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Part of the Problem or Part of the Solution? Legal Positivism and Legal Education

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PART OF THE PROBLEM OR PART OF THE SOLUTION? LEGAL POSITIVISM AND LEGAL EDUCATION

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I INTRODUCTION

In the latest of several contributions on trends in legal education, Margaret Thornton has described the deleterious pedagogical consequences of economic factors such as the commodification of public education and other aspects of neoliberal fiscal policy.[1] Thus, according to Thornton, 'the charging of high fees has transformed the delicate relationship between student and teacher'[2] and, in the context of assessment, 'a focus on doctrinalism, known knowledge and "right answers" has replaced the questioning voice'.[3] A closely aligned 'technocratic or applied approach'[4] is said to focus students' attention on 'what is' rather than 'what ought to be' with the result that 'black letter law is all the students want to hear'.[5]

Along similar lines of analysis, but with a less nostalgic tone, Tamara Walsh has described the contemporary environment of legal education as hostile to the promulgation of a social justice agenda.[6] The findings from Walsh's own empirical study (of student attitudes and values) are somewhat more sanguine than the outcomes of Thornton's enquiry (in part based on a survey of academic staff).[7] The focus of this paper, which is in part a response to Thornton's and

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[1] Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2008) 17 *Legal Education Review* 1; similar ground is covered in Margaret Thornton, 'Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same' (1998) 36 *Osgoode Hall Law Journal* 369.
[2] Thornton, 'The Law School, the Market and the New Knowledge Economy', above n 1, 1.
[3] Ibid 17.
[4] Ibid 22.
[5] Ibid 17, 20; the point about law students' demands for vocational curriculum is also strongly made in Thornton, 'Technocentrism in the Law School', above n 1, 390.
[6] Tamara Walsh, 'Putting Justice Back into Legal Education' (2008) 17 *Legal Education Review* 119.
[7] Ibid 133; thus Walsh reports some evidence of students wanting more social justice content.

Walsh's contributions, relates to the pedagogical significance of the legal positivist orientation. Thornton and Walsh's shared portrayal of (legal) positivism is as symptomatic of, contributory to, and perhaps collaborative with, the applied, technocratic and/or corporate style in legal pedagogy which they discern and deplore. For both authors, legal positivism is, to put it mildly, part of the problem. Thus for Thornton:

> Separating law from its socio-political context reifies the positivistic myth that law is autonomous and disconnected from the social forces that animate it. A depoliticised rules-oriented approach belies the play of power below the surface.[8]

And similarly for Walsh, a corporate bias 'is reflected in, and perhaps perpetuates, the development of business-oriented, "objectified" and positivist attitudes among students'.[9] Thus 'technical skills training', that is, learning 'how to analyse a case, interpret a statute, and apply "the law" so found to a set of facts' constitutes (unless properly and substantially contextualised) a 'corporatised or positivist approach'.[10]

In direct contradiction, it will be proposed here that the positivist approach in jurisprudence (with its concomitant orientation in legal pedagogy), if adequately articulated, is vital to the implementation of any social justice agenda.[11] Where Walsh argues, for example, for the need to 'ensure that we are graduating students committed to using their degrees to enhance social justice and equality, and who are dedicated to upholding the rule of law',[12] it might equally be argued that any effective view of 'the rule of law' calls for a major dose of legal positivism without which the concept may evaporate into moralistic (or other) vacuity.[13] Moreover, the contested nature of 'social justice', rightly emphasised by Walsh,[14] surely requires a nuanced approach emphasising the conventional nature of law. A contested social justice will not readily be slotted into a programmatic list of objectives of a legal curriculum (as a 'graduate attribute' perhaps) as a literal reading of Walsh's claim ('ensure that we are graduating …') might suggest. This is no trivial point. To the extent that a commitment to social justice (as to 'the rule of law') can be assimilated to a technocratic, 'rules-oriented' pedagogy, we should beware. The robust scepticism and iconoclasm that accompanies the

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[8]   Thornton, 'The Law School, the Market and the New Knowledge Economy', above n 1, 10.
[9]   Walsh, above n 6, 126.
[10] Ibid 127–8, 123.
[11] See also Tom Campbell, *The Legal Theory of Ethical Positivism* (1996); Tom Campbell, 'Democratic Aspects of Ethical Positivism' in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000).
[12] Walsh, above n 6, 119.
[13] Matthew H Kramer, *Objectivity and the Rule of Law* (2007) 103.
[14] Walsh, above n 6, 120.

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legal positivist approach guards against this possibility, or so it will
be argued here.

