s/he will be told s/he belongs. As Pheng Cheah puts it, writing of the construction of rape in and as a trial: 'A woman plays no part in her rape. The intercourse is between men or man and himself. She just gets shafted as a result.'[55]

We should not expect the legal profession to be the Cavalry of Hollywood Western legend, riding to the rescue of liberty and the democratic way, much as some of the profession encourages us in such an expectation. Whenever the dire circumstances have arisen, indeed, 'Western' law has proved institutionally compatible with oppression and atrocity. Richard Weisberg notes how readily Vichy lawyers gave effect to anti-Semitic legislation, treating it as just another technical exercise in doctrinal interpretation.[56]

From Hale[57] to the present, the political effect of the common law has been persistently regressive. Feminists have commented on the reluctance of judges to accept full female citizenship.[58] A number of authors have noted the politics of legal semantics in the 'person' cases. In one piece of doctrinal sophistry noticed by Albie Sachs, a woman was held not to have been a person for the purpose of election to an office, but, once having thus been declared ineligible for that office, to have been a 'person' guilty of improperly acting as an elected official.[59]

The dispossession and subordination of Aboriginal people has been accomplished by white officials whose abandonment of the pretence that the Australian continent was a '*terra nullius*'[60] at the time of European conquest is conveniently and spectacularly — two centuries — late.[61] 'The simple fact is,' Gary Foley writes, 'if you are a Koori living out at Northcote on a single parent's pension, this debate about the Mabo case is esoteric bullshit ... if you are lucky you might have an army of highly paid lawyers working for the next ten years resolving your legal

54 Edward Said, *Culture and Imperialism* (1993) 82.

55 Pheng Cheah, 'The Law as/of Rape' (1991) 9 *Law in Context* 117, 125.

56 Richard Weisberg, 'Legal Rhetoric Under Strain: the Example of Vichy' (1991) 12 *Cardozo Law Review* 1371.

57 See the discussion in Margaret Davies, *Asking the Law Question* (1994) ch 2.

58 See, eg, Mary Shanley, *Feminism, Marriage and the Law in Victorian England* (1989); Susan Kent, *Sex and Suffrage in Britain 1860-1914* (1987); Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990); Jocelynne Scutt (ed), *Women and the Law* (1990).

59 Albie Sachs, 'The Myth of Judicial Neutrality: The Male Monopoly Cases' in Pat Carlen (ed), *The Sociology of Law* (1976). Scutt, *Women and the Law*, above n 58, ch 1, multiplies the examples. In an Australian 'person' case, *Ex parte Ogden*, she cites counsel's view that a woman's vote had been correctly counted since she was a person, was on the roll and did turn up to vote. But supposing, Justice Foster, argued, a Newfoundland dog had turned up to vote, claiming to be a person; or, added, Justice Windeyer, supposing it had been a dead person.

60 *Mabo and Others v The State of Queensland [No 2]* (1992) 175 CLR 1 (*Mabo*).

61 See the discussions of the High Court's *Mabo* decision in Margaret Stephenson and Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993).

difficulties.'[62] Writing on the bicentenary of European invasion, Roberta Sykes observed:

> The Black community sees the white legal system as part of their oppression. That legal system did not (in 1788) and does not (in 1988) protect the interests of the Black community.[63]

Academic commentators or advocates of legal change have been stunningly blind to the speed with which legal doctrine is made to accommodate to political expediency. Since 1975, when the elected federal government was dismissed from office, a dozen or more members of federal and state judicial office — all of them associated with the institutional gains of the labor movement — have discovered that their tenure is more fragile than they may once have supposed.[64] The Victorian State government has recently launched attacks on a number of sites hitherto deemed usefully independent of the day-to-day operation of government: the Equal Opportunity Commissioner,[65] the Director of Public Prosecutions,[66] the review tribunals and the machinery of freedom of information.[67] The State constitution is apparently to be amended to facilitate concealment of the public cost and the unopposed operation of a race involving motor cars;[68] and the State Attorney-General is reported to be surprised by references to such 'fuddy-duddy concepts as the [Westminster] division of powers.'[69]

