

Books

Review Essay: The Social Sciences in Australia and the Experience of Law

The Poor Relation: A History of Social Sciences in Australia by Stuart Macintyre
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Abstract

This essay reviews Stuart Macintyre's recent political history of the symbiotic relationship between the Australian social sciences and the federal government, and considers whether this captures the position and experience of the discipline of law. Macintyre has provided his readers with a thought-provoking account of how, over the past 60 years, various personalities and organisations (principally the Academy of the Social Sciences in Australia) have unsuccessfully endeavoured to raise the profile of the social sciences. He invites higher education policymakers and disciplinary leaders to pause and consider how to devise initiatives that reward what is truly unique and valuable within individual disciplines. In addition to reviewing Macintyre's book and testing its prescriptive qualities, this essay considers the insights this work may provide to those in the legal academy.

I Introduction

How do you sell to legislators, governors, trustees, donors, newspapers, etc., an academy that marches to its own drummer, an academy that asks of the subjects that petition for entry only that they be interesting, an academy unconcerned with the public yield of its activities, an academy that puts at the center of its operations the asking of questions for their own sake? How, that is, do you justify the enterprise?¹

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¹ Stanley Fish, *Save the World on Your Own Time* (Oxford University Press, 2008) 153–4.

Since the 1950s, the Academy of the Social Sciences in Australia ('the Academy')² has endeavoured to fulfil the unenviable task of promoting the Australian social sciences³ to their major funder, the Australian Government ('the government'). Stuart Macintyre's political history of the Academy, *The Poor Relation: A History of Social Sciences in Australia*,⁴ explains the magnitude of this task by describing some of the pivotal events, personalities and dogma that have frustrated its efforts to negotiate a more faithful system of recognition and reward. In essence, the work is a history of the symbiotic relationship between the Australian social sciences and the government. In addition to evaluating the central features of the work and Macintyre's prescription, this review tests some of the main elements of Macintyre's thesis against experiences in the discipline of law.

As one would expect from a work that focuses on multiple disciplines and their political clout over a 50-year period, many of the nuances of individual disciplines are either glossed over or ignored. This, and the fact that labelling a discipline a 'social science' is itself open to contest, may suggest that Macintyre's history of the collective social sciences is not reflective of all of the disciplines that make up this fragmented group. For these reasons it is worth exploring whether Macintyre's work translates to law and is therefore a history of law. In particular, this essay considers whether the reasons Macintyre provides for the lesser treatment of the social sciences apply to the experience of law.

Macintyre suggests that the social sciences have falsified their true nature by drawing inappropriate comparisons with the natural sciences, in the belief that this will win favour from government. Macintyre considers that this has subjected the component disciplines to evaluative measures at odds with their mission and virtues, and against which they ultimately perform poorly. Such ill-fitting comparisons have rendered the social sciences a 'poor relation' to the natural sciences. In this context, it is worth considering whether law's distinctive characteristics mean that it, too, fares poorly when subjected to the same comparisons. Macintyre also argues that grouping disciplines under the banner of the 'social sciences' for the purpose of advocacy ignores the distinctive qualities of each individual discipline and conveys a cohesion which does not actually exist. Advocacy based on this cohesion has also frustrated the ability of the disciplines to be recognised for what they individually do best. In order to understand whether law has similarly been poorly served by such categorisation, this review will consider whether the reasons for law's original alliance with the social sciences remain pressing and whether law is properly treated as a social science. But first, some further words on Macintyre's thesis and his work's prescriptive qualities.

² The organisation has changed its name several times: 'It began in 1943 as the Social Science Research Committee of the Australian National Research Council, incorporated itself as the Social Science Research Council in 1952, and in 1971 became the Academy of the Social Sciences in Australia': Stuart Macintyre, *The Poor Relation: A History of Social Sciences in Australia* (Melbourne University Press, 2010) 8.

³ The current social science disciplines in Australia as defined by the Academy are anthropology, demography, geography, linguistics, management, sociology, economic history, economics, statistics, history, law, philosophy, political science, education, psychology and social medicine.

⁴ Macintyre, above n 2.

II Policy Waves

Macintyre's study of the relationship between the Academy and the government identifies two central 'policy waves' that have served to confuse and undermine the direction of the social sciences in Australia. The first wave, represented by initiatives such as the creation of the Australian Research Grants Council in 1965, increased the pressure on disciplines to specialise.⁵ It entrenched a culture of competition and accountability and undermined the Academy's efforts to encourage greater coordination among the social sciences, and, by extension, undermined its ability to advocate on behalf of a coordinated body of social sciences. Macintyre explains that in an environment where research applications were assessed by leading researchers, 'standards and disciplinary perspectives acquired augmented force.'⁶ Increased emphasis was placed on peer review, specialist literature and methodologies that 'favoured advances within established fields of inquiry.'⁷

The government's push for specialisation further encouraged the abandonment of the Academy's founding vision. The founders established the Academy to promote research (as opposed to purely teaching) in the social sciences,⁸ as it was believed that such research was a 'necessary preliminary to facing war-time and post-war problems.'⁹ While the opinions of individual founders differed, they were at least in part attempting to shepherd the social science disciplines towards developing a 'common purpose and method' and 'marking out a distinctive domain of knowledge that could be extended cumulatively and systematically.'¹⁰ It was believed that this mission could serve the instrumental goals of government. However, in Australia, as in other countries, the ideal of creating a science of society failed. Macintyre explains that a comprehensive social science research program has never been realised internationally and observes that:

[e]ven at the height of the war effort and the zenith of confidence in central planning, the social scientists were unable to establish their case for a comprehensive research program. ... Since no one seemed capable of translating its ambitious claims into a convincing research plan, senior government advisers could hardly be blamed for concluding that the fledgling organisation was unlikely to lead such activity.¹¹

As Macintyre's explains, the social sciences never came close to fulfilling their exulted collaborative mission, and with this failure came the recognition that together they would never possess those coordinated qualities that gave the natural sciences both their strength and their appearance of objectivity.¹² As a consequence, the legitimacy of the social sciences was weakened, not to mention

⁵ Macintyre, above n 2, 100.