More generally, therefore, and perhaps surprisingly, it is
legal positivism[15] that best complements a thoroughgoing social
constructionism in epistemology. Admittedly, legal positivism is
repudiated by many legal scholars; as Kent Greenawalt observes,
'"[L]egal positivism" has often been used as a term of summary
condemnation by those with little patience for complex philosophic
refinement'.[16] The 'pariah'[17] status of legal positivism may derive in
part from a perception that legal positivism is an essentially amoral
stance. According to Frederick Schauer, that perception is mistaken:

> [D]espite the excoriations of a generation of contemporary American
> legal scholars, legal positivism is hardly an amoral position. Rather,
> guided directly by moral ideas and ideals, it seeks … to locate the moral
> work where it belongs, in the substantive morality of official acts, and not
> in the concept of law.[18]

Thus for Schauer, it is entirely consistent with their legal positivism
that H L A Hart, Hans Kelsen, and Neil MacCormick (among others)
have been progressive reformists of the law.[19] Such scholars have
been mindful that, like all human endeavours, law (including the
law of human rights[20]) is assuredly the collaborative construction of
people. As Coleman suggests '[l]aw is a human artifact. It is designed
by humans …'[21] A sober and modest attitude to the authority of law,
based on a clear understanding of the mundane origins of laws in
society,[22] complements a similarly humble view of the scope and
status of human knowledge of the natural world.

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[15] The applicable version of legal positivism is well represented by the writings of
Matthew Kramer. See Matthew H Kramer, *In Defense of Legal Positivism: Law
Without Trimmings* (1999) and Matthew H Kramer, *Where Law and Morality Meet*
(2004).

[16] Kent Greenawalt, 'Too Thin and Too Rich: Distinguishing Features of Legal
Positivism,' in Robert George (ed), *The Autonomy of Law: Essays on Legal
Positivism* (1996) 1, 1. To Greenawalt's observation must of course be added the
corrective comment that proponents of the major jurisprudential alternatives to
legal positivism, such as John Finnis, scarcely lack 'philosophic refinement': see
John Finnis, 'Natural Law: The Classical Tradition' in Jules Coleman and Scott
Shapiro (eds), *The Oxford Handbook of Jurisprudence* (2002) 1. However, a
comprehensive and even-handed evaluation of the current status of legal positivism
vis-a-vis its rivals is beyond the scope of this paper.

[17] Frederick Schauer, 'Positivism as Pariah', in Robert George (ed), *The Autonomy
of Law: Essays on Legal Positivism* (1996) 31.

[18] Frederick Schauer, 'Positivism Through Thick and Thin,' in Brian Bix (ed),
Analyzing Law: New Essays in Legal Theory (1998) 65, 65, references omitted.

[19] Schauer, above n 17, 37.

[20] John R Morss, 'Saving Human Rights from its Friends: A Critique of the Imaginary
Justice of Costas Douzinas' (2003) 27 *Melbourne University Law Review* 889;
John R Morss, 'Heteronomy as the Challenge to Nation: A Critique of Collective
and Individual Rights' (2004) 8 *Law, Text, Culture* 167.

[21] Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to
Legal Theory* (2001) 143.

[22] Jeremy Waldron, *Law and Disagreement* (2001) 26.

It will be argued here that, consonant with a legal-positivistic approach, the proper teaching of law is an overwhelmingly transparent practice; 'What you see is what you get'. We present students with what has emerged as legal obligation, legal definition, legal decision-making in this place or that. We show students how law is made. To the extent that law is even minimally made on the run (in courtroom practice), we give our students direct practice in that very activity. We encourage them to reflect on that experience. In so doing, at the same time as they are learning about the constraints of legal fact (statutes, binding precedents and so on), we show how open is the future of law. The same applies to the experience of tackling problem-based questions, for example, in an examination.[23]

This tension of constraint and openness and, hence, unpredictability is, of course, key to the excitement of law as a profession. From a theoretical point of view, law exemplifies the kind of creativeness and 'surprisingness' celebrated by Mikhail Bakhtin.[24] In some respects, the teaching of law may be unique, and this up-front social constructedness of law must surely offer exciting possibilities in legal education. What will be argued is that the theoretical frameworks within jurisprudence that best recognise this openness are positivist ones. It is, in contrast, those approaches influenced by the major alternative world view in jurisprudence that have a tendency to foreclose on this creativity. The latter traditions are those that forge direct connections between moral and legal obligations, whereas the positivist approach (itself a broad church) is sceptical, at the least, about any such connections. The legal positivist approach in general emphasises law's autonomy with respect to politics, values and needs, and has been aptly summed up as an approach 'which asserts that law is nothing more than an artificial human construction with no necessary moral or natural content'.[25] The major alternative world view in jurisprudence is rather difficult to label; the very broad 'church' of the natural law (NL) tradition is its classical manifestation, but other approaches which deny law's autonomy, and therefore (in that sense) reduce it to something else, are cognate without the NL label always seeming quite right. If NL reduces law 'upwards', so to speak — into the clouds of higher values — then legal realism reduces it downwards (into the mud of base interests).

[23] Of which the description 'cramming and regurgitation of doctrine, the paradigm of passive learning' would be inaccurate: Thornton, 'The Law School, the Market and the New Knowledge Economy', above n 1, 16.

[24] John Shotter, 'From Within Our Lives Together: Wittgenstein, Bakhtin, Voloshinov and the Shift to a Participatory Stance in Understanding Understanding' in Lois Holzman and John R Morss (eds), *Postmodern Psychologies, Societal Practice, and Political Life* (2000) 100.