In an attempt to strengthen the foundation of the currently predominant liberal model of law, Neil MacCormick explained the ultimate authority of legislative and judicial law making by reference to 'the substantial majority of at least the most powerful and influential groupings in our society.'[70] (From non-liberal perspectives there is instantly the problem of what makes a society 'ours' if it is controlled by the powerful and 'we' are not among them; but this is in brackets). If liberal models of law suppose that behind (though not necessarily completely determining) the existing legal rules and institutions, giving them their form and rendering them efficacious, there is the will of 'significant and powerful groupings', they will also suppose that any sudden changes of constitutional direction will be associated with those groupings. Changes in the Australian state eroding 'independent' constitutional restraints would be explained in the liberal model as reflecting shifts or restructurings in the forces by which authority is willed and sustained. Perhaps

62 Gary Foley, 'Aboriginal Affairs: The Farce Continues' in David Bennett (ed), *Cultural Studies Pluralism and Theory: Melbourne University Literary and Cultural Studies* (1993) vol 2.

63 Roberta Sykes, *Black Majority* (1989) 118.

64 Jocelynne Scutt (ed), *Murphy — A Radical Judge* (1987); Michael Kirby, 'The Removal of Justice Staples' (1990) 6 *Australian Bar Review* 1.

65 Moira Rayner, 'Middle Aged Ways' (1994) 3 *Australian Feminist Law Journal* 157, 168-72.

66 Jude McCulloch, Greg Connellan and Alastair Isles, 'Putting the Politics Back into Prosecution' (1994) 19 *Alternative Law Journal* 78.

67 Mark Bruer, 'Wade "no" to three tribunal members', *Age* (Melbourne), 25 March 1994; Paul Conroy, 'Wade aims at tribunal system', *Age* (Melbourne), 5 September 1994; Shane Green, 'Kennett exempts GP from controls', *Age* (Melbourne), 16 September 1994.

68 Green, above n 67.

69 Conroy, above n 67.

70 Neil MacCormick, *Legal Reasoning and Legal Theory* (1978) 56.

those forces found liberal democracy congenial, but now no longer do. Or it may be, still within the liberal model, what is revealed is what was always the case: that constitutional forms were never an adequate barrier against the forces behind the law that constitutional stories suggested. One might have expected the teaching of law to ponder and to begin at least to find space in the curriculum to study the social forces upon which the place of law may depend.

Instead, the ease with which the normative ingredients of constitutional propriety have been redescribed in lawyers' stories ought to provoke some reflexion among citizens about the efficacy of various legal forms of safeguards for citizenship and about the reliability of academic recommendations for their extension into juridically guarded bills of rights and charters of freedom. In the literature, judges believed to be tenured are after their dismissal by government 'discovered' by commentators not to have been tenured after all[71] (or the incident is not mentioned, as if it were some embarrassing lapse in etiquette[72]). Tribunals which had been considered judicial become quasi-administrative when it is necessary to subordinate them to the executive, and one suspects that objections based on the separation of powers will not be successful in preventing the changes. Law as a discipline has no apparent capacity to resist permeation by these crucial redescriptions more than momentarily, since its focus is almost exclusively on law as rules with authoritatively given meanings.[73] It has nothing to say about the forces which generate those meanings — other than, on some occasions, that they exist — how they have changed or may alter in the future. At the center of the discipline of law there is no space for theoretical argument about the history, politics or ethics of different kinds of regulation and the different ways in which they may be experienced.

V DISCIPLINARY EMANCIPATION

The cult of expertise and professionalism, as it is reproduced in law school education, rendered blandly unproblematic by the text/casebook tradition and policed by committees of barristers, solicitors and judges is,[74] according to the

[71] David Solomon, *The Political Impact of the High Court* (1992) ch 8.

[72] Peter Hanks, *Constitutional Law in Australia* (1991) 387 notes the tenure rules under which Justice Staples held office and notes the statutory changes of 1989, but omits any reference to Staples himself or his loss of office. Neither Murphy's fate, nor that of Staples, is noticed in Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (1990) although they remark that judges do not use their independence to protect individual liberties (31). In the context of the dismissals, it would seem less reprehensible — or less odd. Himself a judge, Murray Wilcox, in *An Australian Charter of Rights* (1993), purports to identify the shortcomings in the constitution which would necessitate a bill of rights without any mention of the 1975 dismissal, or those of Staples or the 11 Victorian tribunal members. Justice Michael Kirby of the NSW Court of Appeal represents a persistent and rather lonely exception: see *Age* (Melbourne), 29 November 1994.

