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THE MARGINALISATION OF RADICAL DISCOURSES IN AUSTRALIAN LEGAL EDUCATION

Nickolas John James*

I Introduction

I have recently conducted a series of analyses into legal education in Australia using a Foucauldian theoretical framework. In doing so, I have come to view Australian legal education not as a stable and consistent body of knowledge and practices but as an unstable network of competing discourses. These discourses 'proliferate, clash, compete and collide',[1] sometimes uniting in a consistent push in a particular direction and at other times competing for dominance within the law classroom.[2] They include orthodox legal education discourses such as *doctrinal discourse*, which emphasises the transmission of black letter rules by law teachers to law students,[3] *vocational discourse*, which emphasises the teaching of legal skills and the preparation of law students for a legal career,[4] and *corporatist discourse*, which emphasises the notion that the law school is a corporate institution in its own right and insists the objectives of legal education therefore include the minimisation of cost and the maximisation of accountability, efficiency and customer satisfaction.[5] They also include *radical discourses*, which are constructed as oppositional to these orthodox legal education discourses and which

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1 Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994) 9.

2 The law school does not, of course, consist of tribes of warring law teachers, each allied to a particular discourse. Rather, most or all of these discourses intersect within our subjective approaches to teaching. While individual law teachers may have a preferred discourse, we are not consistently and constantly loyal to a single discourse.

3 See Nickolas James, 'Expertise as Privilege: Australian Legal Education and the Persistent Emphasis Upon Doctrine' (2004) 8 *University of Western Sydney Law Review* 1.

4 See Nickolas James, 'Why Has Vocationalism Propagated So Successfully within Australian Law Schools?' (2004) 6 *University of Notre Dame Australia Law Review* 41

5 See Nickolas James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26 *Sydney Law Review* 587.

emphasise the inadequacies of orthodox portrayals of law within the law school.[6]

In *The Struggle for Pedagogies: Critical and Feminist Discourses as Regimes of Truth*, Jennifer Gore conducts a Foucauldian analysis of radical discourses within the discipline of education.[7] She explains:

> I have become increasingly conscious of the marginal status of these radical pedagogies within the educational community at large, and within teacher education more specifically: it is clear their material impact on what takes place in the name of education in either schools or universities is limited. While it is possible to point to all kinds of external social and political conditions to explain the marginality (such as the predominance of neo-conservative politics in the 1980s), I have come to believe that reasons can also be found *within* the discourses of radical pedagogy. The reasons I consider internal to these discourses, which might be associated with their continued marginality, circulate around what I see as the discourses' dominating effects and their regimes of truth.[8]

Gore argues that radical discourses are 'doomed to fail' while they continue to aspire to modernist claims to truth.[9] Radical discourses, like all discourses, seek to dominate a discursive field and to enforce a regime of truth: they seek to portray knowledge which is incomplete, subjective and arbitrary as truth which is complete, universal and necessary. In doing so, they are inevitably resisted by others.

In this paper I conduct an analysis of radical legal education discourses similar to that conducted by Gore in relation to her own discipline. I demonstrate how these discourses are also marginalised within Australian legal education, and explain this marginalisation using a Foucauldian framework.[10] Unlike Gore, I extend my analysis beyond the 'internal' factors of radical legal education discourses, and consider the effects upon those discourses of *external* conditions.

[6] There are multiple discourses within any discipline; as Foucault insisted, knowledge within a discipline is always discontinuous. Michel Foucault, 'The Subject and Power' in James D Faubion (ed), *Power: Essential Works of Foucault 1954–1984* Volume 3 (2002). Each discourse is in conflict with other possibilities of meaning. Discourses 'must be treated as discontinuous practices, which cross each other, are sometimes juxtaposed with one another, but can just as well exclude or be aware of each other'. Michel Foucault, *The Will to Knowledge: The History of Sexuality 1* (1998) 67.

[7] Jennifer Gore, *The Struggle for Pedagogies: Critical and Feminist Discourses as Regimes of Truth* (1993).

[8] Ibid 2.

[9] Ibid xii.

[10] I do not described in any detail the specific teaching practices advocated by radical legal education discourses; rather, my emphasis is upon the conditions of their overall marginalisation.

II Radical Legal Education Discourses

Radical legal education discourses are constructed as oppositional to orthodox legal education discourses and emphasise the inadequacies of orthodox portrayals of law within the law school.

The first step in unpacking this definition is to clarify what is meant by 'discourse'. A discourse is a regular and systematic set of statements by institutionally privileged speakers.[11] Statements include sentences, phrases, documents, non-verbal physical acts, practices and visual symbols. Legal education statements include the books and journal articles produced by legal education scholars, the policies and course descriptions produced by law schools and universities, the verbal statements produced by law teachers and by law students, and the practices which take place within law classrooms.[12] These statements cohere into discourses according to shared descriptions of the nature of legal education. Radical legal education discourses are recognisable as such because the statements of which they are comprised are regular and systematic; that is, they share certain characteristics. If this were not the case, they would be indistinguishable from other discourses.[13]

For Gore, 'radical' discourses include various feminist and critical pedagogy discourses, both of which categories of discourse are apparent — in broadly similar manifestations — within Australian legal education. Feminist legal education discourses emphasise the failure by orthodox legal education and law to acknowledge or respond to the values and experiences of women. Some are critical of the ways in which the orthodox approaches to the teaching of law promote and maintain gender inequality; others emphasise the ways in which orthodox legal education and portrayals of law maintain and aggravate the oppression of women through the myths of impartiality and neutrality.[14] Feminist legal education discourses

[11] Foucault referred to a discourse as a set of 'serious speech acts'. A statement about legal education does not form part of a legal education discourse unless the person who makes the statement has an institutional location; if the person has no institutional location it is merely an opinion.

[12] It would be difficult — if not impossible — to comprehensively identify and evaluate all of the legal education statements which are produced within Australia; the analysis conducted in this paper is therefore limited to those statements located in and extracted from works of legal education scholarship and from law school texts such as teaching policies, course descriptions and promotional materials.