[25] Margaret Davies and Ngaire Naffine (eds), *Are Persons Property? Legal Debates about Property and Personality* (2001) 37. The attempt will be made in Part III to specify the relevant jurisprudential options (those critiqued and those defended) in somewhat more detail.

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To sum up this attempt at the (re)habilitation of a maligned jurisprudence in Orwellian style: if there is any hope (for social justice in law) it may just lie in legal positivism. A belated attempt is thus made to respond to Thornton's charge that legal positivism (a 'modernist legal theory') 'legitimates economic rationality in the interests of capitalism'.[26] One difficulty with the tarring of legal positivism by the broad brush of critique is that it tends to overlook the distinction between positivism in the physical and social sciences (on the one hand) and legal positivism (on the other).[27] These distinctions are addressed in Part II. Part III discusses critical legal studies, natural law and positivism, and Part IV returns to legal positivism and the pedagogy of law.

II BAD POSITIVISM, GOOD POSITIVISM?
POSITIVISM IN SOCIAL SCIENCE AND IN LAW

Psychologists and other social scientists tell their students a parable of a drunk man looking for his keys around a lamppost because that is where there is light, even though he knows that he did not drop his keys there. Different generations of psychologists mean to convey the same message about different methodologies by this story: that the technical precision of a method says nothing about its appropriateness for a particular problem and that it is unhelpful for research to be driven by methodology. In recent generations, this parable has happily been adapted by more critically-minded teachers to tell a story about 'positivism' in the social sciences: the lighted lamppost is the positivist approach, forcing enquiry to remain within its very narrow scope.

Thus it is widely held in the social sciences and social philosophy that positivism is an outdated and inadequate paradigm or theoretical program, characterised by the reduction of explanation to quasi-physical laws and by a related impoverished empiricism of method. Positivism, in this sense, is a catch-all title for outmoded scientific methodology, for unsubstantiated claims to predictive power in the area of human conduct, for attempted manipulation of that conduct and for the denial or suppression of the inadequacy of that very approach.[28]

Legal positivism is a term that has been used since Jeremy Bentham to refer to an approach to legal thinking in which moral judgement is decoupled from legal fact; or perhaps more precisely, an approach in which this decoupling is both desired and aspired to, whether or not it can ever be fully achieved. Different versions of legal positivism provide different readings of the detailed relationships

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[26]   Thornton, 'Technocentrism in the Law School', above n 1, 371, 372.
[27]   The distinction is clearly identified by Margaret Davies, *Asking the Law Question: The Dissolution of Legal Theory* (2nd ed, 2002) 90.
[28]   See Rom Harré, *Social Being: A Theory for Social Psychology* (1979).

'on the ground' between legal and moral authority.[29] In general, however, legal positivism declines to 'outsource' law to the world of values and admits of no necessary connections between the two domains, whatever the contingent associations may be. Whatever the merits of the argument for the rejection of positivism in the social sciences, positivism in law needs to be addressed independently. In view of the above, it is helpful to begin with a discussion of the fate of positivism in the social sciences.

In the social sciences and in philosophy of a social bent, a variety of critical perspectives have come to coexist with a variety of orthodoxies. A series of loosely interrelated critiques of certain kinds of earlier traditions emerged in the middle part of the 20th century, centred on the identification of 'positivism' as a foundational error in methodology and in epistemology.[30] Attitudes related to the critique of positivism in social science and philosophy may be located in the writings of Karl Popper, for whom the 'logical positivism' of the Vienna Circle, and of their acolytes such as Alfred Jules Ayer, constituted an inadequate and impoverished methodology.[31] For Popper, however, the ways in which social science tests out (attempts to falsify) the conjectural statements of causality which working researchers generate are the familiar empirical methods. Despite the conceptual twist provided in Popper's framing of scientific method — falsification rather than positive proof by inductive logic — his contribution came to be seen as rather preliminary, valued more for its recognition that all was not well with scientific method as traditionally understood than as providing a superior approach. Popper's work even came to be seen as part of the problem just as much as it was part of the solution, in over-valuing normative scientific explanation in the context of the social sciences and the philosophy of science. Even so, it seems inaccurate to refer to Popper's approach as 'rigidly "empirical"'.[32]

The impact of Thomas Kuhn, another early critic of the more traditional view in the history and philosophy of science, was somewhat similar: seen with hindsight as providing a necessary preliminary critique of the social sciences, and thereby making a substantial contribution to the overall process of reform of these

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[29]   Matthew H Kramer, 'Once More into the Fray: Challenges for Legal Positivism' (2008) 58 *University of Toronto Law Journal* 1. Also see David Lefkowitz, 'Customary Law and the Case for Incorporationism' (2005) 11 *Legal Theory* 405; Danny Priel, 'Farewell to the Exclusive-Inclusive Debate' (2005) 25 *Oxford Journal of Legal Studies* 675.

[30]   Gerard Delanty, *Social Science: Beyond Constructivism and Realism* (1997) 30.