[73] In this context, assurances about the value of a bill of rights reminds one of Gandhi's assessment of British government promises: cheques drawn on a bankrupt's account. We are told that a bill of rights will alter the legal culture, but as we saw in the 1980s, bankrupts are by nature optimistic. Since they are not dealing with their own money, they can, perhaps, afford to be.

[74] The compulsory elements of the LLB curriculum which are subject to extramural scrutiny vary, but average at around 65% of the whole curriculum. See the Centre for Legal Education paper, *The Cost of Legal Education in Australia* (1994) 59. A less direct form of control affects students who wish on graduating to enter employment with firms for whom course titles including words like 'women', 'poverty' and 'Aborigines' read like terrorist manifestos.

argument of my paper, in need of more than cosmetic change. The law discipline at the end of the twentieth century in Australia would be agreeable in its form, doctrines and priorities, to someone who had studied with John Austin at University College London or with C C Langdell at Harvard, in the nineteenth century. By contrast, a resurrected Arnold, Coleridge, or von Ranke would discover fundamental changes in their respective disciplines.

Recently in a number of humanities and social science disciplines, and in new, cross-disciplinary areas of study, recognition of the silencing effect of the more exuberantly imperialistic forms of knowledge has produced both introspection and a less exclusivist intellectualism, and the exploration of hitherto unnoticed actors and their perspectives. One thinks, of course, of Foucault and his invitation to imagine 'the stark impossibility of thinking that,'[75] but also of the interrogation of canons in, for example, critical literary theory,[76] cultural studies[77] and cultural histories of 'Englishness'.[78] And of the questioning of foundations and disciplinary claims to objectivity in modern historiography;[79] of the replacement of colonial history by reassessments of empire[80] and post-colonial theory;[81] and of the response to what Selma Leydesdorff has termed the call to a 'historiography of what is absent, what is forgotten.'[82]

The new directions have not retheorised disciplinary structures they seek to reform as somehow incomplete, like jigsaw puzzles some of whose pieces have unaccountably been lost but may be replaced — women, Aborigines, for example. The arguments they embody are either that the entire framework of investigation needs to be redesigned to accommodate the addition of what has been forgotten (along with some attention to the question of what the forgetting symptomatised),

[75] Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (1970) xv.

[76] Terry Eagleton, 'The Crisis of Contemporary Culture' (1992) 196 *New Left Review* 29; Spivak above n 17, ch 13.

[77] 'Cultural studies is committed to the study of the entire range of a society's arts, beliefs, institutions and communicative practices', crucially rejecting 'the exclusive equation of culture with high culture, [arguing] that all forms of cultural production need to be studied in relation to other cultural practices and to social and historical practices': Cary Nelson, Paula Triechler and Lawrence Grossberg (eds), *Cultural Studies* (1992) 4. In 'complex societies it has become clear that if we speak of culture as shared, we must ask "by whom?" "why?", "in what ways?" and "under what conditions?"': 'Introduction' in Nicholas Dirks, Geoff Eley and Sherry Ortner (eds), *Culture/Power/ History: A Reader in Contemporary Social Theory* (1994).

[78] Robert Colls and Philip Dodd (eds), *Englishness: Politics and Culture 1880-1920* (1986); Brian Doyle, *English and Englishness* (1989).

[79] See the collection of essays in Ellen Messer-Davidow, David Shumway and David Sylvan (eds), *Knowledges: Historical and Critical Studies in Disciplinarity* (1993); Paul Burke, *History and Social Theory* (1992).

[80] See, eg, Ronald Hyams, *Empire and Sexuality: The British Experience* (1990); John MacKenzie, *Propaganda and Empire: The Manipulation of British Public Opinion 1880-1960* (1984).

[81] Edward Said, *Orientalism: Western Conceptions of the Orient* (1978); Said, *Culture and Imperialism*, above n 54; Robert Young, *White Mythologies: Writing History and the West* (1990); Patrick Williams and Laura Chrisman (eds), *Colonial Discourse and Post-Colonial Theory* (1994). All make the point that *post*-colonialism remains the study of imperialism. The 'post-', as with the post-modernism which informs the present paper, refers to the critical perspective, not to a state of being.