[13] Texts contain statements, but it is not the case that all of the statements in a text belong to a single discourse. A given article on legal education or a law school text may contain a large number of statements, and it is possible that these statements can be allocated to a number of different discourses; in other words, discourses intersect within texts. It is not uncommon, for example, for a law school promotional text to seek to acknowledge as many perspectives on legal education as possible and to therefore contain statements from three or four legal education discourses.

[14] Feminist legal scholarship embraces a wide variety of theoretical positions and is therefore difficult to summarise concisely. Examples of Australian feminist legal education scholarship include Lucinda Finley, 'Women's Experience in Legal Education: Silencing and Alienation' (1989) 1 *Legal Education Review* 101; Margaret Thornton, 'Portia Lost in the Groves of Academe Wondering What to

emerged in Australia in the 1970s when feminist law teachers began to exert pressure on law schools to introduce feminist perspectives into the curriculum. The disproportionately low number of female law teachers and the inherently conservative nature of the discipline meant that this project initially met with little success, but in the mid-1980s the inclusion of women's perspectives in the curriculum began to be considered a serious issue by more senior decision makers within the law school.[15]

Critical legal education discourses also began to infiltrate Australian law schools in the 1970s when some law teachers began to openly associate themselves with politically radical causes and left-wing political parties, and to question and criticise the traditional approaches to legal education.[16] Critical discourses emphasise the political, social and theoretical inequalities and biases within orthodox legal education and portrayals of law, drawing upon critical legal studies[17] and a range of other non-traditional legal, socio-legal and political theories.[18]

Do About Legal Education' (1991) 9 *Law in Context* 9; Barbara Ann Hocking, 'Feminist Jurisprudence: The New Legal Education' (1992) 18 *Melbourne University Law Review* 727; Katherine Hall, 'Theory, Gender and Corporate Law' (1998) 9 *Legal Education Review* 31; Rachael Field, 'Women in the Law School Curriculum: Equity Is About More Than Just Access' (1999) 10 *Legal Education Review* 141; Archana Parashar, 'Teaching Family Law as Feminist Critique of Law' (2000) 23 *University of New South Wales Law Journal* 58; Helen Ward, 'The Adequacy of Their Attention: Gender-Bias and the Incorporation of Feminist Perspectives in the Australian Introductory Law Subject' (2000) 11 *Legal Education Review* 1; Margaret Thornton, 'Neoliberal Melancholia: The Case of Feminist Legal Scholarship' (2004) 20 *Australian Feminist Law Journal* 7.

15 Kim Rosser, 'The Feminist Project in Action' (1988) 13 *Legal Service Bulletin* 233; Rachael Field, 'Women in the Law School Curriculum: Equity Is About More Than Just Access' (1999) 10 *Legal Education Review* 141, 145.

16 Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 715.

17 CLS scholarship emphasises the political nature of law as well as its indeterminacy and incoherence. It argues that, contrary to their typical portrayal, law and legal institutions are not, and can never be, objective or scientific; the law is actually a system of beliefs and meanings which is constructed and enforced in order to make inequalities of wealth and privilege appear natural and inevitable. The late 1980s and early 1990s saw the publication of a number of papers within Australia concerned primarily with the application of the CLS ideology to the teaching of law, including Hilary Charlesworth, 'Critical Legal Education' (1988–1989) 5 *Australian Journal of Law and Society* 27; Andrew Fraser, 'Turbulence in the Law School: Republican Civility v Patrician Deference?' (1988–1989) 5 *Australian Journal of Law and Society* 44; Hilary Charlesworth, 'New Directions in Legal Theory: Critical Legal Studies' (1989) 63 *Law Institute Journal* 248; Gerald Frug, 'A Critical Theory of Law' (1989) 1 *Legal Education Review* 43; Robert Gordon, 'Critical Legal Studies as a Teaching Method, against the Background of the Intellectual Politics of Modern Legal Education in the United States' (1989) 1 *Legal Education Review* 59; Rob McQueen, 'Is There a Critical Legal Studies Movement in Australia? Innovation in Australian Legal Education after the Pearce Report' (1990) 2 *Culture and Policy* 3. According to Margaret Davies, CLS has 'in all probability died a premature, but perhaps expected, death'. Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 168. A number of factors contributed to the failure of the CLS movement: the apparent link between CLS and Marxism, the fall of the Berlin Wall and the end of the Cold War, CLS's alleged nihilism

As Gore acknowledges, radical discourses are 'fragmented' discourses:

> [T]he field of radical pedagogy seems more overtly characterised by a lack of engagement than by disagreement between discourses. That is, rather than addressing the different discourses within radical pedagogy itself, each strand of radical pedagogy tends to situate itself in opposition to dominant/traditional educational theories and practices, each asserting itself as a new alternative.[19]

However, as Gore explains, '[d]espite the differences within and between discourses of critical and feminist pedagogy, an examination of their central claims, in terms of the pedagogy argued for, reveals a great number of commonalities'.[20] Within the discursive field of legal education, both feminist and critical discourses challenge the status quo within the law school and within the legal system by, *inter alia*,

and impracticality, and the perception that CLS was produced solely by idealistic but unhappy white male legal academics. The postmodern 'turn' of CLS scholarship also alienated many adherents and excluded potentially interested outsiders. Together, these factors contributed to a growing reluctance on the part of many Australian law teachers and legal scholars to identify themselves as CLS adherents.

