BABIES AND BATHWATER: TRADITION OR PROGRESS IN LEGAL SCHOLARSHIP AND LEGAL EDUCATION?

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> "Every despotism justifies itself by claiming the power of salvation. Before salvation by the perfect society, there was salvation by the perfect god. One faction after another in history claims to represent perfection, to the immediate peril of those who do not. My salvation cannot tolerate your disbelief, for that is a threat to my salvation."
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> Alfred Kazin, "Not One of Us" (1984), 31 New York Review of Books, No. 10, 13, 16

1. The Current Debate on Legal Education

Formalism alone is no longer accepted by a substantial number of legal scholars as a satisfactory basis for legal scholarship. Does it follow that we should treat the study of law as simply another area of sociological, historical, economic, philosophical or political concern? Do we discard the whole of the tradition of Western European, or even common law scholarship? Or do we use that tradition as a base from which we can push outward the frontiers of understanding?

The study of law is valuable because it is the study of a working part of the social fabric rather than of models abstracted from reality; and any study which becomes too abstract becomes less valuable because it loses contact with the factual, or, put another way, divorces theory from practice. The place of theory in the study of law undoubtedly has been neglected, but the danger presented by some overreactions to the state of contemporary legal scholarship is that

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they would lead the study of law to the same state in which the discipline of economics currently finds itself — a sterile, purely normative and prescriptive study, which ignores human idiosyncrasy and lends itself to political manipulation by the entrenched interests of certain groups in society. The abstract and hyper-theoretical nature of much of modern economics has destroyed much that is valuable in that discipline and in society as a whole. The same should not happen to legal scholarship which must avoid the pitfalls of abstract theoreticism that has trapped economics. The study of law must remain, among other things, concrete and practical.

Another influence on contemporary thought about law is the appreciation that it is essentially political. This contains its own warnings of danger flowing from the acceptance of absolutist theories of law and the values which underpin various legal orders. This article is directed at those dangers. An overreaction to traditional approaches in legal scholarship by transforming it into an activity which is purely intellectual, concerned only with the search for a satisfactory social theory of law, may lead legal scholarship into becoming, like economics, largely an ideological weapon. To discard the formalist and positivist contribution to legal scholarship and legal education entirely is to throw out the baby with the bathwater. Moreover, it may discard the points of contact with practice which makes legal scholarship a valuable avenue for the expansion of understanding of society.

The legal realists, who flourished in the United States in the 1920s and 1930s,[1] taught us that the law can neither be reified, nor understood in any meaningful way, if it is isolated from the social order of which the legal order is a part. That message is the foundation of several contemporary approaches to legal scholarship, including the "socio-legal studies", "law and society" and "Critical Legal Studies" approaches.[2] It is, however, a message largely ignored in the British tradition of law teaching, which has been the major influence on legal scholarship and legal education in Australia. The

1. For an account of the Realist movement see W L. Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld & Nicholson, 1973).

2. These modern movement are the subject of R. Tomasic, "From Empiricism to the Quest for Theory: Towards a Synthesis in the Sociology of Law" (1983), 1 Aust. J.Law and Society 149. Though this article adopts a sociological perspective, it does give an overview of some of the more recent developments in non-formalist legal scholarship.

work of many Australian legal academics today still shows surprisingly little sign of the influence of this tradition,[3] though the work of the realists has itself been criticised as an exercise in cynicism.[4] The prevailing view still seems to be that legal education is predominantly the training of legal practitioners, and the attitudes of the practising profession tend to reflect that view. Among legal academics there is a growing belief that whatever the aims of legal education and legal scholarship may be, they must include the development of critical techniques and attitudes. These objectives should be as important within legal education, as they are in other areas of scholarship and higher education.

Some radical critics of legal education have been led by the dominance of formalist and professionally-dominated ideas in law schools to an over-reaction which may lead to the discarding of much that is good and valuable about legal education in this country. One writer[5] suggests that there may be little, if any, place for the practical in the sort of law schools we should be aiming for. I reject that proposition; rather, I would assert, with Goodrich,[6] that even within a "critical" approach to legal scholarship, the common law tradition is important.

I assume that legal scholarship cannot be confined to the study of legal rules, and that, in order to further understanding of the world, it must, in some sense, be a study of "law and society". That appellation is itself misleading, because it suggets that "law" and "society" are two separate and distinct realms. Most scholars who profess an interest in "law and society" intend that the subject of study should be primarily society, approached through a study of

3. See, e.g., Jude Wallace and John Fiocco, "Recent Criticisms of Formalism in Legal Theory and Legal Education" (1981), Adelaide L.Rev. 309; John Fiocco and Jude Wallace, "The American Contrast: A History of American Legal Education from an Australian Viewpoint"(1983), U. Tas.L.R. 260.

4. A. Fraser, "Legal Theory and Legal Practice" (1976), Arena 44-45, 123. Similar, and slightly more developed views may be found in A. Fraser, "The Legal Theory We Need Now"(1978) 40-41 Socialist Review 147. This is also a view put forward, with, perhaps, a little less thought and a little more ideological conviction, by some of the more extreme CLS writers, e.g. M G. Kelner, "Trashing"(1983), 36 Stanford L.Rev. 293.

5. A. Fraser, "Legal Amnesia: Modernism *versus* the Republican Tradition in Amercian Legal Thought"(1984), 60 *Telos* (Fall) 15.

6. P. Goodrich, *Reading the Law* (Oxford: Blackwells, 1986); compare D.M. Trubek, "Where the Action is: Critical Legal Studies and Empiricism" (1983), 36 Stanford L.Rev. 320.

the legal order, as it operates within a wider social order, of which it is an essential, and a constitutive part.[7]

There is a definite place in legal education for some instruction in the technical rules of law. Knowledge of these technical rules is essential to any worthwhile form of scholarly activity if it is to be called "legal", while legal education should not be dominated by the "manpower requirements" of the profession. Without knowledge of technical rules, no one can gain a proper understanding of the specific operations of the legal order, let alone change them.

Further, the existence of university law schools with significant numbers of scholars on their staffs depends in the long run upon a supply of students. The idea of the university as a group of cloistered academics pursuing the search of knowledge has always been an ideal. Research and scholarship in universities depends entirely upon the demand for education from students. Other than in the most exceptional circumstances, universities will not subsidise those who are "pure" scholars. It is expected that scholars will pass on the fruits of their endeavours to students.[8] Law students undertake a study of law at a university, for the most part, only if the qualification they obtain will assist them in finding employment. A university degree in law which leaves students ignorant of technical rules will not be accepted as the basis of entry to professional practice.

Since the early 1970s, there has been a debate, mainly in North America, which has divided legal academia against itself. This debate has been initiated by a group of legal scholars reacting against the dominant tradition of legal education in the United States, and the failure to pursue the road indicated by the legal realists to a point at which it can provide help in understanding the social functions of law. This movement, associated with the Critical Legal Studies Conference, has led to a considerable amount of literature

7. P. O'Malley, *Law, Capitalism and Democracy*, (Sydney: George Allen & Unwin, 1983), is a very useful Australian text, which contains an account of the contemporary state of this type of work in Australia and elsewhere.

8. See text at n. 55 below.

in the United States.[9] It has provoked some extreme reactions,[10] which ignore many of the valuable insights which the Critical Legal Studies Movement has provided. It has also had some spin-offs in the United Kingdom.[11] However, as Krygier has pointed out: "...Critical Legal Studies is a strikingly American movement, not simply because its members live on that side of the Atlantic, but because its roots, targets and preoccupations are almost exclusively American."[12]

The British adherents of the Critical Legal Studies Movement seem to recognize this, and draw selectively from the insights on law provided by the American scholars. The impact of the Critical Legal Studies Movement in Australia is not yet apparent, except in the case of a few, as yet isolated, individuals. It can be argued that, however one may view law, its nature and operation are to some extent affected by its social environment, and that what may be true of law in one society is not necessarily true in another.

What has been said in other places is useful and helpful for Australian legal educators and legal scholars, but it cannot be a direct guide for Australian practice. The conditions under which legal educators and legal scholars work in Australia differ from those in other countries and necessary adjustments must be made to cope with these differences. That is at the core of some of the criticisms in this article.

It is also important to distinguish between "aims" and "methods". The two are related, but any method adopted for the achievement of a particular end may differ from other methods which may be more successful. This is particularly relevant to the discussion of a development in thinking about legal scholarship and legal education in America which appears to be at the cutting edge of contemporary activity in that country, namely the "Critical Legal

9. The principal contributions, to 1984, are listed in Alan Hunt's "Bibliography" (1984), 47 Mod.L.Rev. 369. Subsequent important collections are the special issues of two American journals, (1984) 36 Stanford L.Rev. (No. 1) and (1984) 62 Texas L.Rev. (No. 8).

10. P. Carrington, "Of Law and the River" (1984), 34 J. Legal Ed. 222; see also (1985), 35 J. Legal Ed. 1.

11. Especially Alan Hunt, "The Theory of Critical Legal Studies" (1986), 6 Oxford J. Legal Studies 1; and P Goodrich, *Reading the Law* (Oxford: Blackwell, 1986). Others are listed at n. 26 below.

12. M. Krygier, "Critical Legal Studies and Social Theory — A Response to Alan Hunt" (1987), 7 Oxford J. Legal Studies 26, 131.