⁶ Ibid 101.

⁷ Ibid 101.

⁸ Law Professor Julius Stone was among the founders: *ibid* 30.

⁹ *Ibid* 37. Macintyre quotes from a document prepared by Professor Julius Stone and Professor Alan Stout.

¹⁰ *Ibid* 31.

¹¹ *Ibid* 46.

¹² *Ibid* 46, 62–8, 86.

their sense of self-worth. These realisations in combination with the first policy wave encouraged specialisation within the social sciences.

Macintyre explains that the second policy wave that served to undermine the social sciences occurred in the 1980s and 1990s. Changes in higher education policy during this period led to the erosion of discipline-led knowledge and a loss of confidence in disciplinary systems of recognition and reward. This change in focus impacted particularly on the social science disciplines, since their efforts during the previous 30 years had been directed at strengthening their disciplinary structures.¹³ During this period the federal government redoubled its efforts to impose research agendas upon the universities. From 1987, the newly-appointed Minister for Employment, Education and Training, John Dawkins, pushed for greater external control and accountability in an attempt to ensure that universities produced work that accorded with the government's policy of treating knowledge as an exploitable commodity.¹⁴ This attitude subsequently endured. Macintyre explains that the

[a]xiom of research policy in the closing years of the twentieth century was the obsolescence of the disciplines. As government directed support to predetermined priorities chosen for their expected national benefits, it was no longer content with curiosity based pure research for its own sake...¹⁵

Macintyre considers that the freedom of academics to direct their own research was further denigrated by the work of a group of social scientists in the early 1990s who divided knowledge creation into two 'modes.' They defined 'Mode 1' as 'disciplinary knowledge in an academic setting guided by curiosity and judged by academic standards.'¹⁶ This type of knowledge creation was considered outdated. They then defined a new and improved 'Mode 2' knowledge, describing knowledge production that 'occurred in the context of its application, framed by the problem rather than its disciplinary components, and negotiated between the academics, users and stakeholders according to its commercial viability and social acceptability.'¹⁷ The push to drive and evaluate research in accordance with market-based models has elsewhere been linked to the intensive management systems created by elite American business schools such as Harvard Business School. These systems have been sold to organisations such as the UK government and universities.¹⁸

¹³ Ibid ch 9.

¹⁴ Ibid ch 9. Macintyre's work suggests that successive Australian prime ministers and governments from the time of Menzies had never fully embraced the universities and had shown cynicism towards the goals of the social sciences. The reports and recommendations of Sir Keith Murray and Sir Lesley Martin in the 1950s and 1960s had nonetheless encouraged the government to afford the universities a level of autonomy. This enabled academics to judge the appropriate balance between 'the pursuit of knowledge for its own sake' and research that was 'indispensable to the welfare of the nation.' In contrast, Dawkins' ideas and reforms constituted a rejection of any such autonomy: 24, 91.

¹⁵ Ibid 274.

¹⁶ Ibid 28.

¹⁷ Ibid (citations omitted).

¹⁸ See, Simon Head, 'The Grim Threat to British Universities', *The New York Review of Books* (online), 16 December 2010, <<http://www.nybooks.com/articles/archives/2011/jan/13/grim-threat-british-universities/?pagination=false>>.

The ‘myth of the modes’¹⁹ not only accommodated the government’s desire to shape and direct the universities to perform research that obviously and crudely met the government’s national priorities, it also further exposed the weaknesses of the disciplinary structures fostered, particularly, within the social sciences. As previously noted, the social sciences had long ago abandoned the goal of fostering coordinated research, a science of society. The previous 30 to 40 years had demonstrated, both in Australia and abroad, the force of the disciplinary structures and their appeal to social sciences. Further the maintenance of disciplinary boundaries within the social sciences had ensured the diversity of the group, making the possibility of a coordinated science of society even less viable. In sum, the social sciences’ response to the first policy wave, leading to a stronger disciplinary focus, had consequently undermined their capacity to respond to the second policy wave and added to both their sense of vulnerability and their reduced prospects for recognition and reward.

By providing a well-evidenced account of the attitudes and behaviours of both the government and the Academy since the funding relationship began, Macintyre’s work permits a close assessment of why the government has supported the social sciences to a lesser extent than their rich relation, the natural sciences. It also provides the essential groundwork for contemplating how social science disciplines can reach their true potential. It is neither a work of nostalgia nor, being written by a highly accomplished Australian scholar, a product of the author’s unhappy predicament. It is the comprehensive historical study of the trajectory of academic disciplines that the Australian scholarly landscape has so far been lacking.²⁰

III A Case for the Social Sciences?