[18] See, eg, Richard Morgan, 'Pearce Report on Legal Education: Corporatist Strategy' (1987) 12 *Legal Service Bulletin* 260; Gil Boehringer, 'Conflict and Transformation' (1989) 14 *Legal Service Bulletin* 275; Ian Duncanson, 'Legal Education, Social Justice and the Study of Legality' (1990) 10 *University of Tasmania Law Review* 16; Andrea Rhodes-Little, 'Teaching Lawyering Skills for the Real World: Whose Reality? Which World? Or the Closing of the Australian Legal Mind' (1991) 9 *Law in Context* 47; Margaret Thornton, 'Property, Profits Given First Place' (1991) 26 *Australian Law News* 18; Ian Duncanson, 'Whether Legal Education Can Be Critical Education' (1992) *Socio-legal Bulletin* 8; Ian Duncanson, 'Legal Education and the Possibility of Critique: An Australian Perspective' (1993) 8 *Canadian Journal of Law and Society* 59; Sam Garkawe, 'Admission Rules' (1995) 21 *Alternative Law Journal* 109; Ian Duncanson, 'The Ends of Legal Studies' (1997) 3 *Web Journal of Current Legal Issues* 8775; Graeme W Austin, 'Queering Family Law' (1999) *Australasian Gay and Lesbian Law Journal* 39; Gil Boehringer, 'Infamy at Macquarie: Economic Rationalism and the New McCarthyism' (1999) 24 *Alternative Law Journal* 30; John C W Touchie and Scott Veitch, 'The Decline of Academic Reason' (1999) 24 *Alternative Law Journal* 26; Sandra Berns, 'Through a Glass Darkly' (2000) 25 *Alternative Law Journal* 265; Adrian Howe, 'Law out of Context (or, Who's Afraid of Sex and Violence in Legal Education?)' (2000) 25 *Alternative Law Journal* 274; Margaret Thornton, 'Law as Business in the Corporatised University' (2000) 25 *Alternative Law Journal* 269; Heather Douglas and Cate Banks, 'From a Different Place Altogether: Indigenous Students and Cultural Exclusion at Law School' (2000–2001) 15 *Australian Journal of Law and Society* 42; Richard Collier, 'We're All Socio-Legal Now?' Legal Education, Scholarship and the 'Global Knowledge Economy': Reflections on the UK Experience' (2004) 26 *Sydney Law Review* 503; Hannah McGlade, 'The Day of the Minstrel Show' (2004) 6 *Indigenous Law Bulletin* 16; Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2004) 26 *Sydney Law Review* 481; Anne MacDuff, 'Deep Learning, Critical Thinking, and Teaching for Law Reform' (2005) 15 *Legal Education Review* 125; Cassandra Sharp, 'Changing the Channel: What to Do with the Critical Abilities of Law Students as Viewers?' (2005) 13 *Griffith Law Review* 185.

[19] Jennifer Gore, *The Struggle for Pedagogies: Critical and Feminist Discourses as Regimes of Truth* (1993) 7.

[20] Ibid.

encouraging the emergence of theoretically savvy law students who are aware of the gendered and political injustices perpetuated by law and legal institutions and who are concerned to do something about them. Both see orthodox legal education discourses — doctrinalism, vocationalism, corporatism — as contributing to hegemony: students are conditioned to unquestioningly accept their place within larger organisational, institutional or social structures and, as legal specialists, employees and citizens, to work towards the maintenance of the status quo. Both accuse orthodox legal education discourses of contributing to social injustice and oppression, and challenge these discourses in order to ensure that law students are not unwittingly induced to contribute to this ongoing inequity. Both seek to transform the legal education process into an explicitly political endeavour.[21]

To what extent have radical legal education discourses influenced actual teaching practices and curricula in Australian law schools? It would seem that the position of these discourses within the discipline of law is no better than their position within the discipline of education: their status is marginal and their material impact upon the teaching of law is limited. Most of the legal education statements I have analysed for this paper — works of legal education scholarship and law school texts such as teaching policies, unit descriptions and promotional materials — clearly favour the orthodox legal education discourses, and focus primarily upon the transmission of black letter law, the inculcation of legal skills, and/or the marketability and efficiency of the school, with relatively little reflection upon the gendered and political biases implicit within these traditional approaches to legal education. According to the websites of the 29 Australian law schools, only half of the schools offer law units which are described as primarily concerned with the study of feminism or with feminist analyses of law and gender[22] (although most schools include feminist

[21] Of course, an argument could be made that teaching is always a political activity, that it is simply not possible to teach in a way that is *not* informed by a particular belief system. By this view, those law teachers who pretend not to be political are 'simply more dangerous, not less political': Ian Ward, *An Introduction to Critical Legal Theory* (1998) 160. Law teachers are political actors, whether they like it or not. The claim that teaching is always a political process is a common one within discourses of critical pedagogy, but see especially the work of Paulo Freire, e.g. Paulo Freire, *Pedagogy of the Oppressed* (1970); Paulo Freire, 'Education: Domestication or Liberation?' (1972) 2 *Prospects* 173; Paulo Freire, *Education for Critical Consciousness* (1973).

[22] For example: *Feminist legal theory* at the University of Adelaide; *Feminist and critical legal theory*, *Law and sexualities* and *Gender and international law* at the Australian National University; *Sex, gender and the law*, *Feminism and the law* and *Women's rights and international human rights* at Flinders University; *Law and sexuality* at Macquarie University; *Feminist legal theory* and *Women and war* at the University of Melbourne; *Crime and gender* and *Law, gender and feminism* at Monash University; *Feminist legal theory* at Murdoch University; *Feminist legal theory* at the University of New South Wales; *Feminist jurisprudence* at the University of Queensland; *Women and the Australian legal system* at Queensland University of Technology; *Law and gender* at the University of Sydney; *Women*

legal theory as a component of another legal theory law unit).[23] Very few law schools offer law units described as primarily concerned with the study of critical legal theory,[24] and only a small number of law schools teach critical legal theory as a component of another legal theory law unit.[25]

Rachael Field argues that in terms of the broader legal academy in Australia, gender issues remain relatively low on its list of priorities:

> Although feminist legal theory has questioned the claim of the law to be rational, objective and neutral,[26] it has not yet foiled the perpetuation of male biases in the law and the law school curriculum. And whilst, in some law courses, 'there have been efforts to present material about the law's differential impact on men and women, and that analyses the 'maleness' of legal standards and values',[27] such efforts are said to be often 'piecemeal and ad hoc, and they are often considered to be — by both students and faculty — peripheral to the main focus of the curriculum'.[28] Without, therefore, the introduction of a specific focus on women's perspectives on law, the curriculum will continue to reflect the persistent androcentric state of legal 'knowledge',[29] and, importantly, from the perspective of women students of law, women will continue to be cast as 'other' by the law and the law school curriculum.[30]

The 469-page 2003 Australian Universities Teaching Committee (AUTC) Report, *Learning Outcomes and Curriculum Development*

and the law at the University of Technology Sydney; *Feminist analysis of law* and *Women, crime and the criminal justice system* at the University of Western Australia; and *Feminism and law* at the University of Wollongong.