Studies" (henceforth "CLS") Movement. Later some comments made by "critical" legal scholars and reactions to those views are considered.[13]

2. Theory in the study of law

The scholars who criticize traditional legal scholarship as "a-theoretical" hold all shades of political opinion, but come predominantly from the political left. They find that the truncated version of "theory" embodied in that tradition fails to take account of the place of the legal order within a wider social order. They wish to locate the legal order in a wider context, so that more general philosophical or theoretical conceptions can be related to it. The traditional forms of legal scholarship are therefore unsatisfactory.[14] To this extent I agree. But in seeking to compensate for the lack of theory implied in formalist approaches some contemporary legal scholars have tended to concentrate on the formulation of theories at the expense of the substance to which those theories must be applied. This approach to scholarship may have as little to offer as traditional formalist scholarship.

This article is a plea for common sense and a return to the task of understanding more about the world, rather than a quest for theoretical perfection or total rationality.[15] In legal scholarship

13. Alan Friedman, "Truth and Mystification in Legal Scholarship" (1981), 90 Yale L.J. 1229, which is a comment on M. Tushnet, "Legal Scholarship; Its Causes and Cure" (1981), 90 Yale L.J. 1205. He asserts that the sort of intellectual legal scholarship he advocates can take place only in a few "élite" law schools in the United States. Fraser, *op cit.*, n. 5, advances a basically similar view of legal scholarship; he writes principally also of the United States. In Australia, despite the self-serving claims of members of some law schools, there are not, nor are there likely to be, any "élite" law schools in the sense that Harvard, Yale, Columbia and a few other U.S. law schools are élite. I am far from convinced that we need or want such institutions in Australia. In a comment at a symposium on Legal Education held at Yale University in 1981, Alan Friedman expressed a reaction to the "navel-gazing" which characterizes much contemporary American scholarship. That reaction is close to my own position.

14. The reasons for this are apparent in many of the works referred to in n. 9 above, especially the symposium whose papers are reproduced in the Yale symposium issue. For once, I find myself agreeing with Judge Posner, "The Recent Situation in Legal Scholarship" (1981), 90 Yale L.J. 1113 and with Stone, "From a Language Perspective" (1981), 90 Yale L.J. 1149, which deal with much the same matters as does Tushnet, op. cit. n. 13. Posner has recently taken his ideas a little further, and argues that law *cannot be* an "autonomous discipline": "The Decline of Law as an Autonomous Discipline (1987), 100 Harv. L.Rev. 761.

15. The most influential attack on "theoreticism" is E.P. Thompson, "The Poverty of Theory" in *The Poverty of Theory and other Essays* (London: Merlin Press, 1978), whose central thesis I agree with wholeheartedly.

theory plays a vital role, but it need not dominate what scholars do. To some extent the search for understanding must be a realistic and eclectic process which depends largely on the examination of empirical evidence gathered from observation of the physical world and of human activity. Those who engage in the search for understanding must exercise both doubt and critical skills to penetrate the illusion which often passes for reality. In this task they need theory as a tool, especially in the building of hypotheses which can be examined, and, through the process of empirical examination, further our understanding. However, an assumption about the purpose of the world, or of human existence, can be no more than an assumption or hypothesis. It cannot properly be seen as Truth.

There are two extremes of values in contemporary legal scholarship. The more intelligent of the contemporary thinkers about law admit the shortcomings in the extreme positions and seek to modify them. The more "progressive" are heavily influenced by thinking about law (and, indeed, of thinking generally in the social sciences) which is "theoretical". Legal scholarship, like the more empiricist approaches to social science, has tended to ignore the value of theory, in order to concentrate on organizing specific material at a relatively low level of abstraction. The more "conservative" writers, point, again correctly, to the artificiality of theory and the perception that theory is so preoccupied with rationality and logical form that facts are ignored. The way ahead lies between these extremes.

The movement in legal scholarship which appears to have attracted most recent attention is the CLS movement and specifically the theory (or group of theories) which originates with this group, now given the hardly felicitous name of "legal nihilism".[16] Fraser's prescription for legal education[17] is part of a general reaction against the assumptions, tactics and program of the CLS movement and especially its "nihilism". It is based on his own vision

16. Roberto Mangabeira Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L.Rev. 561. Another "critical" account, possibly more tolerant of the empiricism of English-speaking intellectuals, but expressing views quite compatible with those of Unger, has been provided by Mark Tushnet, "Post-Realist Legal Scholarship" (1979), 20 J. Soc'y Public Teachers of L. 20, and a variety of "critical" or "political" approaches to the study of law has been published as D. Kairys, *The Poltics of Law. A Progressive Critique* (New York: Pantheon, 1982). See also the collections referred to in n. 9.

17. Expressed in Fraser, op. cit., n. 5, 45-46.

of the radical change that is needed in society, a vision with which, for reasons too numerous to specify here, I cannot agree. That disagreement is based on a difference of value preferences. This article concentrates on his specific attack on contemporary legal scholarship, and his apparent assertion that only his own prescription is intellectually legitimate.

Those who study the legal order seek to relate that order to other aspects of human activity. In the course of their work they will perceive causal links and inconsistencies, but the ultimate result of the examination will depend upon those perceptions, so that questions of epistemology become important.

In this respect, study of the legal order is no different from any other study of human activity. English-speaking legal scholars, faced with new challenges, now find that their questions are not confined to specific aspects of rules and institutions, but also include theoretical and epistemological questions. They are asking "why?" as well as "what?" and "how?" and recognize that the lack of clear theoretical underpinnings for the hypotheses which they advance in the course of providing answers.

One Australian legal scholar has suggested, in relation to Australia, that the fault lies with the "a-theoretical and empiricist teaching of law in Australian Law Schools"[18]. He suggests that neither "legal realism" nor a pluralistic approach will provide any satisfactory solution. Rather, a single theoretical approach which encompasses practice is required. Such criticisms of "mainstream" English-speaking legal scholarship occur elsewhere, too.[19] The appeal for greater attention to theory in law is generally motivated

18. D. Brown, "Judging the Judges" (1984), 3 *Aust. Soc'y* 4, 21, 23.

19. Unger, op. cit., n. 16; Social Sciences and Humanities Research Council of Canada, Consultative Group on Research and Education in Law (Chairman, H.W. Arthurs), *Law and Learning* (Ottawa, SSHRCC, 1983); P. McAusland, "Administrative Lawyers" (1978) 9 Cambrian L.Rev. 41; P. McAuslan, "Administrative Law, Collective Consumption and Judicial Policy" (1983), 46 Mod. L. Rev. 1; Tony Prosser, "Towards a Critical Public Law" (1982) J. L. and Soc'y 1; P. Goodrich, op. cit.,; Roger Cotterell, "English Conceptions of the Role of Theory in Legal Analysis" (1983), 46 Mod.L.Rev. 681 are just a few who follow this line, and they are taken from British periodicals. Fraser's "The Legal Theory We Need Now" (op. cit. n. 4) has had considerable influence. See also K. Klare, "Law making as Praxis" (summer, 1979) Telos 124, and various works by a number of people associated with the Critical Legal Studies Movement, especially Unger, Tushnet, and Duncan Kennedy. Fraser (op. cit.) refers to many of these. D. Kairys, *The Politics of Law, A Progressive Critique* (New York: Pantheon, 1982) typifies a political approach to law, but is more concerned with "law in action" than with legal theory. The same is probably true of the Australian *Critique of Law* (Sydney: Critique of Law Collective, 1978).

by a realization that prevailing legal positivism does not always assist, and may cloud, a fuller understanding of the legal order. Some theory may assist, but it is important that those who seek to formulate such theories do not overreact to the a-theoretical state of affairs, and fall into the same pit as the hyper-theoretical economists and other social scientists.

Recently Lester Thurow[20] has pointed out the sterility and abstraction of much of the work being done by economists, both academic and in government service. The thrust of this criticism is that much work in contemporary economics consists of the construction of theoretical models which are used not to assist in understanding but to prescribe what people should do, and that economists are seeking to make reality accord with theory. This is an inversion of the traditional role of theory.

Thurow says, "Economics is like other disciplines in that it attempts to deduce theories that allow it to describe and predict reality, but it differs from all other fields because it also has a theory of what ought to be."[21] There ought to be a perfect market, say the theoreticians, but Thurow propounds the commonsense view that this cannot be more than an abstract and theoretical ideal. Thurow's criticism is based largely on his observation that some economists try to mould actual practices or eliminate them so that what happens in the world approximates to the model or ideal of a perfect market.

In this context, it is more accurate to speak of "the legal order" rather than "law", for the wider expression includes attitudes, practices and understandings, as well as rules and institutions established and enforced by the state. Even so, the "legal order" is more concrete than the economists' "market", and also more clearly the result of the influences of social groups or classes.

The positivist view, that law is essentially the command of a sovereign, enforced by the possibility of an official sanction, ignores much of what constitutes the legal order. The legal realists destroyed not only the view that judges simply declare law, but

20. Lester Thurow, *Dangerous Currents The State of Economics* (New York: Random House, 1983). Extracts have been published in (1984) 3 Aust. Soc'y, 3 (part 1) and (1984), 3 Aust. Soc'y 4 (part 2).