[82] Selma Leydesdorff, 'Politics, Identification and the Writing of Women's History' in Anna Angerman *et al* (eds), *Current Issues in Women's History* (1989).

or, alternatively, that the notion of entirety itself should be abandoned[83] in favour of perspectival narratives among which, hopefully, constructive dialogues may emerge.[84]

Although not philosophically identical, the approaches have not dissimilar consequences in fragmenting and pluralising the disciplines within which or across which they operate, and in rendering explicit the political character of the sites from which knowing takes place.[85] In re-cognising 'English', for example, as something which grew out of the explicitly ethnic, nationalistic and class preoccupations of upper class nineteenth century Englishmen, or in noticing the racism and misogyny of imperial histories,[86] '[p]erhaps the astonishing arrogance of believing that it is others who have political assumptions, while you just take the stuff straight, has been somewhat eroded.'[87]

In beginning to rethink the law discipline, I have suggested that the distinction should be borne in mind between the practices of the academic, on the one hand, and of the solicitor or judge on the other. How, then, in a more emancipatory narrative, are subjects to be heard? Or how are we to imagine a pedagogical regime which both avoids complicity with official technologies of subject-production and simultaneously refuses to become the conscience of those technologies, the authority in the wings that sees the bad faith and the incompetence of the present and will vindicate the universal commitment to truth when its opportunity comes to produce a new subject?

We should be sceptical about the value of a discipline that is on an official payroll, offering solutions to authority's credibility problems: a charter of freedoms here; more women or non-Anglo judges there; a spot of sociological lubricant; a dab of philosophical polish. Of course there must be mechanics to oil the wheels, but they cannot be expected to provide deep solutions to the problems of engine pollution, smog and global warming, especially if they are consultants to the vehicle companies. Millenarian reformulations of the subject, too, have taught us to be suspicious. The new man, the free woman and the multicultural citizen are all scripted in someone's 'reality', but we are entitled to ask if it is 'really' us of whom they speak.

[83] Stephen Muecke, *Textual Spaces: Aboriginality and Cultural Studies* (1992); Tony Swain, *A Place for Strangers: Towards a History of Australian Aboriginal Being* (1993).

[84] Bearing in mind Judith Grbich's remarks about equality in dialogue in Judith Grbich, 'The Body in Legal Theory' (1992) 11 *University of Tasmania Law Review* 26.

[85] There is a recent summary of some of the social science arguments in Michael Root, *Philosophy of Social Science* (1993).

[86] Addressing those who are spoken for in the imperial narrative, Trinh T Minh-ha writes:

> You ... understand the dehumanisation of forced removal-relocation-reeducation-redefinition, the humiliation of having to falsify your own reality, your voice, you know. And often cannot *say* it. You try and keep on trying ... for if you don't, they will not fail to fill in the blank spaces and you will be said.

Trinh T Minh-ha, *Woman, Native, Other* (1989) 80.

[87] Eagleton, above n 76, 40.

VI HEARING THE SUBJECT

A question with which this paper began was that of how to avoid the contradiction of a discourse *in* which all subjects are constituted equally, but *by* which only some subjects seem authorised to speak about the constitution of their subjectivity. New specifications of the subject, from yet another site of authoritarian knowing are defined by the paper as *out* of the question. If one speaks of subjectivity in general, I have assumed, one speaks of positions identified by and within cultural practices. Delineating and distinguishing positions, working out what one ought to do because of who one is, for a particular purpose, is what I have referred to as regulation (rather than 'law', as if one could immediately prise it free from the technologies and politics of its production), and it is regulation which I suggest could provide the primary orientation for a broadened law discipline.

The complaint that regulation is much too broad an area can be met in a number of ways. First, lawyers, conventionally defined, have insisted upon their own centrality when issues of freedom and equality are raised. They can scarcely object if someone takes them seriously and insists that to speak of freedom and equality is to begin a conversation with enormous ramifications. Second, without meekly deferring to the officially proclaimed canonical declaration that represents itself as the official discourse about what is official discourse, there is no way of closing off inquiry by reference to assertions of authority. The question of what is relevant to the law discipline cannot be answered until we have first answered the questions: 'Relevant to whom? Relevant for what purpose?' Third, it is not denied that forms of inquiry, including pedagogical regimes, must have boundaries and criteria of truth. But as David Hume long ago pointed out,[88] where the boundaries are constructed is a matter which is open to choice: reason is the slave of the passions. Ultimate criteria of truth have eluded us and the discourses which contain justifications for intellectual closure are political and ethical.