23 For example: *Law in context* at James Cook University; *History and philosophy of law* at Flinders University; *History and philosophy of law 2* at the University of Melbourne; *Law and social theory*, *Legal philosophy*, *Contemporary legal thought* and *Theories of Justice* at Monash University; *Law and social theory* and *Legal isms* at the University of New South Wales; *Law, society and justice* and *Theories of law* at Queensland University of Technology; *Law and discourse* at the University of Sydney; and *Sociology of law* at the University of Tasmania.

24 For example: *Feminist and critical legal theory* at the Australian National University; *Critical legal studies* at the University of Sydney; and *Critical legal theory* at the University of Western Australia.

25 For example: *History and philosophy of law* at Flinders University; *Law and social theory*, *Legal philosophy*, *Contemporary legal thought* and *Theories of justice* at Monash University; *Advanced legal and social theory* and *Legal isms* at the University of New South Wales; *Theories of law* at Queensland University of Technology; and *Law and discourse* at the University of Sydney.

26 Kim T Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review* 829, 831.

27 Mary Jane Mossman, '"Otherness" and the Law School: A Comment on Teaching Gender Equality' (1985) 1 *Canadian Journal of Women and the Law* 213, 214. Mossman also referred to Katherine O'Donovan, 'Before and After: The Impact of Feminism on the Academic Discipline of Law' in D Spender (ed), *Men's Studies Modified* (1981).

28 Mary Jane Mossman, '"Otherness" and the Law School: A Comment on Teaching Gender Equality' (1985) 1 *Canadian Journal of Women and the Law* 213, 214.

29 Ibid.

30 Rachael Field, 'Women in the Law School Curriculum: Equity Is About More Than Just Access' (1999) 10 *Legal Education Review* 141, 148.

in Law, devoted less than half of one page to a discussion of the teaching of feminist perspectives:[31]

> Despite the impressive growth of feminist legal theory scholarship in Australia from the late 1980s, and some important work on feminist perspectives on the law curriculum led by law academics such as Regina Graycar, Jenny Morgan, Hilary Charlesworth, Ngaire Naffine, Margaret Thornton, Margaret Davies, Rosemary Hunter, Rosemary Owens, Peta Spender and others, feminist perspectives have not had much impact on the law curriculum. … A study of the theoretical approaches to introductory legal process subjects in Australian law schools showed that the majority of introductory subjects have been taught with a critical approach to subject topics, and that there is much diversity in the approaches taken. The study found, however, that in most law schools feminist critiques were not brought to bear as frequently, or as extensively, as other critiques. In many introductory subjects, there was no feminist content, nor any content concerning women's distinctive, but universal needs and experience.[32]

According to the AUTC Report, only four law schools distinguish themselves as emphasising interdisciplinary legal theory, only one law school distinguishes itself as emphasising social justice, and only one law school distinguishes itself as committed to the university intellectual tradition of inquiry for its own sake.[33] On the other hand, 11 law schools distinguish themselves as a professional law school or as having an orientation to the profession, and 13 law schools distinguish themselves as having a focus on legal skills in the curriculum.[34]

It would appear that while difficult and challenging questions may be asked of law in some legal theory units, the majority of law students in Australia continue to be encouraged to focus upon what the law *is* rather than what it *ought to be*, and to graduate with little desire to participate in legal reform. Feminist and critical perspectives on the law, if understood at all, are categorised as legal theory of marginal relevance to the reality of legal practice, and the last time I looked the Head of my own school was a white male, just like the Head before him, and the Head before him, and the Head before him. In my own teaching, I struggle to include radical perspectives and engender critical attitudes in my students whenever possible, but in truth I find that for most of the time I am concerned

[31] Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) 130.

[32] Citing Helen Ward, 'The Adequacy of Their Attention: Gender-Bias and the Incorporation of Feminist Perspectives in the Australian Introductory Law Subject' (2000) 11 *Legal Education Review* 1.

[33] Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) 26–29.

[34] Ibid.

more with covering all of the relevant doctrine and with keeping the students and my employers happy. I am not denying that progress has been made in some institutional locations,[35] but compared to that of the orthodox legal education discourses, the impact of radical legal education discourses upon the teaching of law in Australia remains minimal. Why might this be so?

In the following pages I analyse the marginalisation of radical legal education discourses from two perspectives: an external approach, analysing the discourses' marginalisation as a consequence of the range of historical, social and political contingencies which form their environmental context, and an internal approach, analysing the discourses' marginalisation as a consequence of the deficient strategies employed in seeking to achieve their propagation. I will conclude with a third perspective upon the marginalisation of radical legal education discourses: the notion that a radical perspective might necessarily and inevitably be a marginalised perspective.

III External Contingencies

What are the external factors which have ensured that radical legal education discourses remain at the margins within Australian legal education? One such factor is the weight of tradition: many law teachers emphasise the transmission of doctrine and the inculcation of professional legal skills because that is the way it has always been done. We focus on the traditional objectives of legal education, and we tend to avoid reflecting upon the implicit biases within those objectives and to disregard the more controversial possibilities for the teaching of law, because the weight of tradition compels us.

> [I]t is hard for professors to stand up before students and tell them of the failures of the discipline, law, to which we who teach have devoted ourselves and to which so many of us and them have come with such high hopes.[36]

Another factor is our own educational and professional backgrounds. Many of us were subjected to a legal education dominated by the orthodox legal education discourses, and we continue to teach law in the traditional ways because we really don't know any better. Even when we do feel inclined to engage with radical legal education discourses, we often lack the necessary

[35] Some law schools have been more willing than others to incorporate feminist and critical perspectives on legal education into the law curriculum. Double degree offerings at several universities encourage undergraduate law students to actively engage in law reform and critique. There are clinical legal programs, such as the Innocence Project at Griffith University, that emphasise social reform and social justice, and some human rights/criminal justice programs that approach the law and legal education from a radical perspective.