21 Op cit. n. 20, in Aust. Soc'y 4, 34-35.

demonstrated that they make law. They also perceived that other factors, such as the behaviour of litigants, the forensic skills of lawyers, and the cultural attitudes and values of judges, influence the course of the legal order. Thus they destroyed the basis of formalism and opened the way to examination of the legal order as part of a wider social order, and for the application of wider social theory. However, the law of concern to the positivists, and the law studied by most law students, comprised primarily the precedent-making decisions of apellate courts, which are the miniscule part of the work of legal institutions and processes. While the realists emphasized the study of "law in action" rather than "law in the books"[22] their successors in the CLS movement emphasize attention to the normative and political functions of legal rules and processes.

Realism, though discredited by many academic lawyers, had a delayed effect on some practitioners. The 1960s saw increased concern with the legal rights of disadvantaged people. The lawyers involved in this process often started with the assumption that in practice as well as in rhetoric, all enjoyed real (as opposed to purely formal) equality before the law. Substantive rights and remedies were available to the disadvantaged so long as they could obtain access to the machinery of the law.

Increased access proved not to be a complete solution, and lawyers, both practising and academic, came to see an inherent bias in the law against the interest of the disadvantaged. This led them to seek political reform, and to support their claims they began to assemble empirical evidence of unfairness in the law. Both their training as lawyers and political reality reinforced this search for evidence. This led them to learn the methods of social research, which in turn showed the value of social theory in the organization of the empirical data. Lawyers and legal scholars need to be able to present evidence in other than an anecdotal way.

This process led to an examination of the relation between law and values. Many lawyers, both practising and academic, found the task too hard. They were not equipped for the work, and there was enough challenge for many of them in the study of legal doc-

22. See n. 1. above.

trine. The rapid growth in state intervention had produced vast bodies of rules which required doctrinal analysis of the traditional kind. Yet some would not leave the question of the place of law in society. They realized that unless they confronted questions which traditional legal and jurisprudential scholarship had not solved, understanding of the legal order would remain circumscribed. They became dissatisfied not only with traditional and positivist accounts of the structure of the legal order, but also with what they found to be inadequate accounts of law provided by the legal realists, and by Marxist and sociological studies. The quest became one for a satisfactory theory of law.

The main product of the search for theory (given that a single theory will seldom provide a completely satisfactory explanation) is that various rational and methodical accounts of the legal order based on assumptions external to the legal order are emerging and greatly assist our understanding. However, as social scientists appreciate, the search for theory is not easy. Concentration on theoretical perfection, if it ignores reality or practicality, is an easy, but unsatisfactory, way out. The current state of economics illustrates this point only too well.

There has been considerable debate about whether there can be a truly "scientific" study of social activities which, by definition, involve a human element. In some of the "social sciences" — particularly in economics, but also in some other disciplines, such as sociology, psychology and political science, a proportion of practitioners of those disciplines show an alarming tendency to ignore the human element. All of these disciplines, to a greater or lesser extent, are concerned with the activities of human beings, idiosyncratic individuals who may be intelligent or stupid, committed or alienated, revolutionary or reactionary, but each possessed of emotions, a capacity to think and to express feelings and views. In this subject-matter lies the main difference between "physical" and "social" sciences. Max Weber, when developing his theory of "ideal types" recognized this human element, but recently social scientists have tended to ignore or disregard it. They have become obsessed with theoretical perfection and quantitative, positivist studies. If something cannot be counted, it does not count. As a result, theory becomes distorted and cannot usefully be applied in increasing our understanding, for the result is nonsense.

The legal order has had some experiences of attempts to rationalize it. In most of the world which was not at some time colonized by the British, the prevailing legal system is based on the codes introduced to Europe by Napoleon, but used, always in the name of "Rationalisation", not only by those who wished to modernise the state in the interest of the bourgeoisie, but also by those who sought to prop up and strengthen the *anciens régimes*.[23] Codes have been spread by colonists or through conscious adoption by states, such as Japan and Turkey, which, in the course of modernization, have sought the most modern or rational legal system for the new society they have sought to build. The codes had their origin in an attempt to produce a semblance of logic and order from the chaos of rules and institutions which represented the pre-revolutionary legal system in France. The model was the idealized form of Roman law distilled through the abstract studies carried on in European universities from the beginnings of the Renaissance. In practice, the strictly rational schemes embodied in the codes have either had to succumb to adaptation to human needs in order to survive, or have become the nightmarish inhuman machines portrayed by Kafka, and apparently functioning in some of the "socialist" countries of Eastern Europe, which maintained many of the forms and institutions of bourgeois law. Codification was the panacea suggested by Jeremy Bentham to correct the anomalies in and inefficiencies of the English legal system, and movements for law reform from time to time revive suggestions that the Anglo-American common law could be improved, or at least made more rational, by codification.[24]

The basis of Thurow's critique of such contemporary economics, especially the neo-classical variety, seems similarly to be based on the idea that in practice it is either difficult or undesirable totally to order human activity in a totally rational way. Thurow portrays economics as having misconceived the role of rationality and theory. His basic criticism is that in emphasizing theoretical models, the neo-classical economists seek to present a situation where "instead

23. H. E. Strakosch, *State Absolutism and the Rule of Law* (Sydney: Sydney University Press, 1967).
24. S. J. Stoljar, (ed) *Problems of Codification* (Canberra: Australian National University Press, 1977).

of adjusting theory to reality, reality is adjusted to theory".[25] Thurow does not deny that theory has a proper role. He lists the following ways in which theory may be used:

1. Economic models can be used to describe and organize events and ideas.
2. They can be used to understand what would happen *in a controlled environment* [my emphasis].
3. They can be used to predict what will happen in the real world.
4. They can be used in design policies to influence and control economic events.
5. They can be used as normative models to indicate how a perfectly rational person should act and how his activities should be organized.

Physicists can predict heavenly motion, but they cannot control or influence it. A model of how *homo economicus* ought to act does not necessarily let the economist accurately describe how *homo sapiens* does in fact act.[26]

He goes on to point out that models can be used in one or more of these ways. Models can include the unknown or the unquantifiable, but in the end, the prescriptive devices remain models, not descriptions of the world. Thurow's specific attack is on the use of models, not on the use of theory as a whole, but the model is the manifestation of the theory used when it is proposed to apply the theory to some practical situation in a prescriptive way.

If references to "law" are substituted for the references to economics, we are left with a statement of the appropriate use of theoretical models in the study of law. Lawyers, as opposed both to second-order scholars of law and to "pure" economists, are, of course, directly concerned with the solution of real-life problems, on a largely case-by-case basis. But they are, like economists, also to some extent involved in the creation of policy, not only in the political sense, but also because on occasions the particular case becomes the problem case on the margin which is the vehicle for the creation of a new rule of precedent by the judges. It is important for lawyers, and especially judges, to be aware of the wider

25. Op. cit. n. 18, Aust. Soc'y 4, 30.
26. Ibid.

implications of the individual case, so that the particular decision does not result in the generation of a legal norm with effects that may be undesirable. Concern with the particular, the winning of the case for the client, has led to a professional myopia among the practising profession which members carry with them when they become judges. Legal scholarship, and legal education, should not be confined to a formalistic or a positivistic study of rules and institutions. It does not follow that the study of rules and institutions has no importance.

The lesson which lawyers should learn from recent critiques is that if the search for theoretical correctness and purity becomes the sole object of the exercise, and practical considerations — often called "externalities" by economists — are ignored, the results of that exercise become counter-productive. Highly abstract conceptualization may have a place, but its use is limited if it loses touch with reality. When, as Thurow suggests is the case with economics, it becomes prescriptive, it is positively dangerous unless it is closely related to practice.

The highly abstract approach which seems to be the vogue of many social science scholars today shows a strong tendency to lose touch with realities. The reaction against a-theoretical empiricism, seen correctly as itself value-loaded,[27] seems to result in a tendency to disregard the need for empirical evidence against which theories, and especially theoretical models, can be measured. When this is coupled with a tendency to normatize or prescribe on the basis of theory, the result is a move to force human behaviour into a theoretically constricted mould.

Feyerabend, whose principal work[28] lends much to the ideas expressed here, was originally a physicist, and wrote about "science". It is clear that I do not regard a great deal of human social activity as being susceptible to the methods of physical scientific research, but it is equally clear that the object of Feyerabend's criticism is what he describes[29] as "critical rationality", as applied to the whole

27 Perhaps the clearest account of this may be found in E. H. Carr, *What is History?*, (Hammondsworth: Penguin, 1984), Ch. 1.

28. *Against Method* (London: N.L.B., 1975); Cf. A.W. Gouldner, *The Future of Intellectuals and the Rise of the New Class* (London: Macmillan, 1979), which adopts a rather different perspective, while acknowledging the significance of "critical rationalism".

29. Ibid. 308.

of the quest for understanding.[30] The subtitle of his book is "Outline of an anarchistic [and he is at pains to point out that he uses this term in a *philosophical*, rather than a *political* sense] theory of knowledge". At the basis of his thesis is the following statement:

> There is no idea, however ancient and absurd that is not capable of improving our knowledge. The whole history of thought is absorbed into science [perhaps we should read "knowledge" for the full sense of what it means[31]] – and is used for improving every single theory. Nor is political interference rejected. It may be needed to overcome the chauvinism of science that resists alternatives to the status quo.[32]

He is not criticizing the use of theory as providing a framework within which ideas about the world can be fitted so that our understanding is improved, but he rejects the notion that a single "rational" or "scientific" method or theory can provide a framework that is appropriate to solve every problem. This is the basis of critical rationalism (which he describes as the "new orthodoxy") and which leads to the rejection of ideas or hypotheses about the world which cannot be accommodated within the framework of Aristotelian rationality. In the task of expanding understanding of the world, we need a variety of tools, theories and frameworks, and in the process of education (discussed below), students should become aware of a number of traditions of thought. Orthodoxy of any kind can only limit the ways in which understanding can increase. If that orthodoxy requires the discarding of old ideas, the search for understanding is similarly limited. Feyerabend specifically warns against such rejection,[33] and accepts that political action may be necessary. However, there is no warrant for reading into his thesis any notion that the political action should be used to eliminate or discredit any "orthodox" view – such an implication would be contradictory – but rather to *establish* alternative views.