[31]   Karl Popper, *The Logic of Scientific Discovery* (1959); George Pavlakos, 'Normative Knowledge and the Nature of Law' in Sean Coyle and George Pavlakos (eds), *Jurisprudence or Legal Science? A Debate about the Nature of Legal Theory* (2005) 89, 103.

[32]   Philip Leith and John Morison, 'Can Jurisprudence Without Empiricism Ever be a Science?' in Sean Coyle and George Pavlakos (eds), *Jurisprudence or Legal Science? A Debate about the Nature of Legal Theory* (2005) 147, 166.

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disciplines, but not pressing the critical analysis hard enough or far enough.[33] Kuhn emphasised the disjunction between (on the one hand) the homogeneity in the kinds of 'normal' science that go on within some broad consensual framework or 'paradigm,' and (on the other) the heterogeneity within the kinds of science enabled under different paradigms. This was seen in hindsight as a rather timid foray into relativism. Sociology of science was thought of by subsequent critics of positivism in the social sciences as potentially a much more powerful tool than it had been in Kuhn's hands, relativising the aims and achievements of scientific research in ways that undermined an approach to science based on normative laws and their quantification.

Even before the advent, within critical approaches to psychology,[34] of social constructionism, and later of postmodernism, post-structuralism and other innovations, positivism was being identified and repudiated. The critical work of the 1970s, such as that of Rom Harré and John Shotter,[35] pressed the claim that positivism was an identifiable ailment for psychology and the human sciences, an approach based on erroneous assumptions about human conduct and, in particular, on erroneous analogies with the natural sciences. Whether or not positivism, as identified, was a correct approach for the natural sciences themselves — sometimes this was accepted by the critics, sometimes challenged — it was clearly identified as inadequate for the study of human conduct. With later waves of critical work, the critique of positivism per se came to be seen as somewhat passé, an argument that had been established. Thus, by 1990, it was clichéd to state that what was wrong with developmental psychology (for example) was that it was positivistic.[36]

Those academics in psychology who were teaching students continued to promulgate the critique of positivism, and it got taken up more broadly as feminist theory, postmodern theory and so on came to impact the field. It came to be amalgamated with supposed critiques of 'dualism' (Cartesian or other), critiques of dogmatic or sometimes 'masculine' thinking, and so on. The package that was the object of derision was unwieldy. While the academic explorations of the critique of orthodox psychology, in both its historical and its

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[33] Thomas Kuhn, *The Structure of Scientific Revolutions* (1962); Delanty, above n 30, 33. Tushnet appositely comments that Kuhn's book became a ritualised first reference in 'the canned footnote': Mark Tushnet, 'Critical Legal Studies: A Political History' (1991) 100 *Yale Law Journal* 1515, 1539.

[34] John R Morss, *Growing Critical: Alternatives to Developmental Psychology* (1996), arguing that available critical approaches to developmental psychology are inadequate.

[35] John Shotter, *Cultural Politics of Everyday Life* (1993).

[36] John R Morss, *The Biologising of Childhood: Developmental Psychology and the Darwinian Myth* (1990) 230, arguing that psychology has deluded itself that its approach to human development is Darwinian when, in fact, it is, if anything, pre-Darwinian.

then contemporary states, moved forward, and while the attack on positivism became less strident, and overlaid with more subtle or at least more complex considerations, the critique of positivism can be said to have become the orthodoxy of the critics to the extent of constituting a commonly agreed first base.

Later, what had been labelled positivist in physical science and in the social sciences came to be re-labelled as 'foundationalist' or as 'modernist'.[37] These various labels, with others, came to refer somewhat interchangeably to a whole series of perceived inadequacies and errors. While the earlier orthodoxy of experimentally-centred and quantitatively analysed psychology continued, substantial progress was made (as it would appear to the critical writers) in establishing the respectability of more qualitative forms of research, of narrative and rhetorical methods, of discourse analysis in its less recherché forms and so on. The critique of positivism in psychology undoubtedly achieved some significant results in broadening, if not changing, the discipline. It has become increasingly implausible for psychology to describe itself as no more and no less than a 'real' science, if only because the physical and life sciences have themselves become somewhat more susceptible to reconceptualisation.[38] The physical sciences need to grapple, in teaching students, with the problem of honestly reflecting the constructedness of their discipline while at the same time laying claim to representing truths which correspond, if only tentatively, with a reality 'out there'. (Scientists' responses to the suggestion that Darwinism is 'just a theory' illustrate this tension). The social sciences share this dilemma in certain respects. The humanities, from time to time, lay claim to the portrayal of larger, stable realities concerning the human condition, especially when in canonical mood.[39]

Despite many reservations that might be offered concerning, for example, the precision of the critique of positivism (did the critics really understand what positivism in the natural sciences actually was, whence it emerged, and what was its relationship with empiricism?), the critique did seem to have some substance. It would not have seemed possible in recent decades simply to reinvent the naïve metapsychology of the 1950s in the sense of reinstating an adulatory attitude to what was perceived as the scientific method. Therefore, for someone comparing the two disciplines during the 1990s or thereabouts, there might well have been an expectation that legal studies would in some ways share or resonate with the

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[37] Lois Holzman and John R Morss (eds), *Postmodern Psychologies, Societal Practice, and Political Life* (2000); Steinar Kvale (ed), *Psychology and Postmodernism* (1992).