[36] Judith Resnick, 'Ambivalence: The Resiliency of Legal Culture in the United States' (1993) 45 *Stanford Law Review* 1525, 1528.

interdisciplinary and theoretical expertise to do so properly. In order to competently engage with radical legal education discourses, some background in social theory, cultural studies, literary theory, education or philosophy is at least desirable and possibly requisite. Many of us, however, have no qualifications beyond our law degrees, or, if we do have other degrees, they are in economics, commerce or science, disciplines as insular and as orthodox as law itself. If we make the effort to educate ourselves by seeking out radical legal scholarship, we are confronted by a body of knowledge which is more often than not obscurely worded, extraordinarily obtuse and annoyingly self-referential. We are assumed to already understand Continental philosophy, the work of the Frankfurt school or the last four decades of academic struggle against patriarchy, whiteness or modernity. Is it any wonder that many of us choose set aside the effort for another day?

Radical legal education discourses are constrained by contemporary teaching conditions. My own experience, as well as that of my colleagues, seems to be that every year the administrative load associated with teaching gets heavier. We are also expected to do more research and more service. We have little time left over at the end of the day to revise our courses in order to engage with radical legal education discourses, and since such revisions often result in little or no recognition or reward from our institution, many of use feel little or no inclination to expend the effort doing so.

Radical legal education discourses are discouraged by the attitudes of many law students. There are some students who apparently wish to challenge hegemonies, to question tradition and to undermine the status quo; most law students, however, seem to be interested primarily in passing their courses and getting their degree as quickly as possible and with a minimum of fuss. They are disinclined to spend time debating difficult and challenging political, sociological and philosophical questions. Unless it is going to be directly relevant to their future careers, they are not really interested. Charles Sampford and David Wood describe how many law teachers have

> experienced the sound of pens dropping and the silent but perceptible click of minds switching off when some theoretical or critical question is raised and sometimes even a hostility or impatience that time is being 'wasted'.[37]

There is a widespread expectation amongst law students and members of the wider community that education should lead to employment, an expectation itself contingent upon both the rising cost of education and the rising fear of the consequences of unemployability. Prospective law students are increasingly

[37] Charles Sampford and David Wood, 'Theoretical Dimensions of Legal Education' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 104.

concerned to ensure that their choice of degree will lead to a job, and this puts pressure upon the law school to offer a legal education with a vocational emphasis. Those law schools which ignore this pressure fail to attract students.[38]

Some law students see radical legal education discourses as necessarily involving extremist political opinions and activism, and are threatened by, or at least disinclined to cooperate with, such extremism. Other law students perceive units informed by radical legal education discourses as 'difficult'. As a result of such attitudes amongst students, enrolments in non-traditional elective law units are typically small, and many of these units are sustained only by teachers committed to offering them.[39]

Legal professionals and employers do little to encourage radical legal education discourses.[40] Like vocationally-minded law students, they question anything not directly relevant to the practice of law, and if they are going to offer any suggestions at all, they will usually emphasise the enhancement of practical legal skills teaching rather than the subversion of dominant discourses. For many employers, the law school is a factory for the production of skilled workers, and while employers may desire workers with an ability to think critically and independently, very few want workers trained to ask difficult political questions and to destabilise orthodoxy.[41]

The Uniform Admission Rules and the 11 areas of knowledge that law students are required to have studied successfully before they can be admitted to the legal profession (the 'Priestley 11')

[38] John Goldring, 'Tradition or Progress in Legal Scholarship and Legal Education' in John Goldring, Charles Sampford, and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 47; Andrew Goldsmith, 'Standing at the Crossroads: Law Schools, Universities, Markets and the Future of Legal Scholarship' in Fiona Cownie (ed), *The Law School — Global Issues, Local Questions* (1999) 70.

[39] Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) 107.

[40] Sharon Hunter-Taylor noted in relation to the inclusion of critical pedagogy in Practical Legal Training: 'It may not be appropriate to encourage critical approaches to learning discipline knowledge in a professional course. … Durie's observations that critical pedagogy is overly interventionist and prescriptive is relevant to the likely resistance to critical learning in PLT. Research is likely to show that key stakeholders would not embrace emancipatory approaches to learning.' Sharon Hunter-Taylor, 'Professional Legal Education: Pedagogical and Strategic Issues' (2001) 3 *University of Technology, Sydney Law Review* 59, 67.

[41] According to the AUTC Report, 'most employers interviewed expressed similar views to each other about the emphasis given in the LLB to practice-related skills — they thought it was insufficient. This view was held even by those interviewees who had no other criticisms of the LLB. Most commonly, interviewees thought there was not enough of an emphasis on communication skills and 'team work'. Employers from commercial law firms were furthermore dissatisfied with law graduates' lack of business-related skills, and thought that most law graduates could not 'hit the ground running'. Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) 246.

influence significantly the nature and characteristics of Australian legal education.[42] While law schools are not compelled to offer all eleven areas of knowledge in their core curriculum, most schools nevertheless do so. Even where the eleven areas are not part of the core curriculum, the elective law courses that are required for admission effectively become compulsory law courses because the students who do not intend to practice law are usually aware that, should they later decide to practice, they would otherwise be required to pass additional courses.[43] In order to avoid this, most students prefer to take the eleven areas of knowledge during their university education, ensuring that the majority of law students in Australia spend much of their time at law school studying vocational law units.[44]

What of those contemporary external factors which appear to support radical legal education discourses, or to at least be consistent with their objectives? What about the gender equity officers, the equal opportunity policies, the appointment of female Deans, and the teaching of feminist law units? The Australian Law Reform Commission's (ALRC) *Equality Before the Law* Inquiry, for example, devoted an entire chapter to the issue of gender bias and looked in particular at the issue of the law school curriculum. The ALRC reported that 'the experiences and perspectives of women are lacking in course materials and textbooks',[45] and recommended that feminist legal theory be introduced into the curriculum and that women's experiences and perspectives be integrated into the content of units generally.[46]

Rather than radical efforts to challenge the status quo, however, such contingencies are more likely to be liberal efforts to enforce it. Liberalism is an insidious and effective constraint upon radical legal education discourses. The liberal ideology, and its veneration of ideals like equality and liberty, encourages such efforts with the intent not of destabilising dominance but of stabilising it by reconciling all alternative perspectives with the liberal worldview.[47] Feminism as taught in a feminist legal theory unit by a teacher who does not

[42] Contract Law, Tort Law, Real and Personal Property Law, Equity (including Trusts), Criminal Law and Procedure, Civil Procedure, Evidence, Professional Conduct (including Basic Trust Accounting), Administrative Law, Federal and State Constitutional Law, and Company Law.