A *Good Intentions*

The lesser regard for the social sciences compared to the natural sciences and the scepticism about their methods and academic contribution have been noted in numerous places and are by no means uniquely Australian phenomena. It is therefore pertinent to ask, ‘What does Macintyre’s work add to what is already known?’ By focusing on the Australian context over a 50-year period, Macintyre is able to provide a detailed case study of the social sciences that distinguishes his subject matter from other works. His methods and goals are also different from those of many similar studies.

At one point Macintyre states that his reason for writing was to study why there is a lesser regard for the social sciences.²¹ At another, he claims that his purpose was ‘to provide an account of the social sciences in Australia, not so much by identifying the major advances made here — though some will be described —

¹⁹ Macintyre, above n 2, 29.

²⁰ Macintyre describes the Australian literature as ‘fragmented’, providing ‘only the most rudimentary sketch of the Australian university’: Macintyre, above n 2, 9. For a further recent history of policies relating to the Australian tertiary sector, see Frank P Larkins, *Australian Higher Education Research Policies and Performance 1987 – 2010* (Melbourne University Press, 2011).

²¹ Macintyre, above n 2, 5.

but through a broader examination of their fortunes²² and that by ‘relating the endeavours of the social sciences’ he hoped ‘both to explain their fortunes and affirm their importance.’²³ By focusing on the activities of the Academy, the work highlights how the collective disciplines forming the social sciences ‘endeavoured’ to organise themselves and advocate their cause for greater funding and respect. It also illustrates how these endeavours have been frustrated by the policies of their major funder. Macintyre’s work does not seek to explain the contributions made by the disciplines to innovation and knowledge. A small number of projects encouraged by the Academy are detailed, but no attempt is made to draw out significant achievements of the Australian social sciences per se. The evidence Macintyre presents is of the social sciences’ efforts to gain recognition, rather than the research and scholarship they have carried out.

Under Macintyre’s model the ‘importance’ of the social sciences therefore equates to their good intentions, rather than to hard evidence of their achievements. Further, the work is based on the broader unsubstantiated premise that the disciplines forming the social sciences are ‘valuable’. At the same time Macintyre labels the social sciences in Australia as ‘poor’ because of the low levels of funding they have received, both historically and relative to their equivalents in other countries. This is the primary reason, Macintyre argues, why the social sciences in Australia have lagged behind the natural sciences in making contributions of worldwide significance. Macintyre’s thesis is borne out by the recent Excellence in Research Australia (‘ERA’) exercise, conducted by the Australian Research Council, where on the whole the performance of the social sciences was lower than that of the natural sciences.²⁴

Macintyre’s work is valuable in that it seeks to explain the causes of the shortfall in the context of Australia’s political landscape. It is a case study that reveals and explains the ineffectiveness of advocacy advanced by the Academy on behalf of the social sciences. As such it invites first, a consideration of how members of the university should better interact with policymakers to advance their interests and second, greater scrutiny of the effectiveness of higher education policy more broadly.

B *Playing Someone Else’s Game*

Macintyre has achieved both more and less than his expressed intention. He fulfils his purpose by exploring the past to discover the reasons for the social sciences’ poor treatment by government. He then exceeds his purpose by seeking out reasons why the social sciences and policymakers should do things differently. His work, especially the concluding chapters, has a strong prescriptive element. He considers that both the government and disciplinary leaders should do things differently to improve their relationship.

²² Ibid 7.

²³ Ibid 29.

²⁴ See, eg; Judith Brett, ‘Results Below Par in Social Sciences’, *The Australian* (Sydney), 9 February 2011, 36. The social sciences received an average rating of 2.5 out of 5 in the ERA, a score classified ‘below world standards’.

First, Macintyre's study leads him to conclude that policymakers should re-evaluate their initiatives and that disciplinary leaders from the social sciences should encourage the government to recognise the unique qualities of the disciplinary structure. He urges the government to question the wisdom of the 'modes' analysis, characterising the modes as a myth that disturbingly 'allows no role for the university other than to hold itself or conform to the needs of government and industry.'²⁵ The critical voice within the university is lost, along with the idea of discipline-based knowledge.²⁶ Macintyre considers this a recipe for mediocrity.²⁷

Second, Macintyre calls on leaders of the disciplines to embark on a David and Goliath struggle. He argues that disciplines need to regain autonomy, receive greater support and develop their own frameworks of reward and recognition, if they are to become bastions of excellence. To achieve this, Macintyre believes that disciplines need to engage in greater advocacy based on solid intellectual foundations. This, according to Macintyre, will involve more soul-searching, as the disciplines need to 'articulate what they do, how they do it and why it matters.'²⁸ This argument runs counter to the government's policy and worldwide rhetoric that supports 'Mode 2' knowledge.²⁹ It therefore requires a reassessment of current wisdom on a global scale.

While these prescriptive elements take Macintyre's work beyond its stated aims, at the same time his work falls short by failing to affirm the importance of the disciplines identified as the 'social sciences.' This weakens the cogency of his explanation and his overall case for the social sciences. On the one hand, he encourages his readers to recognise the grandeur of the social science disciplines, while on the other he notes that such disciplines have not fulfilled their promises.

Macintyre's depiction of the Academy's ongoing inability to articulate a statement of purpose leads his audience to question whether the social science disciplines in fact have a claim to intellectual propriety. In the past 50 years, why has the Academy been unable to provide a voice for the range of different interests represented under the social science banner? Macintyre's work provides a solid grounding for understanding how research policy has shaped the status of the social sciences in Australia but does not provide a defence of the disciplines.³⁰

Further, while on the whole Macintyre's work provides a probing and thoughtful insight into the experience of the social sciences in Australia and the policy waves that have shaped that experience, and provides an incisive diagnosis of the problems, his prescription ultimately falls short. Macintyre is right to expect

²⁵ Macintyre, above n 2, 29.