[38] Science is now 'a post-Newtonian activity where the observer is part of the experiment': Leith and Morison, above n 32, 149.

[39] Harold Bloom, *Shakespeare: The Invention of the Human* (1998).

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anti-positivist trend. Some comments, therefore, need to be made on critical movements in legal studies.

III CRITICAL LEGAL STUDIES, NATURAL LAW AND LEGAL POSITIVISM

The approach to legal pedagogy advocated by Thornton and Walsh is clearly an anti-positivist one and might be best characterised as a 'socio-legal' approach which emphasises law's embeddedness in culture, the political, locality and history. If two poles of a range of approaches to the teaching of law are operationally defined as 'black letter' law ('pure doctrinal analysis') and critical legal studies (CLS) then such a socio-legal orientation would be located towards the latter pole and continuous with it, but perhaps short of it.[40] The following analysis focuses on CLS because of its close relationship with the social sciences and for clarity, and thus it is not in general being asserted that Thornton's or Walsh's own position is being directly critiqued at this point. However, the points about non-positivist approaches to jurisprudence are of general application.

It is useful to treat CLS as the exemplar of non-positivist approaches in legal theory in the context of pedagogy, even if its radicalism and its theoretical emphasis to some extent distinguish it.[41] CLS may be defined as a movement which emerged in United States legal thought as the radical (left) heir to legal realism in the 1960s and 1970s.[42] Thus, whereas the program of the realists was 'to lift the veil of legal form to reveal living essences of power and need,' the program of the critics was 'to lift the veil of power and need to expose the legal elements in their composition'.[43] It was thus argued that law's institutions and professional practices serve both to perpetuate, and at the same time to protect from scrutiny, the political functions of those institutions and practices, namely the preservation of social inequalities in the capitalist economy. CLS shares much with critical movements in social science, for example the influence from the sociology of knowledge, from various post-Marxist traditions and critical theory, and latterly from feminist theory, literary criticism and so on. It also shares the activist agenda by which it is allied with progressive social movements and opposed to conservative attitudes in the political sphere (with the precise

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[40] Fiona Cownie, *Legal Academics: Culture and Identities* (2004) 52, 54; also see Nick Johnson, 'The Lecturer, the Law Student and the Transmission of Legal Culture' (2006) 40 *The Law Teacher* 117.

[41] Cownie, above n 40, 52.

[42] Davies, above n 27, 169; Hugh Collins, 'Law as Politics: Progressive American Perspectives' in James Penner, David Schiff and Richard Nobles (eds), *Jurisprudence and Legal Theory* (2002) 320.

[43] Robert Gordon, 'Critical Legal Histories' in Allan Hutchinson (ed), *Critical Legal Studies* (1989) 79, 97.

meanings of 'progressive' and 'conservative' subject, of course, to contestation and to redefinition).[44]

The response of CLS to orthodoxy in law, as it perceived it to be, was very similar to the response of critical psychology (for example) to orthodox psychology as it perceived it to be. The orthodoxy in each case was seen as repressive, serving the purposes of a capitalist economy, maintaining the privilege of able-bodied, white heterosexuals, concealing opportunities, alternatives and resistances from the objects of its depredations — a veritable 'Matrix' of false consciousness[45] wrapped up in both cases with a harsh package of professionalised practices.[46] An attitude shared between critical thinkers in law and in psychology has been a generational sense of 'younger' scholars challenging the hegemony of their teachers.

In its political radicalism, CLS thus shared some perspectives with Marxism and it is illuminating, in the context of the different forms of positivism, to briefly consider the relationship between Marxism and the alternative approaches within jurisprudence. 'Traditional' Marxism[47] might be thought to have laid claim to the discovery of the kinds of deterministic laws in social and political life that would rival the laws of the natural world in precision, regularity and robustness. To the extent that even in the 19th century the scientific world recognised limits to its omniscience, and anticipated further discoveries about relationships in natural phenomena yet unseen, old-style Marxism perhaps claimed the kind of certainty in the laws it discerned that went well beyond the certainty claimed by the natural scientists. In any event, this classical Marxism was heavily reliant on law-like claims regarding social life, the economy and consciousness. In this sense it was undoubtedly positivistic in style. Yet so far as jurisprudence is concerned, the Marxist approach to law is, if anything, a natural law orientation; that is to say an approach which presupposes the legitimacy of certain kinds of non-legal justifications for legal statements. Natural law denies that legal obligations may be attributed to the merely conventional or contingent.[48] In some variants there is a search for transcendent reasons for the force of law's prescriptions, even though humans are undoubtedly the agents through whom the higher truth (spiritual

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[44] Roberto Mangabeira Unger, 'The Critical Legal Studies Movement' in Allan Hutchinson (ed), *Critical Legal Studies* (1989) 323, 335; Tushnet, above n 33, 1525; Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 241.