Although opposed to the adoption of a single theory as the basis for explanation (and, *a fortiori*, to the use of theories as the basis for prescription, which he sees as the necessary consequence of the adoption of any theoretical orthodoxy) Feyerabend also rejects naive realism or philosophical empiricism. It is clear that he is aware of

30. Ibid. 187-188
31. Ibid., 50
32 Ibid., 47.
33. Ibid., fn. 2.

what he calls "the problem of observation" which flows from the view that what an individual sees as "fact" is the product of ideology, socialization and language.[34] Indeed, his book is full of examples of this.

The study of the legal order is essentially the study of institutionalized and socially enforced values. To some extent, the study of institutionalized values also seems to be the subject of the work of economists. It is wrong to assume that a study of such subject-matter can be value-free. If we are properly to understand what is said by economists and lawyers, the values which they hold, and which they find underpinning the objects of their study, need to be articulated. Once that is done, there is a proper ground for criticism of the findings of, say, positivist legal scholars, or the normative prescriptions of economists. The values that are the foundation of the normative aspects of the discourse in which respectively lawyers and economists engage is all-important.

Theory can be very important and helpful in understanding the world, provided that we know something about both the way the tool is constructed and the way in which it is used. It is probably no accident that the lawyers who seek a more theoretical approach to the study of law wish to expose the value-loaded basis of the legal system, because an appreciation of these values is essential if lawyers are to be expected to work for reform of the law, and if any such reforms are to be accepted by the community. Similarly, many economists in the neo-classical mould speak as if what they say is the absolute truth, and criticisms like Thurow's threaten them; the state of the emperor's dress becomes a matter of debate.

3. What legal scholarship may entail

Prescription for legal scholarship might lead to a situation where a heterogeneous approach to the pursuit of understanding, which is essential to scholarship, would become impossible. Again, the determination to deprecate what is bad in the existing state of affairs leads to a suggestion that the whole — the bad and any good — should be jettisoned.

A little autobiography may explain my approach to legal education and scholarship and the formation of that approach, and why

34. Ibid., 56.

I oppose any attempts to destroy heterogeneity in legal scholarship. By heterogeneity I mean the tolerance of a number of different approaches, in this case to a common task of furthering understanding of the legal order, or of social order through the legal order. In this context I am referring to the practice of politics within an academic institution, not to the position of an individual scholar. It is perfectly legitimate for a scholar to adopt a particular moral or political stance and to adhere to it in the course of intellectual activity. It is both illegitimate and counter-productive for that individual to insist that the whole of a scholarly community adhere to the same political or moral stance. Others may express a view of the relative worth of particular approaches to scholarship, but this should not prevent any individual from following a particular path. Nor should it lead to the requirement that a particular approach be followed be made a condition of employment or of advancement in an academic career, as this would lead to the institution becoming a self-perpetuating clique of like-minded people in an atmosphere lacking creative tension. That, in fact, is the problem with many law schools.

My first experience as a full-time teacher of law was in a developing country where a colonial legal culture and legal system had been imposed upon a people whose cultural traditions were profoundly different from those dominant in the metropolitan society. The clash of moral, political and cultural values which resulted from this imposition was immediately obvious to anyone who was obliged to explain the purpose and effect of legal rules to students who had no knowledge or understanding of the society or culture in which those legal rules evolved and operated. A common reaction was for the teacher to begin to question the basis of the legal order, not only in developing countries, but also in the cultures in which the legal system was more highly "developed".

The idea that law could play a role in development — and the reaction, that law was an instrument of cultural colonization — has influenced many of those who have gone on to take a radical or critical approach to the study of law.[35] In developing countries

35. E.g. D. M. Trubek, "Towards a Social Theory of Law: An Essay on the Study of Development" (1972), 82 Yale L.J. 1; D. Trubek and M. Galanter, "Scholars in Self-Estrangement" (1976), Wisc. L. Rev. 1062; J. Goldring, *Law and Cultural Colonialism. Questioning some Assumptions About Law and Devleopment* (Sydney: Australian Society of Legal Philosophy, 1976); P. Fitzpatrick, *Law and State in Papua New Guinea* (London: Academic Press, 1981).

the imposed law has seldom been wholly absorbed into popular culture, though parts of it may be. The question confronting the law teacher then, is whether by offering instruction in an alien legal system, one is helping to destroy another culture. (Many of us came to see that this process of cultural destruction affected the developed, as well as the developing countries.)

We accepted the inevitability of a legal system, which, in Weber's terms, would be modern and largely rational. The consequence was that there should be a legal profession. What intellectual equipment would such a legal profession need? Whether or not the indigenous lawyers would immediately opt to become part of a comprador class, we felt it was necessary to equip them with the critical tools to enable them to make a relatively informed choice. It was not sufficient to teach technical skills, but because they were familiar only with their own culture, we also had to teach the context — cultural, political, economic — in which the skills would be exercised and the purpose for which the skills would be exercised. This type of approach stayed with us when we returned to teach in developed countries. Perhaps the most articulate presentation of such a view is William Twining's article, "Pericles and the Plumber"[36] — written after his experience in East Africa. It is no accident that many of those associated with "Critical Legal Studies" in its various forms have worked in developing countries.

Those involved in the movement for a new approach to the study of law (not necessarily with developing country experience) have sought to question the assumptions of existing legal institutions, and especially legal education. The legal realists have had influence: so have the "policy-élite" views of Lasswell and McDougal.[37] They accept that if the legal system is to change, external pressure is insufficient. The legal culture has its own dynamic force; the existing professional organizations have their own interests which they fight to preserve. The rules and the procedures will not be changed without specific attention to those interests, and this process must be undertaken by people with technical skills of a high level as well as a broad understanding of wider contexts and purposes.

36. (1967), 83 L.Q. Rev. 394.

37. H. Lasswell and M. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest" (1945), Yale L.J. 203.

This presupposes that things can be changed for the better. It is inevitable that they will change in some way. History does not stand still. Therefore the aim is to provide insights and knowledge that will equip those who may influence the process of change, so that society as a whole will benefit. This requires the acquisition of an attitude which leads to understanding, in the sense that institutions and events can be seen in terms of their antecedents and consequences. It also requires an understanding of the detailed mechanics of how those institutions have come to operate as they do and how they are likely to operate. These techniques are not specific to any one culture or discipline. Central to understanding in the broader sense is an awareness of politics and its importance, and of the historical factors that produce that politics. These are also closely related to what might be called "culture".

The objectives of specifically *legal* scholarship might be transposed, with little change, to other disciplines which operate in the practical, as opposed to the purely speculative, world. Similar views are held in other disciplines. In the physical and biological sciences there is an increasing move by thinking scholars to achieve a measure of "social responsibility" in what they do. This very process requries those who wish to achieve it to move from the directly practical and technical to a more contemplative frame of reference. But this move does not require a neglect of the practical. This would involve a move from one incomplete frame of reference to another, rather than a broadening of the frame of reference.

We are told philosophy is the posing of questions about human activity: it is a "second-order" study, rather than a first-order or empirical study such as those which concern scientists and historians. Philosophy is the study, therefore, of the concepts used in the first-order studies. This may be a narrow use of "philosophy" because it separates the theoretical from the practical, the conceptual from the empirical. Would the work of legal scholars still be *legal* scholarship if it were to take place in isolation from the practical operation of the legal order?

Fraser writes:

> Professional law schools in America have rarely represented anything that would be recognized as a community of scholars. One can be sure that they never will, unless critical legal scholars cease to imagine that their role is to train radical lawyers and seek instead to constitute an autonomous

> tradition of legal scholarship. The cultivation of the virtues appropriate to legal scholarship as a worthwhile activity in its own right will continue to be neglected so long as conservative and radical law teachers alike regard themselves as bound to satisfy the manpower requirements of their respective fractional groupings within the legal profession. That subordination of scholarly values to the supposedly more practical task of preparing radical lawyers is all the more suprising given the fairly obvious fact that, whatever else law schools might be able to do, they certainly cannot teach people how to practise law, much less give them a concrete appreciation of what it means to be a "good lawyer".[38]

This appears to be the central thrust of an argument for a radical change in the nature of modern legal scholarship, both "traditional" and "critical". Fraser is right when he suggests that legal scholars must not accept the self-imposed boundaries of the legal culture: they must question the assumptions which underlie not only the legal order but also the culture which the operation of that order has produced. The operation of the aspects of the legal order must be measured against standards external to itself. This is, of course, the message of legal realism, which is the direct ancestor of the movements variously described as "law in context", "law in society" or "socio-legal studies", which, though they have developed differently, were originally directed to the same end. Yet Fraser clearly calls for more than this, and in the course of his attack on American legal scholarship raises a number of questions about what legal scholars should be doing. At the same time, his imprecise prescription of a new order of legal scholarship would seem to lead to a situation where the scholars, and their students, would lack the intellectual equipment to study law "in its own right" or in any other way.