²⁶ Ibid 274.

²⁷ Ibid 29.

²⁸ Ibid 336.

²⁹ Ibid 28.

³⁰ In a review of Macintyre's work, Richards concludes that 'the winning of greater public support might have been better served by a demonstration of the accomplishments of the social sciences over the past fifty years, a worthy task for some future author.' Eric Richards, 'Book Review: *The Poor Relation: A History of the Social Sciences in Australia* by Stuart Macintyre' (2011) 46 *The Journal of Pacific History* 147, 148.

policymakers to evaluate whether the strategies they have implemented to make universities more accountable have advanced innovation. There is also great force in his belief that strengthening the disciplinary structure will best enhance the value of the university, and is a cause worth fighting for. His suggestion that Australian scholars should engage in greater meta-scholarship to enhance and strengthen the disciplines also has much merit. Where his prescription falls down is in the idea that leading scholars can engage in a productive dialogue with policymakers that will convince them of the worth of individual disciplines. While the idea of such advocacy is noble, given the history Macintyre has outlined, it also seems naïve.

Macintyre puts forward a convincing case that the government's tertiary education policies have depended heavily on the predetermined attitudes and individual personalities of those who have held the post of federal Education Minister. Even in an environment where a growing number of government seats are held by university graduates, there has been an ongoing scepticism about the traditional goals and values of university education.³¹ Dawkins' rule in the 1980s marked, according to Macintyre, the lowest point in tertiary education policy. Macintyre suggests that Dawkins stacked committees with academics who were sympathetic to his (Dawkins') cause and marginalised those who dared voice a counter view.³² Even savvy attempts by influential intellectual leaders such as Professor Peter Karmel to mount a case against prevailing policy were, according to Macintyre, dismissed and ignored by Dawkins and his government.³³ This portrayal not only evokes a sense of hopelessness, it also weakens Macintyre's prescription. If so much rests on the predetermined opinions of government Ministers, what difference will further advocacy on the part of the individual social science disciplines really make?

The problem with Macintyre's prescription is that it embodies unfounded optimism for future dealings with policymakers, ignores the fundamentally different positions occupied by policymakers and scholars, and overlooks the difficulties associated with scholarly leaders putting forward a convincing case for their discipline. In this way Macintyre's prescription exhibits a quality found in many works of legal scholarship. Often legal scholars similarly mistake the true nature of the decision maker to whom they address their prescriptions. For example, Rhode writes that even legal scholars who:

issue the most blistering indictments of ineptitude, special interests, or political pressures in legal decision making often conclude with touchingly naïve strategies for change. Yet if decision makers really resembled the high-minded reformers that many authors envision for their policy proposals, the problems that their scholarship identifies would never have arisen.³⁴

There is little in Macintyre's work to suggest that policymakers would be receptive to an argument for the disciplines. There is much to suggest that such a dialogue would involve advocates inviting more rather than less scrutiny, based on

³¹ Macintyre, above n 2, 235.

³² *Ibid* ch 9.

³³ *Ibid* 242–3.

³⁴ Deborah L Rhode, 'Legal Scholarship' (2002) 115 *Harvard Law Review* 1327, 1342 (citations omitted).

oversimplified accounts of the true nature of the disciplines. Critical legal thinker, Stanley Fish, writing of the American experience, also argues that justifying the worth of disciplines to legislators, trustees, donors and so on is a dangerous enterprise because “[t]he person who asks you to justify what you do is not saying “tell me why *you* value the activity” but “convince me that *I* should,” and if you respond in the spirit of that request you will have exchanged your values for those of your inquisitor.”³⁵ This captures the position that the Academy and social sciences have been in for at least the past 30 years, as related in Macintyre’s work. Attempts by the Academy to appease policymakers by suggesting that the social sciences share the same values as the natural sciences, and are fully aligned with the government’s national priorities, have caused a distortion of external perceptions of the disciplines and have confused developments within the disciplines. In essence the social science disciplines have exchanged their values for those of government.

There is no doubt that there are some intellectually compelling arguments for retaining disciplinary autonomy. On any objective view, judged over a long period of time, the disciplinary structure has succeeded in fostering the advancement of knowledge. It is also a structure which scholarly leaders have consistently preferred. Attempts to amalgamate disciplines have generally failed. The institutionalisation of the disciplines is well documented in the literature.³⁶ The strength and primary attributes of the natural sciences derived from their disciplinary structure which facilitated the consensus and legitimacy in that field. It led to the creation of journals, learned societies and other innovations resulting in communication systems facilitating the production of knowledge. Vick highlights the success of disciplinary development:

The stunning advances in knowledge from the Reformation to the present day, particularly in the physical sciences, can be seen as vindication of the system of disciplinary specialization, and this success has helped reinforce traditional disciplinary divisions.³⁷

Further, the disciplinary structure has historically achieved much of what the government is seeking for universities today. The rise of disciplinarity in the 1900s led to the imposition of peer review, to act as a form of quality control, and placed an emphasis on publications.³⁸ Increasing specialisation led to competition both among and within disciplines for prestige, resources and influence.³⁹ While the disciplinary structure provided for greater autonomy for the disciplines, the criticism that such autonomy also brought insularity is not supported by history. Studies of the history of disciplines and the university acknowledge that as social

³⁵ Fish, above n 1, 154.