It is the constitution of equality in the political order which provides the ethics of closure in the law discipline, I suggest: what it means, and to whom; how it may be accomplished. If the contradictorily inegalitarian fixation with the self-authenticating authority of certain professions is to be avoided, a broadened discipline of law could be constructed for the purpose of hearing a multiplicity of subject voices. This is different from knowing what they are going to say and saying it for them. Sofia explains what not to do, and I think her argument applies to unsilencing knowledges generally:

> [W]ell-meaning men have made the mistake of approaching feminism like any other field of knowledge: a topic to 'get on top of' and subsume in an efficient list of 'isms' of which one claims knowledge ... [but] a different approach to acquiring knowledges [is] reliant on negotiation rather than mastery ... [F]eminism is not a terrain to be conquered or a position to adopt, but a process to which one commits oneself: shuttling between norms which are constitutive

[88] See, eg, David Hume, *A Treatise of Human Nature* (1st published 1739, 1978 ed) book I, part IV, ss VI and VII.

> of one's very 'social identity', and the emergent, utopian, and not always fully articulated spaces of feminist theory and cultural practice.[89]

Teresa de Lauretis also argues for a processual view of subjectivity:

> [O]ne places oneself or is placed in social reality and so perceives ... as subjective those relations — material, economic and interpersonal — which are ... social and ... historical. The process is continuous. For each person ... subjectivity is an ongoing construction, not a fixed point of departure.[90]

What are the implications for reconstructing the law discipline? A first broadening move might be to look for absences in the master narrative. As Michele Wallace puts it, the 'gaps in the dominant discourse constitute signposts to where the bodies — that is, the bodies of those who have been ignored or negated — are buried.'[91] As the radical participants in the seventeenth century Army debates at Putney recognised, the rules of property frequently operate to exclude more people than they include.[92] But the excluded, though as much affected by the result, have generally had little influence in the construction of their exclusion; and in contrast to the sophisticated electronics of modern conventional titles registries, the register of disentitlement is, until one has second thoughts, invisibility and silence.

It is not possible, Spivak says,[93] for the subaltern to speak about his or her exploitation: his or her subalternity is produced by the deprivation of that possibility through the denial of education, articulacy, self-worth or personal safety. For present purposes, to demand that the silenced speak seems to me merely to compound their oppression. The first step in reconstructing law is instead to diagnose its own lack, its own failure even to imagine its meaning to those whom it deprives or the nature of the regulatory machinery of deprivation: merit, desert, IQ, capacity to pay, standing, etc.

From symptomatic absences, one might begin to notice significant presences. Holmes' 'bad man of Massachusetts' wanted to know what courts would decide: juridical outcomes, the schedule of outcomes patterning citizenship around entitlements and obligations which courts would enforce 'and nothing more pretentious' was what Holmes, via his bad man, meant by law.[94] The meaning is to be found, in other words, in the perception of 'what happens' formulated initially at least without professional gloss. The Realists were quite clear, though, that legal meanings were not to be looked for only in the utterances of judges. The capacity to cloak oneself with authority, to claim to speak in the name of the law, to designate 'the facts' and to inscribe a meaning for law upon subjects placed in a certain relation to one another, is produced within networks of power. For weakly

[89] Zoe Sofia, 'Position Envy and the Subsumption of Feminism' (1993) 4 *Arena Magazine* 36.

[90] Teresa de Lauretis, *Alice Doesn't: Feminism, Semiotics, Cinema* (1984) 159.

[91] Michele Wallace, *Invisibility Blues: From Pop to Theory* (1990) 216-7.

[92] Henry Brailsford, *The Levellers and the English Revolution* (C Hill ed, 1961); also on a similar theme, Margaret Davies, 'Feminist Appropriations: Law, Property and Personality' (1994) 3 *Social and Legal Studies* 365.