The first question is the place of the professional law school. Fraser is a Canadian working in Australia, but his main interest appears to be in the development of legal thought in the United States. His statement occurs in an article criticizing the specifically American CLS Movement in a paper which really is specific to the United States, and cannot automatically be applied to other

38. Op. cit., n. 5, 45-6. This may be compared with the approach taken by some of the contributions to the Yale Law School symposium (n. 9) above, who also point out that if American law teachers can be characterized as "scholars", in a specific sense, their scholarship is of a different order Posner (op. cit., n. 14) takes this view, as does Ackerman, "The Marketplace of Ideas" (1981), 90 Yale L J 1131, but neither would go as far as Fraser, nor even Tushnet, whose opposition to traditional and formalistic scholarship is at least as strong as Fraser's.

places. My concern is with legal education in Australia. This immediately raises other questions. While trends in the United States influence Australia in many ways — and American constitutionalism and culture have influenced much in Australia — other influences, particularly British, continue to operate in Australia. Legal education and legal scholarship in Australia differ from that both in North America and Britain, though the extent of these differences has not been examined sufficiently closely to enable exact comparisons to be made.

Fraser nowhere states what he understands by "legal scholarship" or "academic community". Legal scholarship has a long tradition: study of Roman law was important in the mediaeval universities of Europe. Study of the living law is a relatively recent introduction to universities in the English-speaking world, outside Scotland. It has certainly been heavily influenced by the demands of the practising profession, at least in the United States and Australia, where many law schools were established essentially as credentialling bodies for the professions. But what is legal scholarship? Can it be anything other than a quest for the understanding of the legal order? Those who have style themselves as scholars of the law have, as Fraser is well aware, set out to undertake a systematic, or "scientific" study of the rules of law. This very process has produced not only the CLS movement, but virtually all of those engaged in the current debate about the nature and functions of legal scholarship.

Fraser asserts that the study of law "in its own right" is a worthwhile scholarly activity. It is not exactly clear what Fraser means by "autonomous" or "in its own right". From the context it seems that it means autonomous of the manpower needs of the legal profession, rather than autonomous of other disciplines. In "The Legal Theory We Need Now" he has suggested that what *radical* legal scholars need is to embark on a systematic study of the forms of legal domination and "a legal theory that acknowledges the real and developmental nature of human moral consciousness".[39] Apart from the problematic and controversial nature of the concept of a "human moral consciousness" — a rationalist or naturalistic assumption — this suggests that he envisages legal scholarship which

39. Op. cit., n. 4, 183-184.

seeks primarily to understand the legal order, rather than primarily to train lawyers. Thus he creates an artificial dichotomy between two objectives which seem not to be inconsistent, and may, indeed, be mutually dependent. His criticisms of the narrow professional basis of legal scholarship are not dissimilar to those of the Arthurs Committee in Canada, and by a number of independent writers in England.[40] Though they may be welcomed by legal scholars who see themselves as "radical" or "critical", many of the arguments apply with equal force to those who do not.

Fraser's argument is particularly distressing, not because he perceives shortcomings in contemporary approaches, nor because, while advancing a backward-looking prescription, he emphasizes the need for *radical* change. (He criticises Unger, in essence, for being insufficiently radical.) Rather, Fraser's prescription is distressing because, to the extent that it articulates any programme at all, it seems to be a programme which both ignores the professional role of law schools and which sees little place for the technical, as opposed to the abstract. These are false dichotomies.

Those who do not normally think of themselves as "radical" are not prepared to throw over all that has gone before unless convinced that what is prescribed for the future is better. Fraser's proposal for the future is valuable only to the extent that it is seen as part of a dialectical process, rather than as providing an ultimate solution.

This article seeks, among other things, to provide an antithesis. I am not convinced that the existing social order is so bad that virtually anything else would be better, as the logical consequences of Fraser's view would suggest. He appears to suggest that a utopia should and could be established now, both in the world as a whole, and in the universe of legal scholarship in particular. Fraser's presentation suggests that he is the prophet of an instant heaven, which provides an intellectual opiate for a small band of scholars seeking release from the arduous task of ameliorating the legal order through solid and practical work. In the *Theses on Feuerbach*,[41] Marx said that philosophers had merely interpreted the world, but the point

40. See n. 25 above.

41. K. Marx, *Theses on Feuerbach* (No. XI) in K. Marx and F. Engels, *Selected works in Two Volumes* (Moscow: Foreign Languages Publishing House, 1951).

was to change it. This much of Marxist thinking has penetrated the work of the critical legal scholars, who make no attempt to hide the fact that their aims are transformative. Not all critical legal scholars are Marxist — Unger is certainly not — but their scholarship is sufficiently mature to take account of the Marx's critique of theory divorced from practice. It is not clear where Fraser stands in this debate. His earlier work[42] shows that he considers himself a radical, one, perhaps, who has moved beyond Marxism, but the latest paper shows him to be a radical of thought rather than of action — if he can be called "radical" at all.

Is Fraser's charge against American law schools supported by the evidence? Can the same charges be made out against Australian law schools? Is he correct in saying that the aim of the CLS Movement represents an abandonment of scholarly purpose, in the sense that scholarship is a collegial search for understanding? Is work less scholarly because, in addition to increasing our understanding, it also has a practical application? Fraser's own work has been publicly available, and has clearly influenced many, including most of those who have had contact with him. This does not mean that they entirely accept his conclusions, or that they necessarily agree with the assumptions he appears to make about scholarship in general and legal scholarship in particular.

Fraser himself has suggested that views such as his on the contemporary legal order and the place of the individual within it have "...become the anachronistic dream of a few nostalgic academics...."[43] Fraser's view of the academy also seems to be an anachronistic dream. Many of his criticisms are credible, but it is impossible to ignore the demands of practicality. Certainly it is permissible for anyone to resist change which is seen as a threat to values or interests which are worthy of preservation. But what is the point of turning the clock back? The academy as a cloistered and secluded body of celibates joined in a collective search for understanding was probably always an ideal. The university or college, as distinct from the monastery, has traditionally attracted students, who are an essential part of the process of discovery. Traditionally it was the learning *process* which was as important

42. Op. cit., n. 4.

43. "The Legal Theory We Need Now", op. cit., n. 4, 166.

for the students as the *substance* of what they learned. Can Fraser deny that the process of developing a critical spirit of enquiry is part of the essence of scholarly work and the key to understanding?

Measured by this standard, can any legal scholarship meet the test? Systematic analysis of positive rules of law of itself can be seen as scholarly in the wider sense only if it is seen as a necessary step in understanding, not as an end in itself. It is understanding, but understanding only at one level — the "first-order" level mentioned above. The shortcomings of formalism have already been discussed.

To assert that formalism and other forms of legal positivism are an unsatisfactory theoretical basis if it is the only approach to the study of law is not to destroy the importance of understanding the mechanisms through which the law operates, both in (formalist) theory and in practice. Even if we accept that the objective of legal scholarship should be the study of the forms of legal domination, examination of the historical and other contexts in which those forms operate is an essential part of the undertaking. Study of the actual internal operation of those forms is equally essential. In this respect the work of scholars in the positivist tradition is valuable, even indispensable, if we are to have a complete understanding of the legal order, as is the work of empirical scholars of a more sociological and historical bent. The various systematizations and analyses of the particularities of the legal order provide an essential part of the basic data of legal scholarship, presented in a way that is readily understandable. Without it, a scholar seeking to take a more holistic approach would be at a severe disadvantage, because that scholar would have to undertake a similar systematization or analysis of the nature of legal rules in order to complete a study of the operation or impact of those rules. Those who attack the positivist tradition correctly point to the limitations inherent in it. It cannot give a complete picture or account of how the legal order operates, or of "the forms of legal domination". It does not attempt to do so, and that is its major failing. It would be a virtually impossible task for a single scholar or body of scholars to attempt to master the whole of a body of knowledge in such a way that the understanding of that body is complete and sufficiently representative of the whole of the legal order, so that generalizations can properly be drawn from the particular studies. Scholars working in the physical

sciences face similar problems. If one can accept that there is a "science of law" — an assumption made by the positivists, but now questioned — the basis upon which generalizations are founded is an important methodological question.

Nonetheless, positivism has made a distinct contribution to the scholarly task of furthering understanding of and through the legal order, and may continue to assist that task. It has provided a framework for better understanding the specifics of the legal order. Scholarship involves both the expansion of the boundaries of understanding and an increase in the specificity of understanding. It is not clear that Fraser shares this view. He would limit, though not eliminate completely, the second part of this twofold aim. On my view then, the positivist contribution is a valid part of scholarship, even though its concern is with the internal, rather than the external dimensions of the task of developing understanding.

A theme runs through Fraser's work which I find difficult to accept, both in the specific context of legal scholarship and more generally in relation to scholarly endeavour and the place of the academy. This is his emphasis on the "intellectual" rather than the professional aspects of legal education, at times amounting to a distrust of the practical.