³⁶ See, eg, Julie Klein, *Interdisciplinarity: History, Theory, and Practice* (Wayne State University Press, 1990); Roger G Krohn, ‘Patterns of the Institutionalization of Research’ in Saad Z Nagi and Ronald G Corwin, *The Social Contexts of Research* (Wiley-Interscience, 1972) 29.

³⁷ Douglas W Vick ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 163, 167.

³⁸ See Mary Biggs, ‘The Impact of Peer Review on Intellectual Freedoms’ (1990) 39 *Library Trends* 145.

³⁹ See Dennis P Carrigan ‘The Political Economy of Scholarly Communication and the American System of Higher Education’ (1990) 15 *Journal of Academic Librarianship* 332.

constructs, disciplines have always been shaped by society and influenced by the agendas of their funders.⁴⁰

The problem for advocacy groups such as the Academy is that current dogma and ongoing government scepticism mean that such arguments are almost certain to be ignored. When even the most sophisticated and well-evidenced arguments for disciplinary autonomy have little force, it suggests that strategies to educate policymakers must be abandoned to make way for an entirely new approach.

C *Questions Unanswered*

Surely, the most disturbing consequence of the government's insistence on closely monitoring, controlling and evaluating the universities, as highlighted by Macintyre, is that this has led to the disciplines falsifying their true nature. Higher education policy has encouraged social science academics to make bold claims suggesting that their research shares the same qualities as the natural sciences, led to suggestions that the social sciences are more cohesive than is actually the case and encouraged advocacy to centre on the crude and obviously practical benefits of the disciplines, rather than their more significant — but less tangible and quantifiable — values. However, Macintyre's work does not explain how these developments have impacted on the scholarship produced by social scientists. What projects have been discouraged by research policy? Has such policy encouraged social scientists to engage in safe or orthodox projects? How far have the government's 'national priorities' been interpreted and to what extent have they shaped the work produced by Australian social scientists? Have the leaders of the discipline offered a layer of protection, by sitting on councils and boards, or are they too part of the problem? These are critical questions, often raised in newspapers and other literature,⁴¹ but are not clearly dealt with in Macintyre's work.

Of course, Macintyre's position as a leading Australian social scientist means that this study was conducted from a viewpoint largely sympathetic to the concerns and interests of the social sciences. While this does not diminish the cogency of his work, the problems that may arise from conducting such a study from this vantage point could be better explained. Other questions could be raised concerning Macintyre's treatment of the natural sciences. Arguably, these disciplines are caricatured in his work, and the difficulties that they have faced, and the compromises they have had to make in order to satisfy government agendas, are largely ignored.

⁴⁰ Thornton, for example, notes that the 'idea' of the university is an unfulfilled ideal. She describes Karl Jaspers work on *The Idea of the University* and how that idea could not be realised in Nazi Germany due to the university's dependence on the government. Jaspers was not able to pursue his anti-Nazi work due to this dependence. Margaret Thornton 'The *Idea* of the University and the Contemporary Legal Academy' (2004) 26 *Sydney Law Review* 481, 492–3.

⁴¹ For a recent example see Julian Hare, 'Researcher Slams Secretive Science' *The Australian* (Sydney), 8 June 2011, 37.

IV The Experience of Law

Overall, Macintyre's thesis is applicable and defensible with respect to the discipline of law in Australia. There are a number of ways that this can be demonstrated. First, law fares poorly when its attributes are compared with those of the natural sciences which have attracted recognition and reward. Second, law's distinctive qualities mean that not only is it fundamentally different from the natural sciences but that it cannot be too closely compared to the other members of the social sciences. Third, over the past 60 years, law has grown in strength and confidence. It is now a large professionalised discipline. The original reasons for joining with other members of the social sciences no longer apply. The experience of law further suggests that members of the legal academy are willing to acknowledge the distinctiveness of their discipline rather than looking for similarities with the natural and social sciences. They see strength in difference and believe that these differences ought to be rewarded.

A *Comparisons with the Natural Sciences*

Macintyre provides several reasons why, compared with the natural sciences, the social sciences have been placed at a distinct disadvantage by government policies. He points to their fragmented nature, the academics' identification with 'their discipline rather than common interests', their 'intuitive, qualitative and argument based' methodologies and their 'focus on the "academic side" at the expense of public promotion and advocacy.'⁴² Law largely shares these same qualities.

Law has similarly been described as intuitive, qualitative and argument based. Standard forms of legal scholarship involve scholars prescribing reform based upon argument and an implicit normative foundation.⁴³ Peer review of legal scholarly work has largely been an intuitive process.⁴⁴ There are no standard criteria against which legal scholarship is assessed. Leaders of the discipline know good work when they see it. The intuitive nature of evaluation and reward in legal scholarship is illustrated by the controversy that erupts whenever the ranking of law journals or books is proposed.⁴⁵ While all scholars may agree that the *Harvard*

⁴² Macintyre, above n 2, 271.

⁴³ See Edward L Rubin, 'The Practice and Discourse of Legal Scholarship' (1988) 86 *Michigan Law Review* 1835; Carl N Edwards, 'In Search of Legal Scholarship: Strategies for the Integration of Science into the Practice of Law' (1998) 8 *Southern California Interdisciplinary Law Journal* 1, 23–6; Brian R Cheffins, 'The Trajectory of (Corporate Law) Scholarship' (2004) 63 *Cambridge Law Journal* 456, 462.