[43] Sam Garkawe, 'Admission Rules' (1995) 21 *Alternative Law Journal* 109, 110.

[44] I do not want to suggest that radical perspectives on the law are only taught within courses badged as such. It is possible for Priestley 11 courses to be informed by feminist and/or critical discourses. It is, however, relatively rare.

[45] Australian Law Reform Commission, *Equality before the Law: Women's Equality*, Report No 69 Part I (1994) 137.

[46] Rachael Field, 'Women in the Law School Curriculum: Equity Is About More Than Just Access' (1999) 10 *Legal Education Review* 141, 143–144.

[47] This is a point which I have explored in greater depth in Nickolas James, 'Liberal Legal Education: The Gap Between Rhetoric and Reality' (2004) 1 *University of New England Law Review* 163–186.

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identify herself or himself as a feminist is unlikely to actually advocate feminism and more likely to portray feminism as just another legal theory or perspective on law and society. Margaret Thornton writes that the tokenistic inclusion of feminist perspectives does little to alter the essentially gender biased nature of traditional legal education. Citing Robert Connell, who in turn borrows from Gramsci, Thornton explains how society is characterised by hegemonic masculinity, defined by Connell as 'a social ascendancy achieved in a play of social force that extends beyond contests of brute power into the organisation of private life and cultural processes'.[48] Diversity, she explains, is essential to maintain this dominance because the explicit use of brute force and insistence upon complete homogeneity might encourage insurrectionist conduct on the part of the oppressed:

> Thus, the appointment of the occasional dissentient feminist law teacher, the creation of a feminist legal theory course, and the inclusion of a feminist session at a law conference, dare I say it, all serve to mask the nature of male dominance.[49]

Thus the proportion of female law teachers is increased not with the intent of challenging patriarchy and feminising the curriculum but with the intent of warding off criticism and ultimately maintaining the masculine status quo. Radical legal education discourses are colonised by the liberal agenda; the more threatening and subversive ideas are sheared away and the remainder is carefully reconciled with the Western masculine worldview.

Law school and university administrators, legal practitioners, and senior law teachers all have investments in maintaining the stability of contemporary legal institutions and educational structures. Despite the occasional liberal platitude, they are unlikely to overtly support radical legal education discourses, and are more likely to accept their marginalisation. This marginalisation, however, cannot be blamed entirely upon counter-radical conditions. Radical legal education discourses must themselves bear some responsibility for their own lack of impact.

IV Internal Features

Radical legal education discourses compete with the orthodox discourses identified earlier: doctrinalism, vocationalism and corporatism. In most Australian law schools, they do not appear to compete very successfully. What are they doing wrong?

It is necessary to first identify what radical legal education discourses are 'doing'. How do they 'work'? I have already referred

[48] Robert Connell, *Gender and Power* (1987) 184.

[49] Margaret Thornton, 'Women and Legal Hierarchy' (1989) 1 *Legal Education Review* 97, 98–99.

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to the fragmented nature of radical legal education discourses. These discourses, however, share certain features: they are constructed as oppositional to orthodox legal education discourses and they emphasise the inadequacies of orthodox portrayals of law within the law school. Despite their many differences, radical discourses are united in their desire to destabilise dominant paradigms within legal education and within society and to privilege the perspective of the other. They are disparate when it comes to more specific goals: some discourses, for instance, seek to subvert masculine dominance and privilege the feminine other; others seek to subvert class dominance and privilege the marginalised other. All agree, however, that the status quo within the law school and within the legal system is unacceptable. All seek to change, and encourage others to seek to change, what *is* into what *ought to be*.[50]

Like all discourses, radical legal education discourses create a dichotomy and privilege one part over the other. Radical legal education discourses recognise a dominated class of beings — women, feminine perspectives, non-white cultures, poor people — and a dominant class of beings — men, masculine perspectives, Western culture, rich people — and privilege the former over the latter by portraying the former as deserving of our sympathies and the latter of our criticism. They portray law as made by or in favour of the dominant, in accordance with the worldview of the dominant, and in ignorance of the perspective of the dominated other. They claim that while orthodox legal reasoning and legal scholarship are posited as neutral and value free, they in fact privilege the dominant and marginalise the dominated other. They explain how orthodox legal education discourses reinforce the relationships of dominance within both the law school and the wider community, and insist that legal education should be about facilitating awareness within the law student of these relationships and motivating them to do something about it.

Radical legal education discourses appear to describe these relationships of domination and subordination, but they at the same time create these subject positions. The political elite, the patriarchy, the dominant culture; these subject positions would not exist were it not for the radical discourses which produce them. I am not suggesting that oppression and suffering do not take place beyond the academic discourses. The descriptions of this oppression and suffering, however, and the labels that are attached to them, are produced by discourse. Patriarchy is, according to this view, created by feminist discourse; class oppression is created by critical discourse. In creating these subject positions, radical legal education

[50] Radical legal education discourses do not necessarily agree, however, regarding the details of what 'ought to be'.

discourses place the dominated other in the morally and ethically superior position.

Similarly, in relation to the teaching of law, radical legal education discourses favour progressive pedagogies over other, more traditional pedagogies. They divide the possibilities for legal education into radical teaching and orthodox teaching, and privilege the former over the latter. The orthodox, conservative majority, with their orthodox, conservative politics and pedagogies, are distinguished from and contrasted with the progressive minority, with their progressive politics and pedagogies, and found wanting. Radical legal education discourses create orthodox and progressive legal education and orthodox and progressive academic roles, and place the progressives in the institutionally dominated but morally and ethically superior position.