I have worked in two newer Australian universities where the law school is the only, or virtually the only, part of the university concerned with professional training as well as "purer" academic contemplation. I have also worked in a college of advanced education where the emphasis was on "applied research" and training. I have often met arguments that there is no place in the universities for professional training. Universities, in the view of those who make such assertions, should be concerned with "pure" research rather than the application of ideas. A different argument, more common in the advanced education sector, but equally misplaced, in my view, is that educational institutions must give great weight to the demands of potential employers of students, and that in consequence teaching and research must be directed primarily to solving immediate problems.

Of the two arguments, the second is easier to dismiss. In relation to law, Twining in "Pericles and the Plumber,"[44] has already

44. Op. cit., n. 36.

disposed of it. If the training process results merely in graduates who have technical skills, the sytems which they operate after they leave the education sytem will at best keep pace with current demands, and with luck those graduates may make some adaptation to future needs. They will lack formal development of the capacity of flexibility, and also of the analytical and critical skills necessary for future planning and for the understanding of the phenomena which give rise to social needs. Not only will the students lack this capacity, but also the academic staff, if they ever had these capacities, will lose them as they apply their talents to tasks which do not require broader analyses or citical skills. Because the legal order is a human construct which encompasses both principles and skills which operate in a practical environment, an understanding of the "whole" of law — including its operation — requires, if not practical experience, a foundation of understanding the practical operation. This foundation must include the mechanical techniques as well as the abstract theory.

The first argument, in theory, has more to commend it. If one accepts that a university is a collegial community of scholars collectively engaged in the search for understanding, then it could be argued, though falsely, that any element of practicality has little, if any, place in its task. Understanding includes not only questions of how ideas are ordered, but also of how things work. Until mediaeval times it could be said that philosophy, literally the love of knowledge, encompassed all forms of learning other than the purely mechanical, though it presupposes the mechanical. The body of knowledge included the traditional abstract disciplines of mathematics, logic and rhetoric. But human curiosity and the search for understanding led mankind to apply the abstract disciplines: physics, politics, history, music, geography, theology, physiology and anatomy, chemistry, psychology — and law — became legitimate objects of study and contemplation of those who were originally philosophers. As the body of knowledge grew, the efforts of scholars became more specialized. Empirical studies, first in the physical and biological sciences, and later in the "social" sciences, were accepted as a legitimate part of academic work, and the relationship between abstract and theoretical speculation and events as observed became an accepted part of the academic activity.

At some stage the influence of the professions came to be felt by the English-speaking academies, especially newer institutions.

Some members of the professions were graduates, though not in law, of the universities, who had studied under the scholars and had been influenced by the results of their intellectual efforts. When they sought to enhance their own status and value systems, the academy seemed to offer a means of credentialling which offered both social and practical benefits. Fraser's paper gives an account and an explanation of this process. Of the professions, the practice of law probably had the least claim to academic status. The traditional objects of the academic study of law — jurisprudence, Roman law, constitutional law, international law — had little relevance to the practice of most solicitors or barristers. The study of the common law, in English-speaking countries, though originally included in the academic law curriculum, came to dominate it in the 19th and 20th centuries because of the desire of the profession for law graduates with a solid grounding in these areas of practical relevance. The profession itself, in North America and Australia, provided the teachers. The universities provided the environment and academic respectability. However, it was and is common that in other professional schools (medicine, architecture) the part-time practitioner/teacher still plays an important role. The result is a curriculum whose form and content has been shaped to an undue degree by members of a working profession. This may be wrong, but does it mean that no professional school has a proper place in the university? And to return to an assumption underlying Fraser's question, does it necessarily follow that the concern of scholars with questions directly relevant to the practice of law, i.e. the operation of the legal order, has no proper place in the university?

This may be to misread Fraser's argument. An alternative version, consistent with what he has put forward in other contexts, is that the practical operation of legal rules as a form of domination should be the focus of the study of the development of legal culture. I would agree to the extent that a study with such a focus could be part, but not the whole, of the study of law. However, the general thrust of Fraser's argument appears to be that any practical study of law is merely a product of the dictates of the manpower needs of the practising profession. That view is unhelpful, and, in my view, inaccurate. He may be objecting to the traditional structuring of discussions about law, and suggesting that these be broken down and reconstituted. Again, there can be no intelec-

tual objection to this, provided that one remains aware that the traditional structuring of the law and the language that arises from this structuring has become an essential part of the legal culture.[45] Legal practice, and the activities of the legal profession, are also part of that culture and a proper subject of academic study.

It is not a complete answer to say that many contemporary universtities have professional schools. A more satisfactory answer is that understanding the contemporary world does require the study, to some extent in a detailed and specific way, of the physical nature of the world, and of the operation of the social order. "Law in action" is necessarily a part of the social order, and therefore a legitimate object for academic attention. Other arguments made in this article suggest that either a purely theoretical or a purely doctrinal study is not helpful in increasing understanding. It is not illegitimate for a scholar, even in the strictest sense, to seek understanding through study of and reflection upon, say, the operation of the legal order or of some specific part of it. I do not take Fraser as disagreeing with this proposition in principle, though some of his assertions do not seem consistent with it.

Fraser asserts also that law schools "cannot teach people to practise law, much less give them a concrete appreciation of what it is to be a 'good lawyer' ".[46] In part, he is right. It certainly is true that some American law schools did see themselves as having the role of teaching students to be lawyers, both in terms of instruction in technique and of professional socialization. The same process has not been carried to the same extent in Australia, partly because of English influence. The English law schools have never seen themselves solely as breeding grounds for the practising profession, and the profession has never seen the university law schools as the sole source of recruits or as providing the whole foundation for a career in legal practice. In Australia, the law degree is seen as a foundation for legal practice, but not as a sufficient condition. The profession has always assumed that something more is required and has provided this, often in the desultory form of articles of

45. E.g. Duncan Kennedy, "The Structure of Blackstone's Commentaries" (1979), 28 Buffalo L Rev. 209; see also his "Form and Substance in Private Law Adjudication" (1976), 89 Harv. L. Rev. 1685.

46. Op. cit., n 47.

clerkship or pupillage, and more recently in formal practical training courses which make no pretence at being academic. The profession should do more in the provision of practical training.

Fraser's attack, then, is directed against the form of legal education, but also against its substance and against the process of professional socialization, especially in America. The United States (but neither Canada nor Australia) has a long tradition of full-time law teachers. The emergence of such a group is a recent development in Australia. Because of basic education common to practitioners and teachers and the factors mentioned above, law teachers have felt a need to continue to provide courses which are largely descriptive, and which neither challenge basic assumptions nor seek to relate what is described to a wider social environment. The part-time teachers taught what they knew from their own perspective. Most part- and full-time teachers failed to see the limitations of this approach. This resulted in the recycling of the same ideas from one generation to the next. As the succeeding generations included both practitioners and teachers, the latter were not exposed to new ideas. As indicated elsewhere, the legal realists, and others who followed through their ideas, came to question some of the assumptions, and this led some teachers to adopt a different approach to legal education.

The legal profession, by the very process of its socialization, is resistant to, or at least suspicious of, change. The greater the degree to which its members saw "the law" as a separate, self-contained body of rules, the less able, in general, they were to see the benefits of a broader approach, particularly an approach which sees law as a part of the social order, and which adopts a multi-disciplinary methodology in seeking to understand it. Lawyers often do not welcome challenge to their assumptions about legal education or about the legal order.

In the United States, the domination of the law schools by the profession is largely informal, but extremely strong, because of the dependence of most law schools on alumni donations to provide financial support, especially to attract faculty of high quality. In one sense this could be seen as an element of the republican tradition in American law, which Fraser values so highly, though no doubt he would agree that the contemporary role of law alumni associations as fund-raisers is consistent with the breakdown of that

tradition. When the scholars and the practitioners are drawn from the same group, it is extremely difficult for a young lawyer with aspirations to a scholarly career to resist the financial attractions of private practice. This has always been a problem for all professional schools and is another factor in the persistence of the appointment of part-time staff. In Australia, universities and law schools are not so dependent on alumni donations. In the United States alumni associations have great informal influence on the appointment of deans, and less directly on other appointments and curriculum. In Australia, the legal profession has always provided more than its share both of politicians — who play a substantial role in the operation of universities — and of the members of senates and councils of universities. Only one of the Australian law faculties does not include judges, representatives of the professional associations, and other leading practitioners, on its policy-making body. Therefore the influence of the practising profession over academic institutions remains strong but it is quite clearly institutionalized. It is not often a power which is exercised directly, but the possibility hangs *in terrorem* over the schools.

In any case, for reasons already alluded to, there is little need for the profession to exercise power. The majority of law teachers have internalized the values and attitude of the legal profession, of which they see themselves as a branch.

Fraser's criticism must be seen in this light. Even members of the CLS movement, at which the bulk of his comments are directed, see themselves as lawyers first. What Fraser is saying is that if there is to be progress in legal scholarship, law teachers must reformulate their own attitudes, so that they see themselves primarily as scholars rather than lawyers. For him, the two roles are incompatible. This view is examined shortly.

For some of the reasons already mentioned, many law teachers see a need to retain credibility with the practising profession, and further, believe that they can only do so if they do not challenge the basic ethos of the profession and the assumptions which have been the foundation of traditional legal education. Some of them also believe that they have an obligation to their students not to depart too radically from accepted modes of legal education. For some, this is because they consider that their task is to provide the students with what the students expect: a course of studies which

will be the basis for a career in legal practice. Others fear that if they do not, students will not seek to enter their law schools.