⁴⁴ 'Many of the most significant debates in legal scholarship involve evaluation, and many of these are repetitive and unproductive for lack of an evaluative theory. Legal scholars have argued back and forth about the value of critical legal studies and its relationship to traditional scholarship without establishing any criteria for making such determinations. They have debated the contribution that other fields, such as economics, literature, and social science, can make to legal thought without general rules for assessing these external contributions': Edward Rubin, 'On Beyond Truth: A Theory for Evaluating Legal Scholarship' (1992) 80 *California Law Review* 889, 889–90. Cheffins refers to the 'heated discussion' in legal scholarship 'about whether the "quality" of what is published can be evaluated in accordance with any sort of neutral criteria': Cheffins, above n 43, 466.

⁴⁵ See Dan Jerker B Svantesson, 'International Ranking of Law Journals – Can It Be Done and at What Cost?' (2009) 29 *Legal Studies* 678, 681.

Law Review and the *Modern Law Review* should sit at the top of any list, this consensus quickly dissolves when moving to other periodicals. The ad hoc development of journals in law, ranging from the general to the specialised, simply does not accommodate these kinds of assessments. It is also illustrated by the debates that have emerged concerning the use of methods and knowledge from other disciplines. While scholars continue to reassess what constitutes a model specimen of these new forms of scholarship, a dominant orthodoxy has not prevailed. As Rubin argued:

[L]egal scholarship by its very nature involves interchange between those with opposing views. The failure to agree upon a substantive position does not represent an unfortunate or temporary disarray within the field, but a central feature of the field as a whole.⁴⁶

Law has also struggled to extend its audience beyond the profession and other legal scholars to the broader public: ‘policymakers, legislators, civil servants, the media, grass roots activists, various categories of citizens, and, in particular, students, scholars and experts in fields other than law.’⁴⁷ In 2009, Twining put forward an argument that law ought to strive to be one of the humanistic disciplines. This would require legal scholarship to ‘self-consciously broaden its audiences’ through ‘not only changes in attitudes and practices of individual scholars, but also institutional support from funders of research, law schools, law publishers and bodies like [the Society of Legal Scholars].’⁴⁸ He advanced the view that most legal scholarship does not get read and that which *is* read extends primarily to an audience of legal academics and to a lesser extent judges and practising lawyers.⁴⁹ The narrowness of this audience has frustrated many.⁵⁰ Twining also argues that there are very few public intellectuals in law and those that do exist are mostly American or cater to an American audience.⁵¹ Law has not been effective in its attempts to communicate with broader audiences and there is little to suggest that Australian legal academics are devising new and different ways to communicate with these audiences.

Despite the adversarial nature of the discipline, law has been a poor self-advocate. For example, in the late 1990s, Parker and Goldsmith mounted a similar argument to Macintyre’s, suggesting that it was the law schools’ failure to advance a single goal or model of legal education that made them particularly vulnerable to external role definition,⁵² ‘reacting’ to external demands rather than ‘trying to re-

⁴⁶ Rubin, above n 43 895–6 (citations omitted)..

⁴⁷ William Twining, ‘Punching our Weight? Legal Scholarship and Public Understanding’ (2009) 29 *Legal Studies* 519, 521–2 (citations omitted).

⁴⁸ *Ibid* 521. This same premise underlies Twining’s earlier monograph: William Twining, *Blackstone’s Tower: The English Law School* (Sweet & Maxwell, 1994).

⁴⁹ Twining, above n 47, 524.

⁵⁰ See also Richard A Posner, ‘The Deprofessionalization of Legal Teaching and Scholarship’ (1993) 91 *Michigan Law Review* 1921, 1928; Rhode, above n 34, 1332–3; Michael Tilbury, ‘Why Law Reviews?’ (2003) 25 *Sydney Law Review* 21, 25; John Gava, ‘Scholarship and Community’ (1994) 16 *Sydney Law Review* 443, 458–60.

⁵¹ Twining, above n 47, 525.

⁵² Christine Parker and Andrew Goldsmith, “Failed Sociologists in the Market Place: Law Schools in Australia” (1998) 25 *Journal of Law and Society* 33, 46.

negotiate the terms on which legal education is offered.⁵³ They believed that, in Australia, law occupied a ‘precarious position between profession, state and market’,⁵⁴ and that as funding was diminishing the discipline was subjected to heightened regulation and increased demand and expectations from stakeholders. Parker and Goldsmith’s solution was for law to adopt a well-articulated mission to shield itself from external attack.⁵⁵ Law needed to provide a more cohesive purpose and become a stronger advocate. Their thesis therefore implies that the legal academy has similarly struggled to communicate a uniform vision for its discipline.

There are several strong reasons for viewing law as a discipline facing similar obstacles to others within the Academy. Government policies intended to assess the disciplines in accordance with attributes common to the natural sciences will impact as severely on law as on other members of the social sciences.