The transformative success of radical legal education discourses is dependant upon the effective propagation and acceptance of these radical dichotomies. Effective change cannot be achieved unless other law teachers and law students allow their orthodox distinctions and preferences to be replaced with these new, more radical ones. What strategies, then, are deployed in order to propagate these radical dichotomies?

Radical legal education discourses include and embrace a wide range of often conflicting ideas and theories, ostensibly in recognition of the contingency of truth and the plurality of human knowledge. They demonstrate respect for cultural, political and intellectual diversity, and this is a strategy which has the effect of attracting a broad range of adherents. Some texts are solely theoretical, others are concerned with the practice of law and of legal education; some wish to enforce and defend rights, others reject the concept of 'rights' as meaningless, useless or misleading. Many radical texts caution outsiders not to regard radical theory as a single, unified doctrine or as having a single, unified perspective. However, this strategy is often counter-productive within the conservative law school because traditional law teachers and law students are likely to see this diversity as simple incoherency. Compare such a strategy with those of, say, doctrinalism, where the emphasis upon one clear and certain perspective upon law is so much easier for overworked and often overwhelmed law students to accept and recall.

Another radical strategy is tactical obscurity: some radical legal education discourses are expressed using a vocabulary and style which on the one hand appears to have an extremely high level of intellectual rigour, but on the other hand is largely impenetrable to the untrained outsider. This density and impenetrability may be directed towards enhancing the intellectual reputation of radical legal education discourses and of the radical legal scholar but it has a negative impact upon the discourses' propagation. Radical legal

education texts are less likely to be read, radical law units are less likely to be taken and radical ideas about the teaching of law are less likely to be passed on if law teachers, law students and other non-radical outsiders have no idea what is being talked about.

The specific statements which comprise radical legal education discourses primarily include works of legal education scholarship such as books, journal articles and conference papers. To a less quantifiable extent, they also include personal communications between law teachers in school corridors, in lunch room debates and in school committee meetings. This 'word of mouth' propagative process is an inefficient one because it is a voluntary one: radical notions are expressed in writing or verbally, but it is then left up to the reader/listener to take the next step. Such an approach to the dissemination of radical legal education discourses is certainly consistent with liberal notions of liberty and free will, but it is not terribly effective in terms of propagative success. Compare this strategy with that deployed by, say, corporatist administrators: corporatist notions of efficiency and accountability are propagated not by word of mouth and voluntary dissemination but by a complex system of rewards and penalties. There are no immediate consequences if I fail to engage with radical legal education discourses in my teaching, but if I fail to comply with my university's administrative requirements I will be penalised by disciplinary action, a lack of promotion or even dismissal. In the ongoing competition between discourses within the law school, the strategies deployed in the propagation of corporatism, doctrinalism, and vocationalism are far more effective than those deployed in the propagation of radical legal education discourses, and it is no surprise that the former dominate and the latter remain at the margins within Australian legal education.

V Is Marginalisation Inevitable?

Radical legal education discourses criticise orthodox approaches to legal education as implicitly privileging a particular, conservative worldview. However, radical discourses themselves implicitly privilege particular, radical worldviews. Radical legal education discourses are less about revealing the 'truth' about orthodox ways of thinking and teaching than they are an effort to displace some (allegedly narrow and close-minded) ways of thinking and teaching with other (allegedly pluralist, diverse and open-minded) ways of thinking and teaching. Gore suggests that radical pedagogies are 'doomed to fail' while they continue to aspire to modernist claims to truth.[51]

[51] Jennifer Gore, *The Struggle for Pedagogies: Critical and Feminist Discourses as Regimes of Truth* (1993) xii.

> For critical and feminist pedagogies, pedagogy is a major site in which to attempt educational and societal change, to attempt to enact visions of different worlds. In this context, pedagogy's appeal is frequently coupled with the modernist temptation for structural and universal explanations and solutions. I argue that these seductions herald the failure of pedagogy on the very terms of its own construction.[52]

Radical legal education discourses, like all discourses, seek to dominate a discursive field and to enforce a regime of truth. They seek to portray knowledge which is incomplete, subjective and arbitrary as truth which is complete, universal and necessary. In doing so, they are inevitably resisted by others.

All legal education discourses generate their own resistance.[53] However, the resistance to radical legal education discourses in Australia has been particularly vocal and, on occasion, particularly vicious. Radical legal education discourses deliberately position themselves as oppositional to traditional and orthodox approaches to the teaching of law, and thereby provoke a more forceful reaction by conservative teachers and scholars. In fact, resistance to radical legal education discourses when they initially emerged within Australian law schools in the 1970s was so forceful, it ensured that for decades most law teachers preferred not to be identified as a radical scholar:

> What we in fact got was abuse. We were accused of putting an end to the Law School, of working against the students, of destroying the degree, subjected to personal abuse, and a scare campaign was concentrated on the students to convince them that their degrees and careers were on the verge of extinction. One teacher was summoned out of class, angrily confronted by a superior with a memo which the teacher had written offering self assessment, and told that if this got out to the judges it was the end of the Law School — and presumably of the teacher.[54]

This was the experience of one radical legal scholar at the University of New South Wales Law School in the 1970s. Others who chose to take a radical approach to the teaching of law met with similar reactions and resistance from the conservative majority within the discipline. According to Rob McQueen, a widespread radical legal education movement failed to take hold in Australia, despite the enthusiasm and innovation of the 1970s, because of a failure to present a united front against more conservative trends. He suggested that '[t]he lack of any broader purpose, even in the

[52] Ibid.

[53] According to Foucault, resistance to discourse by other discourses is always present. In the discursive field of legal education, for example, vocationalism was dominant in the early decades of the 20th century, but that dominance was inevitably resisted, leading to the rise of new discourses such as doctrinalism and liberalism. The dominance of doctrinalism and liberalism was later resisted by other discourses and there was even a shift back towards vocationalism.