Again, these arguments can be supported to some extent, but should not dominate the choices which law schools and members of their teaching staff must make from time to time. Students, as mentioned already, are a vital part of the law school. Their views must be given some weight, though it must always be realized that they have not been through the formative experiences which can be expected to give members of the academic staff greater and deeper apprecition of what they are doing. At present, both in Australia and in North America, the demand for places in law schools greatly exceeds the number of places available, so that it is highly unlikely that the numbers of students will decline. However, it may be that some of the academically more able students will seek to avoid law schools which are not approved by the profession, especially as law students in Australia tend to have family contacts with practising lawyers.[47] Conversely, there is some evidence that a few extremely able students seek out the more innovative law schools, such as Warwick in England, and Macquarie in Australia, even though they would be admitted to more "prestigious" schools, simply because they are looking for a different and more challenging course of studies.

If, however, the practising profession or the courts, which control admission to practice, were to deny recognition to the courses offered by any particular law school, one would expect a decline in the number of students seeking to enter that school, and the disappointment of students who have entered on a course of studies in a particular law school in the legitimate expectation that successful completion of the course will exempt them from any requirement of completing professional examinations. The possibility of such an event does act as a deterrent to change in Australian law schools. In the United States, where an applicant for admission to practice needs both a law degree approved by the American Bar Association and a pass in the state bar exam, admission requirements do not present an impediment to law students. But in Australia students

47. J. Goldring, "Admissions Policy", in Law Council of Australia, *Legal Education in Australia* (Melbourne: Law Council Foundation, 1976); "An Updated Social Profile of Students Entering Law Courses" (1986), 29 Aust. Universities Rev. 2, 38.

other than those in the Department of Legal Studies at La Trobe Unviersity, which is avowedly not a professional law school, have an expectation that a law degree will provide the foundation for a professional qualification. The law schools themselves maintain some degree of self-regulation, but this is directed more at length of course, and quality of facilities and teaching, than to approaches to teaching and to curriculum. Finally, anyone who had fulfilled the requirements of a law degree course worth the name should be able to satisfy the requirements of a professional examination, since, for reasons given above, the study of law at a university should result in every student developing the necessary technical skills as part of what she or he learns in the process of developing an understanding of the legal order.

A further difficulty with the professional influence on the academic study of law lies in the nature of the object of that study. The body of rules of law themselves are based on notions of authority. Any proper scholarly examination of the legal order, especially if it is in any degree radical or critical, but necessarily if it has any pretensions to intellectual vigour, must question the basis of that authority, both internally and externally. Otto Kahn-Freund, an outstanding legal scholar, indicated the nature of that dilemma in his retirement address, "Reflections on Legal Education".[48] Kahn-Freund, as a committed democratic socialist and disciple of the jurist/politician Karl Renner, is not a figure to be discounted by those on the political left, but he was able to explain the dilemma facing those who seek to pursue legal scholarship in a university.

In his own work, which included the highly abstract sub-discipline of comparative law, as well as more concrete studies in labour law and conflict of laws, Kahn-Freund demonstrated an ability to maintain a critical attitude, without becoming an unquestioning "servant of the law", as most practising lawyers need to be. Yet he lost contact neither with the practicalities nor with the political or theoretical significance of the work he was doing. While scholars may need to depart from traditional thinking about law, and even at times to re-conceptualize the law, their relevance and the value of their work becomes questionable once they lose contact with the law in action.

48. (1966), 29 Mod. L.Rev. 121.

Thus we return to the question of what legal scholarship might require. It certainly requires, as an intellectual activity concerned with a body of knowledge, a broad and interdisciplinary approach. The study of the law in isolation from the social and cultural environment cannot lead to a full understanding of law. It also requires an understanding of the internal operations of the legal order. We can make these assertions, however, only if we ask not only what the role of legal scholarship might be, but also what the role of the law school, and the place of legal scholarship within it, may be.

It is possible to think of a law school as an institution whose purpose is simply to further the understanding of the social order through a detached study of the legal order — of rules of law, etc. — without giving any regard to a professional role for such an institution. To some extent, this is the role which Blackstone envisaged when he accepted the Vinerian Chair at Oxford: the provision of studies which were essential to the education of a gentleman. Some years ago, I asserted that some understanding of the legal order is still an important and desirable part of any general education.[49] This is also the role of some of the law faculties of European universities, which traditonally have much less emphasis on the practical, and whose academic staff are much more concerned with doctrinal and theoretical questions. In England and Australasia, only the Department of Legal Studies at La Trobe University has been established with such a role, though it also provides "service" courses for degree programmes in commerce and education. There is surely a proper and legitimate role for such institutions.

Fraser's prescription for legal education should be seen primarily as an over-reaction to traditional views of legal education. The implication which can reasonably be drawn from what he says is that the type of "critically rational" study which he proposes, with its Aristotelian, teleological foundation, will correct the incorrect situation. Yet because it is a prescription, it reduces, almost to the greatest extent possible, the degree of choice which remains for the individual about the way in which that individual will see the world. Of course, the same criticism could be levelled at a large number of prescriptions about legal, and other, sorts of education.

49 "Learning Law and Learning About Law" (1979), 16 Education News 12, 8.

The concept of "legal education" as suggested above may be contradictory, in that it seeks, or should seek, both to be a general education and a professional training. In so far as it is a professional training, the nature of the legal order dictates much of what is required to be learned by way of technical skills. If general education is to proceed by way of a study of the social order through a specific study of aspects of the legal order, a certain degree of mechanical competence in the technicalities of a particular legal system is a prerequisite. Yet, once this is overcome, and there is no doubt that those technicalities do involve a constitutive element, Australian legal education can still provide a general education and, indeed, some technical expertise is necessary if it is satisfactorily to do so. We cannot hope to achieve salvation through perfect rationality if we are to preserve human individuality and other human values. Here, again, the philosopher-physicist Feyerabend provides sound advice. The idea that legal education, so long as it is also to any extent professional education, can be general education is probably something that Feyerabend would not accept. But even given this difference, it is possible, and, I think, desirable, to apply to contemporary Australian legal education much of what he says about general education:

> But one thing must be avoided at all costs: the special standards which define special subjects and special professions must not be allowed to permeate *general* education and they must not be made the defining property of a "well-educated man". General education should prepare a citizen to *choose between* the standards, or to find his way in a society that contains groups committed to various standards *but it must under no condition bend his mind so that it conforms to the standard of one particular group*. The standards will be *considered*, they will be *discussed*, children will be encouraged to get proficiency in the most important subjects, but only as one gets proficiency in a game, that is, without serious commitment and without robbing the mind of its ability to play other games as well....[50]

If Australian legal education is to continue to take place in the universities, and is to perform a dual function, Feyerabend's prescription presents problems. But if one assumes that the two functions can be combined, it is vital that no single theory or approach, whether it be positivist, formalist, or "Critical" (either in the sense used by Habermas or by the CLS Movement) should be allowed to dominate, and that no commitment be required of

50. Op. cit., n. 36, 216-218 Emphasis in original.

either staff or students. To do so simply turns education into indoctrination, theory into ideology.[51] Another quotation from this passage by Feyerabend may also be relevant: "*Charlatans* have existed at all times and in the most tightly-knit professions...this is especially true of the new 'revolutionaries' and their 'reform' of the Universities. Their fault is that they are puritans and *not* that they are libertines...."[52]

Does the university law school have any role in professional training? It is possible to argue that it can and should, without accepting the dominant role of the profession in matters of course design and content. Certainly the role of professional socialization is not a proper conscious role for the law schools even if, to some extent, it is inevitable.[53] That role is very much a function of the desire of many of the law students themselves, though to some extent their teachers do provide a role-model. Until fairly recently, with a few notable exceptions, the role-model was of a lawyer rather than a scholar. Law schools must increasingly be independent of the practising profession, in determining their curricula and in their task of developing a questioning or critical attitude. Even if this does not lead legal scholars to "radical" stances such as that of Fraser or of the CLS movement, it will and should destroy the identity of the law school with the practising profession and replace it with

51. Peter Singer, in "Teaching About Human Rights" in A. Tay (ed.) *Teaching Human Rights* (Canberra: AGPS, 1981), takes a similar view. While denying that educators can or should be morally neutral, he attempts to draw a line between "education" and "indoctrination". I would support this view, but implicit in what both Fraser and members of the CLS movement write (see the article by Kennedy referred to at n. 53, below) is that there must be some "counter-indoctrination" to meet the "hegemonic" inculcation of dominant values by existing educational institutions. In a university, I should have thought it sufficient to indicate the existence of this hegemonic indoctrination, and to let academics and students draw their own conclusions.

52. Op cit , n. 36, 219. Emphasis in original.

53 I am not certain that I agree entirely with Duncan Kennedy, another inspiration of the Critical Legal Studies Movement, in his prescription for Legal Education, "Legal Education as Training for Hierarchy" in Kairys, op. cit. His approach presupposes another form of socialization, this time, in a "critical" or radical way. I find difficulty with the idea that education should set out to impse any system of values, other than the value of the questioning and critical attitudes of scholarship, which can be applied to other areas of activity or endeavour. In my view the purpose of education should be to expose students to a variety of perspectives and to encourage them to apply critical attitudes to all. This gives them the equipment with which to make a relatively informed choice. The environment in which students receive their education will, no doubt, be part of the social conditioning which will affect their choice and their perceptions of it. Its underlying values need to be articulated and recognized Kennedy's criticism is mainly of the fact that the values embodied in a traditional legal education are not articulated, though he is also critical of those values.

a situation where there will be mutual respect and co-operation, including the willingness of the one group to learn from the other. It will benefit both. Legal scholars will develop a broader perspective, and practitioners will at least become aware of both positive and negative aspects of the legal order in which their role is integral. Discussion of transformation of the legal order can then take place in the open. Because of the nature of the legal order, and its instrumental function in relation to politics, there will, no doubt, be political struggles both within and outside legal institutions. If there is a need for "destabilization", as advocated by Unger, it can occur in an environment where it is used wisely and taken seriously and not dismissed as extremist or anarchist machination or subversion. Openness and rational discussion should assist the reformist process of transformation which is advocated by the CLS movement and many others who take a critical view of the legal order.