[45] Jerry Anderson, 'Law School Enters the Matrix: Teaching Critical Legal Studies' (2004) 54 *Journal of Legal Education* 201, 211.

[46] This approach is clearly indicated by Thornton (1998), above n 1, 371.

[47] Mark Tushnet, 'Critical Legal Theory' in Martin Golding and William Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (2005) 84.

[48] Finnis, above n 16, 4; Yorke, Leaving Early, above n 33, 19–25; Yorke 'Student Engagement', above n 16, 4–5.

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or 'historical') becomes manifest. It is this latter (quasi-historical) kind of natural law with which Marxist legal theory most converges. Again, the point has been made that Marxism is centred on a moral thesis concerning the definition of 'fundamental human goods'[49] and the ideal distribution thereof; that is to say an extra-legal thesis on the basis of which law is posited.

Legal positivism, which emphasises both the conventional origins of legal obligation (and hence, it might be said, its democratic affiliations) and its disjunction from moral imperatives, is thus anathema to Marxism. Indeed, a rigorous separation of legal prescription from the world of morality and of values, as in stronger ('exclusive') versions of legal positivism, would seem to represent for Marxism the triumph of reaction: the ruling ideas of a class presenting themselves as objective, a fetishising of law. The reform of law, it seems to suggest, will emerge from the reciprocal proactivity of those who combine sufficient privilege with sufficient decency — an international community of progressive jurists whose efforts gradually accumulate and become ever more refined. But even so cautious and qualified a recognition of law's conventionality, with the whiff of relativism that accompanies such a position, must set off alarm bells for any dogmatic world view, including dogmatisms of the Left.

The same analysis surely applies to CLS, at least in its broader dimensions, even though the similarities between CLS and Marxism may by now have been well outweighed by differences.[50] Being defined by ideological commitments (however unsystematic or ill-defined) ensures that CLS adheres more closely to a natural law or other 'reductionist' orientation (in the sense defined above) than to any of the legal-positivist alternatives. This is exemplified in the idealist writings of Roberto Unger.[51] Even if the convergence with Marxism is taken into account, this seems odd. Certainly, CLS has been much more pragmatic and, as it were, down to earth than the more patent examples of natural law, recognising in ways that natural law does not that laws as we know them are constructed by humans in collaboration, or perhaps conspiracy, with each other. But the lesson drawn by CLS from this is that the legal system should be reformed, under guidance from superior principles. Just so might a Marxist be severely critical of the legal system of a capitalist state, identifying its mystifying and oppressive functions and contrasting it with the proper purpose of law, whether or not any existing socialist legal system were to be pointed to as exemplar of the latter.

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[49]   Michael Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 975.
[50]   Tushnet, above n 33, 1525.
[51]   Roberto Mangabeira Unger, 'The Spell of Rationalizing Legal Analysis' extracted in Michael Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 1113.

Some pressing concerns should be addressed. It might be suggested that legal positivism enables the avoidance of responsibility by means of the fraudulent separation of law and the ethical. To accept a moral responsibility for a victim's suffering while at the same time disavowing a legal responsibility has been said to encapsulate the form and function of legal positivism; thus, assuredly, confirming its repudiation by those on the Left. According to this analysis, legal positivism provides the theoretical legitimacy for what might be called 'bad faith'. Yet the problem here is surely political or ethical rather than a matter of the choice of legal theory. If a person can be persuaded to sign up to a contract which puts her at a severe disadvantage in terms of obligations (for example, in the workplace), legal positivism cannot be blamed for that undesirable circumstance even if a court's implementation of the contract, in due course, appears positivistic in style. In the same way, a higher court's decision that such a contract was unconscionable and should be voided does not represent the triumph of natural law (or equity) over legal positivism as such. The evasion of responsibility or of liability has nothing to do with the separation of law and morality in legal positivism, for the latter is an epistemic claim and not an ethical one. Law and morality are not to be thought of as Jekyll and Hyde (or rather, respectively, Hyde and Jekyll) such that their violent separation out of a proper unified state gives rise to the unstable cohabitation of bad law and good morality.

A jury that acquits an accused person on the basis that the prosecution case has not been made out beyond a reasonable doubt — despite a shared intuition that the person is guilty as charged — might be said to have separated out morality from law.[52] They will have received instructions to do precisely that. If it is felt that the outcome is unsatisfactory, it would make no sense to blame legal positivism. If, on the other hand, a jury convicts a person, determining that the prosecution case has been made out and, at the same time, feels that the person really is guilty — and, moreover, the person *'really is'* guilty, whatever that may be taken to mean — then this situation might be said to be satisfactory, yet the law has been no less positivistic in the latter situation than it was in the former. The neutrality or autonomy of law is genuine, although by no means infinite.[53]

The critique of positivism within CLS emphasises the inadequacy and the danger of treating legal statements as self-sufficient

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[52] The argument here connects up with the question of procedural justice; John R Morss, 'Crime Stories: Posnerian Pragmatism, Rawlsian Pure Procedural Justice, and the Fictional Problem' (2004) 9 *Deakin Law Review* 643.