[54] Brian Kelsey, '"What's Wrong with the Law School?"' in Critique of Law Editorial Collective (ed), *Critique of Law: A Marxist Analysis* (1978) 125.

form of a loose national body, exposed many of the initiatives of the late 1970s to various processes of attack and/or decay',[55] and many of the more progressive academics were 'weeded out, discriminated against, or alternatively pressured to water down unconventional aspects of their courses'.[56]

In 1987 the Pearce Report criticised radical legal scholars for what it considered to be unacceptable attitudes to the legal system and to the requirements of professional training. The Report argued that radical movements such as CLS were outside the scope of appropriate theoretical and critical inquiry in law schools.[57] Those who favoured a vocational approach to the teaching of law also joined the attack on radical approaches.[58] Andrew Lang, for example, argued that Macquarie University law students who were taught by radical legal academics would not be employable, due to

[55] Rob McQueen, 'Is There a Critical Legal Studies Movement in Australia? Innovation in Australian Legal Education after the Pearce Report' (1990) 2 *Culture and Policy* 3, 4.

[56] Ibid.

[57] Dennis Pearce, et al, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Committee* (1987) 49. The Pearce Report's explicit criticism of radical critique in the law school provoked some Australian academic lawyers to defend progressive approaches to legal education. For example, in 'Critical Legal Education', a 1989 article encouraging the adoption of some of the insights of the CLS movement into Australian legal education, Hilary Charlesworth wrote: 'The charge that the aims of the CLS movement are fundamentally at odds with the education of students "for careers requiring full legal qualifications" is based on a misunderstanding of the Critical project. The CLS movement challenges traditional forms of legal education, but it does not question the importance of legal education in training legal practitioners. Indeed, the asserted incompatibility of the CLS movement and legal education can only be sustained if the proper role of legal education is seen as simply the transmission and absorption of packages of rules'. Hilary Charlesworth, 'Critical Legal Education' (1988–1989) 5 *Australian Journal of Law and Society* 27, 34. Rob McQueen responded to the Pearce Report in a similar fashion: 'This analysis contained in the Pearce Report of the Macquarie situation in particular, and the 'critical legal studies' movement more generally, seems unfortunately to confuse an attack on certain aspects of current law teaching with an attack on 'Law Schools' per se. An argument for the severing of the existing ties between the profession and the legal academies does not necessarily have as its corollary an end to all professional training. … The project of many so-called 'CLS' adherents might amount to little more than having legal 'scholarship' accorded its due weighting in the legal curricula. This is hardly subversive of legal education per se, and could indeed be seen as adding a vital component to University studies in law.' Rob McQueen, 'Is There a Critical Legal Studies Movement in Australia? Innovation in Australian Legal Education after the Pearce Report' (1990) 2 *Culture and Policy* 3, 9.

[58] Resistance to radical approaches at the time even managed to get reported in the mainstream media. Hilary Charlesworth quoted an article in the *Australian Financial Review* in 1989 which argued that radical legal theorists should not be allowed to teach in law schools, because 'it is their avowed intention not to teach law in a way that will be useful to practitioners in the actual legal system'; that CLS 'represents the loony Left of the legal profession'; and that its advocates 'have many of the features of a fundamentalist sect, being intolerant of democracy and willing to employ intimidation and misrepresentation'. Hilary Charlesworth, 'New Directions in Legal Theory: Critical Legal Studies' (1989) 63 *Law Institute Journal* 248, 248.

> an abandonment of the balance in the quality and interests of the teaching staff, in favour of the theoretical (including sociological), at the expense of professionally-oriented courses and adequate coverage of substantive law.[59]

In recent years, the resistance to radical legal education discourses within Australian legal education has not been quite so overt, but it certainly exists and is in many ways more insidious. Feminist legal theory has had an impact upon the teaching of law in Australia, and gender equality is an explicit aspiration of many law schools, but ongoing resistance to feminist discourses is apparent from the fact that they are still treated as separate and 'alternative' points of view on law; non-feminist scholarship is not called 'masculine legal scholarship', for example, while feminist legal texts, journals, courses and scholars are still clearly labelled as such. Similarly, critical legal scholarship is occasionally recognised and valued within the academy, but resistance to this scholarship is apparent from the fact that it has also continued to be treated as a separate and alternative point of view on law.

In pointing out some of the characteristics of radical legal education discourses which contribute to their own marginalisation, I do not mean to underemphasise the limiting effect of external conditions upon these discourses. Confronted by the ongoing dominance of legal education by doctrinal and vocational discourses, and the rising influence of corporatism and neo-liberalism within the wider community, the future for radical legal education discourses looks less than rosy. As Margaret Thornton recently wrote:

> The social justice environment that engendered Second Wave feminism has become passé. The shift to the right is so pronounced that it has enabled the discourse of the market to become the metanarrative of our time. The intimate relationship effected between neoliberal governments and the market has caused civil society to contract and faith in the political to diminish. The individualising, privatising and marketising propensities of neoliberalism are weakening the collective underpinnings of feminism, along with other social movements; competition is necessarily corrosive of community.[60]

It seems that given the external conditions, internal features and unavoidable resistances I have described in this paper, radical legal education discourses will continue to exist at the margins of Australian legal education for some time to come. Perhaps, however, that is where they belong. The principal role of feminist and critical law teachers is to challenge orthodoxy, and if any particular radical legal

[59] Andrew Lang, 'Will Macquarie Law Graduates Remain Employable?' (1989) *Law Society of New South Wales Journal* 41, 47.

[60] Margaret Thornton, 'Neoliberal Melancholia: The Case of Feminist Legal Scholarship' (2004) 20 *Australian Feminist Law Journal* 7, 7.

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education discourse were ever to assume a position of dominance it would be their role to challenge that discourse as well. Feminist and critical teachers are professional trouble-makers, persistently and doggedly questioning what others take for granted, and ever watchful for those few students and colleagues who are open to initiation into the radical project. Feminist and critical teachers need not be disheartened by the apparent marginalisation of radical legal education discourses: that marginalisation is the price paid for an existence beyond dominance by hegemonic knowledge.

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