Justice O.W. Holmes of the Supreme Judicial Court of Massachusetts, at the opening of a law school in 1897, after speaking in general terms about the relationship of law and morals, and generally about the need for a broad and historical approach to the law, said:

> The way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations, by the help of jurisprudence; next to discover from history how it has come to be what it is; and finally, so far as you can, to consider the ends which the several rules seek to accomplish, the reasons why those ends are desired, what is given up to gain them, and whether they are worth the price. We have too little theory in the law rather than too much, especially in this final branch of study.[54]

What the leading mind of the common law said 90 years ago still rings true, even if, as he predicted, times and the nature of the legal order have changed. Theory, curiosity, and imagination are needed in legal scholarship. But the immediate object of study remains the legal order and doctrine. Since Holmes spoke, the second and the third elements of his prescription, under the influence of the practising profession, have been neglected. Practicality has become dominant. Fraser, and other critics of contemporary legal education, abhor this change. It is deplorable that the other essen-

54 "The Path of the Law" (1987), 10 Harv L. Rev 457, 476.

tial elements of legal scholarship have been so subordinated. But, in order to rectify the imbalance, it is not necessary completely to discard the practical or doctrinal element, which seems to be a result of the over-reaction to the lack of what Holmes called "theory" in legal education. For intellectual as well as practical reasons, the practical and technical can and must have a place in the law school.

Concern with the practical aspect of what actually happens in the day-to-day operation of the legal order is essential if what legal scholars do is to be a first-order, rather than a second-order study. We may talk of legal language and legal concepts as a second-order study, but this categorization cannot apply to the operation of the legal order. If we seek understanding of the forms of legal domination we are necessarily involved in a first-order study, yet there are passages in some of Fraser's writing which suggest that only second-order studies are appropriate activities for the academy. This view is tenable neither as a matter of practical reality, nor, more importantly, in principle, for it would exclude from the proper scope of academic work all work in the physical and biological sciences. What he seems to object to is not so much a concern with practicalities, but rather a system in which a particular type of practicality — the specific immediate needs of the practising legal profession — has come to dominate the activities of law schools. No doubt his reaction has been heightened by particular instances, but his objection is neither new nor isolated. It is, indeed, shared by many, notably the Arthurs Committee in Canada. What jars is the extreme and absolutist style in which it is presented.

The sort of experience which the law school provides for students is the real "professional" role of the law school. This role is quite compatible, indeed congruent, with the role of the university. It is to provide an environment in which students develop a critical, questioning attitude, leaving no assumption unchallenged. They do so through a specific examination of particular aspects of the legal order. Legal scholarship is essential if students are to have this experience, and, as the development of the students' understanding is the immediate way in which the scholars' progress in understanding the world is disseminated, legal scholarship and legal education are intertwined. If we know the objectives of legal education, then we also know some of the principal objectives of legal scholarship. In my view the object of legal education is the prepara-

tion of a group of people who have the capacity to understand the legal order and its operation, and to make use of that knowledge and understanding for whatever purposes they choose to implement. If the process of education is sufficiently full, the values which they develop in the course of their education will come to the fore in this process. These particular studies need not necessarily be selected according to traditional divisions of legal study: indeed the experience of the Macquarie University Law School has been that to take a functional, rather than a traditional division of the areas of study has produced great benefits for students and teachers. This process should continue.

Posner[55] states that law teachers, by and large, are interested more in teaching than in what he calls "scholarship", while "scientific" scholars — including, but not limited to, economists and philosophers — are more concerned with research and publication. Ackerman, in his commentary on Posner's paper,[56] echoes and elaborates the point. Fraser would take much the same view. The papers in the *Yale Law Journal* ascribe this to the fact that "traditional" legal scholars find little satisfaction in what they do. However, it is a fact that in many areas of the university teaching is underemphasized, and under-rewarded. Attention to teaching may mark the "professional" school off from the purely academic, but the reason may well be that academics in non-professional schools see their published research as the only way of spreading their contribution to the search for knowledge. Academics in professional schools are conscious that their students will not only carry forward a body of knowledge and a way of thinking they have acquired in the course of their education, but they will also apply them in practice. This practice, as much as the published work (the value of which Ackerman properly questions[57]) of those scholars, is their contribution to the growth of understanding. It is also part of the reproduction of a culture to which it can be presumed legal scholars attach some value. While the weight and attention given to teaching in law — and other professional — schools is not a complete substitute for published and scholarly work, it is surely

55. R. Posner, "The Present Situation in Legal Scholarship" (1981), 90 Yale L.J. 1113.
56. Op. cit., n. 46.
57. Cf. the Arthurs Report, n. 25.

something to be emulated, rather than downgraded, in other parts of the academy.

Although the institution of the law school should be independent of the institutions of the practising profession, and although the staff of the law school should not see themselves in the role of practising lawyers (either successful or failed), this does not mean that either a "purely" academic school or one which, in the sense in which I use it here, is "professional", should remove itself entirely from concern with doctrinal law or law as it is practised. The tendency of law schools to confine themselves to narrow, doctrinal, positivistic studies, which is criticised by Fraser, by the CLS movement, by Twining, by the Arthurs report in Canada, and by Goodrich, has produced a reaction. Fraser's statement, reproduced above, is one view, perhaps extreme, but increasingly attractive to some. In it, however, the baby is thrown out with the bathwater. Because traditional formalistic and positivistic approaches to the study of law do not and never could produce a satisfactorily full understanding of the legal order, there is an over-zealous tendency to discard any vestige of doctrinal or positivistic study, and any interest in or relationship with the practising profession. Any move in this direction would be counter-productive, *not* because of any of the negative aspects of the relationship between the practising profession and the law schools which has led to the present situation, but simply because it will inevitably lead to ignorance and lack of understanding of that aspect of human activity which it is the business of legal scholars to understand. If we are to understand the legal order, we must know it. If we cut ourselves off from an integral part of it and cause distrust and alienation between the law schools and the professions, we will find it harder to come to terms with the subject of our scholarly attention. In turn, the degree of understanding which we pass on to our students will be less. This does not mean that any legal scholar should permit herself or himself to be captured by the attitudes, practices and values of the legal profession. It does mean that experience in practice before embarking on a scholarly career is to be valued highly, as is a limited amount of practice in conjunction with a scholarly career (to the extent that the practice does not come to make undue demands on the scholar's time for teaching and research). This line is a delicate one which depends very much on the individual. When a proper balance is maintained, it can and should be valuable.

It also bridges a gap between scholar and practitioner. The distrust is mutual and is not new. The scholar resents the domination which practitioners have had over legal education. The practitioner is threatened by challenges to the basic assumptions of legal practice. This gap can only be overcome if both sides appreciate what the other is about, and respect the independence of the other. Both sides must be willing to accommodate the other.

Fraser's polemical and confrontationist style masks valuable criticisms, both of contemporary legal scholarship and of its critics in the CLS movement. When translated into a political stance, it is unacceptable, because it denies the possibility of difference of opinion which is essential to scholarly endeavour. Like the "manifesto" of the CLS movement which drove Fraser to write this particular piece,[58] his statement is clearly designed to a be a weapon in a political struggle. Its extreme language may be read down as a contribution to an intellectual debate. Even within an intellectual debate, the question of tactics is relevant, and, within the current state of legal education, a tactic of accommodation is more likely to achieve progress than one of explicit opposition and confrontation. If Fraser's purpose in attacking the "illegitimacy" or "bankruptcy" of contemporary legal scholarship is serious, rather than a polemical device in an intellectual battle, then those legal academics who dare to differ from Fraser have cause to fear for their own right to follow a different path to the furtherance of understanding.

The style of Fraser's approach implies that one approach, and only that approach, is legitimate and permissible. It is perfectly legitimate to include, within the activity of legal scholarship, the study of law as a "phenomenon" or as "the study of the forms of legal domination", even within a professional law school. It must not ever be accepted as the only legitimate approach. The expansion of the limits of understanding requires a variety of approaches. If one accepts the correctness of even some of the criticisms which Fraser makes, then the end of giving effect to those criticisms is little served, a reasonable person might have thought, by the adoption of a style calculated to alienate all except those who share a commitment to the same intellectual and ideological purity which

58 Unger, op cit , n. 16

Fraser assumes that he possesses himself.

The law schools, and legal education, need to change and to keep changing. Similarly, approaches to legal scholarship, and scholarly values themselves, need to change and to keep changing. The world is a practical place. Theory and practice need to be combined if any beneficial change is to result from what law students learn as a result of the exposure to legal scholarship in the course of their legal education. The law school, therefore, is one place where theories can be made concrete, with real value both to legal scholarship and to the practising profession.