[93] Gayatri Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (1988).

[94] O W Holmes Jr, 'The Path of the Law' (1896-97) 10 *Harvard Law Review* 457.

positioned buyers or debtors, to give a banal example, the meaning of the law is frequently given by the seller or credit supplier.[95] Equal opportunity laws obtain their social meaning not only from the remedies they promise and the financial costs of access to them, but from the fear of retribution which deters precisely those who are unequal in power to their oppressors from using them.[96]

The examples could be multiplied. There is MacKinnon's work on rape and pornography, contrasting the official story about law's intent — the prohibition of rape and the protection of free speech — with the experience of women.[97] There is work by Judith Grbich[98] on disfigurement and Naomi Wolfe on beauty,[99] indicating how legality as it affects women tracks the topography of women's bodies as they are mapped by the regimes of the dominant culture regulating femininity. My point is not the high school/law school one that the law reflects public morality or opinion, which presumes the availability of a pristine national consensus on significant issues. I am suggesting the opposite, that we can begin to discern the boundaries of subordinated subject positions in a fragmented social order through an Orwellian reading of a legality which does not, it can be assumed, come from nowhere, but is created and given its official meanings from specific positions of dominance in class, gender and ethnic struggles. Just as Orwell's Ministry of Truth was the government propaganda arm in the novel, *Nineteen Eighty-Four*, so the laws which 'protect' women and aborigines have in practice operated to 'protect' them from their own emancipation.

To conclude there, however, is to ignore Foucault's point about resistance. One is produced as a knowing subject, of course, at the intersection of a multiplicity of practices, a field of force, perhaps, and what each of them means can only be determined in the context of the others. This sounds excessively mechanical and excessively individualistic. But to be able to be produced, to be able to become a knowing subject, means to be part of a culture of representations of experience, which exceeds the particular subject and the particular subjecting experience. One — the self — is never finally interpellated and can always escape through the retheorisation of experience, which, again, is a shared, culturally mediated act.

I note in conclusion of the paper two implications of these last remarks for the study of law. The first is that 'the law' needs to be studied — and as something of shifting rather than static meaning — in the context of, say, the collective renegotiation of aboriginalities or the politics of sexuality, gender, work and other identities, rather than the other way round. Second, since the dynamics of these resistances to power often register outside the structure of rules studied by the

[95] The officials of a bank from which the author obtained a mortgage some years ago were bewildered when told that they could not unilaterally alter the terms of the loan after completion of the legal formalities. 'But we do it all the time,' a senior official from head office said.

[96] See Margaret Thornton, 'The Indirection of Sex Discrimination' (1993) 12 *University of Tasmania Law Review* 88.

[97] Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); Catharine MacKinnon, *Only Words* (1993).

[98] See Grbich, above n 84.

[99] Naomi Wolfe, *The Beauty Myth: How Images of Beauty Are Used Against Women* (1990). See also Sandra Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (1990).

conventional law discipline, the counter-responses from those whose power is being subverted frequently seems inexplicable within conventional frameworks;[100] so much so, that, as I suggested earlier, they are often ignored in legal texts. But one should notice certain developments when popular activism closes in on the familiar formal symbols of political power, on legislative assemblies through the extensions of the franchise and the construction of working class parties, for example, or on judicial bodies through multiple tactics of delegitimation — documented claims of gender, class and ethnic bias, unrepresentativeness. When such developments take place, so the territory of privileged resistance moves: to the executive branch of government, or to shadowy forces, if one thinks of the threats to the Wilson[101] or Whitlam[102] governments, to the public bureaucracy or, through privatisation, to undisclosed structures of power whose rhetoric is full of references to the market and efficiency. The law discipline needs to concern itself with these shifts and displacements and if necessary to transform itself in the process.

[100] Just as, in economics, events which threaten the tightly drawn neatness of the equations are consigned to the chaotic world of 'externalities': see Brian Toohey, *Tumbling Dice: The Story of Modern Economic Policy* (1994) ch 1.

[101] Stephen Dorril and Robin Ramsay, *Smear! Wilson and the Secret State* (1992); Peter Wright, *Spycatcher* (1987) ch 22.

[102] John Pilger, *A Secret Country* (1989) ch 5.