B *Fragmentation*

Law’s experience also suggests that Macintyre is correct in his thesis that the disciplines represented by the Academy tend only to be very loosely connected and possess many distinctive qualities, limiting the potency of collective advocacy. Macintyre acknowledges that the social sciences are far from a cohesive group. He explains the position of the social sciences in the following way:

The social sciences occupy the space between the natural sciences, which allow for the establishment of general laws applicable throughout nature, and the humanities, which deal with individual creativity and experience. They are linked loosely by a common purpose of investigating how societies work, but do so differently: some aspire to causal explanation and combine theoretical models and quantitative methods; others are more attentive to context and contingency, for their object is understanding.⁵⁶

The distinctiveness of law becomes all the more apparent when one considers that many members of the discipline would dispute the idea that their job involves ‘investigating how societies work.’ Even Macintyre’s loose common bond is contested within law. For example, Rubin suggests that one of the key ways that law and the social sciences differentiate themselves is through the perception that law is primarily prescriptive whereas the social sciences are primarily descriptive. He considers that:

[s]ocial science is a separate discipline from law because it perceives itself as separate, and that perception is based on its further perception that it is describing reality. Legal scholarship, by its own account, makes no such claim. To the extent that it describes anything, it describes a human artefact, and its main claim is that it can prescribe alternate approaches.⁵⁷

⁵³ Ibid 33.

⁵⁴ Ibid.

⁵⁵ Ibid 47. Parker and Goldsmith formulate a possible mission for law.

⁵⁶ Macintyre, above n 2, 4.

⁵⁷ Edward L Rubin, ‘Law and the Methodology of Law’ [1997] *Wisconsin Law Review* 521, 543.

There are of course scholars who do seek to both describe and prescribe phenomena and who describe their work as socio-legal.⁵⁸ Aspects of law and economics scholarship might be described as possessing a descriptive quality and legal formalists have traditionally suggested that their work is descriptive. In addition, legal scholars frequently incorporate knowledge and learning from other members of the social sciences. However, it is not yet the case that this incorporation represents an abandonment of law's prescriptive origins.⁵⁹

Other distinguishing features of legal scholarship include the relationship that legal scholars have with the legal profession and the fact that judges can be both the audience and the subject matter of such scholarship.⁶⁰ Legal scholarship is often described as 'reactive.' It involves scholars reacting to events and decisions made externally to the discipline and for this reason struggles to develop coherence and accumulate to a greater extent than most other members of the social sciences. This supports the view that legal scholarship is not typically driven by theories, nor does it evolve in accordance with standards of verification.⁶¹ These differences suggest that collective advocacy on behalf of the members of the Academy is likely to obscure important nuances unique to law. Law's distinctiveness requires separate attention and support.

C A Social Science?

The third way in which the experience of law verifies Macintyre's thesis is that, not only is it distinct from other members of the social sciences, but it has largely outgrown the social science tag, and the reasons for its original alliance with the social sciences are now less pressing.

The grouping of law with the social sciences can be understood historically as the product of both intellectual and practical concerns. The intellectual concerns are represented by one of the Academy's founders, Professor Julius Stone. Stone's strong identification with American Legal Realism underpinned his efforts to establish the Academy and the promotion of law as a science of society.⁶² American Legal Realism embraces the idea that law should be founded on 'human experience, policy and ethics, rather than formal logic'⁶³ and that legal academics should incorporate learning from the social sciences to drive legal reform. Many

⁵⁸ For example, by establishing the 'Socio-Legal Research Centre' the Griffith Law School has pledged its commitment to socio-legal research. By seeking to understand law as a social phenomenon, the Centre is arguably attempting to inject law with greater scholarly coherence: *Socio-Legal Research Centre*, Griffith University <www.griffith.edu.au/law/socio-legal-research-centre>. Flinders University also offers a degree in legal studies which has similar aims: *Legal Studies* (7 December 2011) Flinders University <<http://www.flinders.edu.au/courses/undergrad/majors/legal-studies.cfm>>.

⁵⁹ See Susan Bartie, 'The Lingering Core of Legal Scholarship' (2010) 30 *Legal Studies* 345.

⁶⁰ For an excellent discussion of the relationship between legal scholars and their judicial audience, see Meir Dan-Cohen, 'Listeners and Eavesdroppers: Substantive Legal Theory and Its Audience' (1992) 63 *University of Colorado Law Review* 569.

⁶¹ Cheffins, above n 43, 462.

⁶² For a full account of Julius Stone's life and achievements see Leonie Star, *Julius Stone: An Intellectual Life* (Oxford University Press, 1992).

⁶³ Joseph William Singer, 'Legal Realism Now' (1988) 76 *California Law Review* 465, 474.

members of the Academy shared Stone's interest in jurisprudence and public law and legal realism had a pervasive influence on many of the full time legal academics employed in law schools in the 1950s and 1960s.⁶⁴ A large number of legal scholars sought to depart from the formalist understandings of law associated with the English textbook writers such as Dicey.⁶⁵ In fact the idea that law should be studied as a 'social science to be continually moulded and remade as the needs of society change' was set down in print as early as 1935 by Melbourne University law students in the predecessor to the *Melbourne University Law Review*, *Res Judicatae*.⁶⁶ The desire of many legal scholars to incorporate learning from the social sciences to engage in proposals for broader law reform has endured throughout the past 60 years.⁶⁷ There is therefore an intellectual sincerity to the grouping of law with other members of the social sciences.

At the same time there are also practical reasons for the grouping of law with the social sciences. The emergence of a growing number of full-time legal academics in the 1950s and 1960s, coupled with a new understanding of law that departed from formalism, placed pressure on the discipline to establish its intellectual legitimacy. By rejecting the idea that law is an objective system that develops systematically and cumulatively, a large number of Australian legal scholars (like their American counterparts) abandoned law's claim to a scientific foundation.⁶⁸ Aligning law with the social sciences provided it with a new intellectual home. From this alliance law could distinguish itself from the physical sciences and carve out its own expertise while at the same time the possibility of incorporating empirical work might strengthen any future claims to objectivity.