[53] John R Morss, 'Pride's Purge: A Puritanical Response to Dr Allan's "A Modest Proposal"' (2005) 30 *Australian Journal of Legal Philosophy* 82; John R Morss, 'Who's Afraid of the Big Bad Fish? Rethinking What the Law Wishes to Have' (2003) 27 *Melbourne University Law Review* 199, 204

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declarations in no need of interpretation. In the study of constitutional documents, for example, CLS scholars warn about the problems that arise if the exact wording of a documented constitution (such as that of Australia or of the United States) is treated as some kind of holy writ. Constitutions, they claim, must be 'alive' and amenable, in the right hands, to being developed, evolved and adapted to the contemporary world. What 'strict legalist' scholars tend to call 'judicial activism'[54] involves judges deliberately interpreting the apparently fixed text of a constitution (or other piece of statute) so as to take account of cultural and political realities, for example trends in international law or social changes at home.[55] CLS scholars would decry the aspiration of the positivist as a ritualistic adherence to the formalism of 'black letter' law. To the contrary, according to CLS scholars, legal statements must be located within a social, cultural and historical context so that interpretation of those statements is unavoidable in any event. To claim that a statement in law (such as a statute) can be applied without a process of interpretation, however constrained or opaque, is for CLS to deceive and to be deceived. The role of interpretation thus becomes crucial. According to CLS critique, the legal positivist is one who denies the necessity of interpretation.[56] In common with the positivist in the social or physical sciences, it is thus argued, the legal positivist treats the statement of norms as abstracted from any qualifying context, as something akin to an absolute truth.

But this is entirely incorrect. For, the problem with positivism in the social sciences is that it involves the assumption that there are facts and lawful relationships 'out there' to be discovered. Legal positivism, to the contrary, embraces the socially constructed (conventional) character of its subject matter. Anti-positivist criticism of law sees the legal positivist's view of law in terms of the pretence to value-freedom, to neutrality and objectivity. The split of law from morality is seen to imply this. But the (sophisticated) legal positivist's understanding of this split is itself contextualised in a sociocultural framework. Perhaps legal norms are, by definition, those norms that are split from values in this way; physical norms like the effect of gravity are not (it appears) related to values in anything like this manner.[57]

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[54]   John Gava, 'Another Blast from the Past or Why the Left should Embrace Strict Legalism: A Reply to Frank Carrigan' (2003) 27 *Melbourne University Law Review* 186, 194.

[55]   A practice vigorously defended by Hon Justice Michael Kirby, 'Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30 *Melbourne University Law Review* 576.

[56]   Morss, 'Who's Afraid of the Big Bad Fish?', above n 53.

[57]   The legal status of norms that might be said to be 'natural' norms (such as norms of arithmetic) is discussed in John R. Morss, 'Can Custom Be Incorporated in Law? On the Place of the Empirical in the Identification of Norms' (2008) 53 *American Journal of Jurisprudence* 1.

IV POSITIVISM, DEMOCRACY AND PEDAGOGY OF LAW

What is argued here is that legal education would benefit from a re-evaluation of the contribution of legal positivism. For this to happen, the stigma attached to the term positivism in contemporary social science and political studies should be addressed and the democratic tendencies of legal positivism reasserted. It is noted above that legal positivism embraces, indeed celebrates, the socially constructed or conventional character of its subject matter. In contrast, CLS emphasises the contingent social processes at work in law's functioning but frames this recognition with a set of strongly held, if elusive, values and a sometimes dogmatic political program. Law is emptied out in the same way that it would be by the adoption of a dogmatically religious approach — everything important is seen as taking place around law, not within it. The same consequence arises from a strong form of naturalism applied to jurisprudence, as advocated by Brian Leiter, according to which explanatory frameworks from the social sciences supervene on legal decision-making.[58] The broadly socio-legal perspective contextualises law in less dramatic ways and co-exists with more doctrinal approaches to the teaching of law for reasons that are not merely pragmatic.[59] An interdisciplinary observation is again apt; within psychology, a 'social context' approach to the understanding of human development represents but a modest step away from the biological orthodoxy.[60] It might be suggested that the socio-legal/law-in-context perspective wants, so to speak, to have its law and eat it too. In any event, the socio-legal approach reveals its weakness when the question of democracy is raised. Democracy is all about the contestation of voices and of identities, but it is also all about shared and reciprocal obligations within communities. It is about contested normativities that we are 'inside' and for which we have responsibility. Legal positivism focuses squarely on the processes that sustain all this. Thus legal positivism makes possible an articulation with the imperfect processes of representative democracy, without being constrained by those imperfections and without separating out democracy as a principle, a value or a function. It transcends the merely descriptive without straying into the programmatic prescriptiveness of CLS (or indeed of ideologies of the Right).

Open-endedness also applies to adjudication, since '[p]ositivism entails the view that we cannot determine adjudicatory content a priori'.[61] To the extent that judges legitimately contribute to the 'making' of law, they participate in the community's collective

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[58]   Brian Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' (1997) 76 *Texas Law Review* 267.
[59]   Cownie, above n 40, 54.
[60]   Morss, above n 34.
[61]   Coleman, above n 21, 215.

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decision-making in a manner complementary to the noisier activities of the legislators. Grasping this depends on the recognition of conventionality in the law that is guaranteed by the positivist approach. It may well be that 'the pull of formal legal reasoning [as a] necessary … ingredient of the judicial process … remains strong' and undoubtedly the longstanding debate between formalism and 'activism' in the judiciary has significant pedagogic implications.[62] But the connection between legal positivism and such formal reasoning needs further scrutiny. After all, there is no necessary connection between a standpoint in legal philosophy and a particular form of reasoning. Michael Coper associates formal reasoning, at least as it is transmitted to the student of law, as a 'fascination with the internal logic, formal validity and elegance of argument for its own sake'.[63] Of course, no effective advocate (or even successful student) can long indulge in such fascination. Sooner or later the student of law must learn to harness disciplines of argument in an environment defined by (in Coper's words) 'the realist truth that judges have choices that are not compelled by the legal materials.'

Coper is somewhat pessimistic about beginning students' capacity to grasp this complex and apparently paradoxical task, a task that for Coper corresponds to, and derives from, the 'intractable dilemma of the judicial process' itself. Yet viewed from a positivist standpoint, the tensions in this task no longer seem paradoxical even if nothing of their complexity is lost. Indeed, when students are challenged to participate in simulated tribunals such as mooting, they may well struggle to perform as successfully as they and we would wish. However, understanding the basic task does not itself seem to be a problem. So much is this the case that much useful teaching of law could be based on the guided reflection on students' experience of such practical exercises. Certainly, the conventionalism which is central to legal positivism brings with it a sense of the enabling (and ennobling) of collective decision-making with its concomitant obligations of communal respect for those decisions. In the 21st century, the domain of collective decision-making extends way beyond the boundaries of any one nation-state. But however far it extends, it remains a collaborative human activity, a work in progress.

This is not 'formalism' — far from it. The 'Blackstonian declaratory theory' of law, which has been associated with the formalist critique of judicial activism,[64] has no connection with a contemporary (post-Hart) legal positivism. The subjects of law — those for whom its pronouncements are held to be obligatory — are

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[62] Michael Coper, 'Concern about Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 573.
[63] Ibid.
[64] Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163, 164.

at the same time the sovereign source of law. Their sovereignty expresses itself in diverse ways and in diverse places. Our law students are citizens,[65] and even if they are as special as we like to think they are, they share the common experiences of citizens as they learn to understand, to advocate, to challenge and to advise.

The arguments of Thornton and of Walsh, to the extent that they treat legal positivism as part of the problem in legal education, need to be balanced with other views. As Schauer has commented:

> [If one] wishes to remain sceptical not only about laws but about law, then one would want to make clear the distinction between recognizing law and endorsing it, between locating law and obeying it, and between identifying law and celebrating it. In this sense it is the rejection and not the acceptance of positivism that appears conservative … To take law and morality as necessarily conjoined is to run the risk of minimizing the moral space between the products that legality has given us until today and the goals we might wish an ideal legal system to accomplish.[66]

It is legal positivism that best illuminates the difference Schauer describes and hence enables detached scrutiny of existing legal institutions. Granted, legal positivism sometimes generates a merely 'neutral' perspective which stresses that 'the fact of an institution's existence says nothing about its desirability' but leaves the matter there. But legal positivism also enables a sceptical view, 'taking the existence of an institution as a reason for suspecting it'.[67] This is an intellectual resource that legal pedagogy can ill do without.

Thornton and Walsh treat legal positivism as complicit in a technocratic, unreflective and somewhat mechanical approach to legal education. This interpretation depends on the characterisation of legal positivism as a matter of the articulation of legal rules of a kind whose expression is sufficiently precise and unambiguous as to generate a legal curriculum almost in and of themselves. Any extended text can form the basis of an educational program; 'religions of the book' are the most obvious example, and some of the educational regimes that have been derived from religious texts have been dogmatic indeed. If any teachers of law treat legal texts (whether statutes or 'textbooks') as materials to be conveyed dogmatically to, and uncritically interiorised by, their poor students, then those teachers' practices are to be deplored. Teaching of any topic that is narrowly vocational, or that involves mere 'regurgitation' of material, is to be condemned. But those teachers' lack of imagination and professionalism are not attributable to legal positivism. Indeed, what has been argued in this paper, as a contribution to debate on legal education, is that if there is anything distinctive about law as

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[65]   Ibid 182: 'A scholarly education will equip law students to become lawyer-citizens'.
[66]   Schauer, above n 17, 46.
[67]   Ibid.

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a discipline and as a profession then the legal positivist approach captures it rather successfully. This is especially the case in relation to the legal positivist celebration of the socially constructed, which promises to assist in the orientation of legal education toward a more transparent, accountable and democratic future.