Despite the intellectual and practical justifications, this alliance has always been controversial. Anyone who has read the common law literature on legal scholarship written over the past 100 years would appreciate the ongoing hostile debates over how to marry or accommodate the interests of the practising profession with scholarly methods and learning. The grouping of law with the social sciences has not fully represented the interest of all legal scholars. Further, the growing diversity within the discipline of law in terms of methods, purposes and perspectives, points to the impossibility of confidently grouping law with any other branch of the university. The recent creation of the Australian Academy of Law recognises this separation. More significantly, as demonstrated in the following part, literature produced in response to various research exercises in England, Australia and New Zealand suggests that many of law's leaders perceive

⁶⁴ See Susan Bartie, 'A Full Day's Work: A Study of Australia's First Legal Scholarly Community' (2010) 29 *University of Queensland Law Journal* 67.

⁶⁵ See, eg, Leslie Downer, 'Book Review: *British Nationality* by Clive Parry' (1952) 2 *University of Western Australia Law Review* 451, 452; David Benjafield, 'Book Review: *Executive Discretion and Judicial Control: An Aspect of the Conseil d'Etat* by CJ Hamson' (1956) 2 *Sydney Law Review* 206, 206-7; Robin Sharwood, 'Book Review: *Judicial Review of Administrative Action* by S A de Smith' (1960) 2 *Melbourne University Law Review* 431, 431. These references are further explained and cited in Bartie, above n 644, 92.

⁶⁶ Foreword (1935) 1 *Res Judicatae* v, v.

⁶⁷ See, eg, Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing, 1987) vol 1, [1.20].

⁶⁸ For a further explanation see Bartie, above n 644.

law as fundamentally different to the social sciences. The reasons for the original alliance are both less pressing and less relevant.

D *Punching Its Weight*

One positive development of the research assessment exercises conducted in England, New Zealand and Australia, is that they have prompted leading scholars to firm up, and speak out about, the characteristics of the discipline of law, and which of these characteristics are worth preserving. Responses by leading legal academics speak of a new confidence and strength in law, where the discipline is 'well positioned' to 'punch its weight'.⁶⁹ There are several recent public examples that demonstrate these new perceptions and suggest that it is both necessary and desirable for law to stand alone and advocate on its own behalf. These examples suggest that the discipline of law is in a position to do more than merely attempt to find better ways to explain itself to government.

In an article published in 2008, the late New Zealand Professor, Michael Taggart, argued that New Zealand's Performance-Based Research Fund ('PBRF') failed to recognise and reward the practitioner focus and local nature of legal scholarship. He spoke of the academy's close and ongoing relationship with the profession, with legal scholars feeling obligated to contribute to the profession by giving seminars, contributing to practitioner-oriented books and professional journals and participating in local conferences.⁷⁰ This clearly distinguishes the experience of law from other members of the social sciences. Further, Taggart explained that the discipline of law in New Zealand, as in Australia and England,⁷¹ bases much of its work on developments within specific jurisdictions.⁷² This constitutes a significant departure from many other disciplines where national boundaries are of little consequence. This national focus in many cases limits the available publication outlets to those located within New Zealand. As New Zealand publishers cater for the practitioner and student market, this has driven legal scholars there to publish text books primarily. Australian publishers have taken a similar position. By failing to reward most text books the PBRF ignores both the practical reality of publishing in New Zealand and the richness of law's textbook tradition, famously brought to life by Sugarman's historical account.⁷³

⁶⁹ Twining, above n 47, 532:

I shall proceed on the assumption that in the past 50 years or so academic law in this country has grown out of being a small, young, introverted, amateurish occupation struggling to gain respectability in the eyes of both the legal profession and other university disciplines. It is now a much larger, more self-confident, more professional enterprise that is poised to move out from largely talking to itself to make a much more visible contribution to public debate and understanding. We have already grown from baby bantam to respected middleweight, but we need to move on from introspection and soliloquy to better communication to a variety of audiences' (citations omitted).

⁷⁰ See Michael Taggart 'Some Impacts of the PBRF on Legal Education' in Claudia Geringer and Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, 2008) 250, 252–3.

⁷¹ Cheffins, above n 43, 461.

⁷² Taggart above n 70, 252–3.

⁷³ David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (Blackwell, 1986) 26.

In 2009 Twining also spoke of the significant obstacles the Research Assessment Exercise ('RAE')⁷⁴ in England posed to legal scholars producing work directed at legal practitioners, such as 'case notes and legislation comments; book reviews; reference works; collections of statutes; even, if annotated, short articles in practitioners' journals; submissions to the Law Commission or government committees.'⁷⁵ Twining believed that research audits tend to ignore the important practical elements of law which ground the discipline's relevance. He considered that research audits ought to recognise and foster those aspects of law which impact on the public rather than simply pure research, which he characterised as being of a more marginal nature.⁷⁶ In addition he was of the view that the audits stifle law's ability to gain greater relevance and currency through the production of a wider range of works, published in a variety of outlets, to assist public understanding of the significance and realities of law.⁷⁷ Twining therefore suggests that both law's link with the profession and ambitions for the future distinguishes it from other parts of the university.

In 2008, Goldsworthy challenged the government's insistence on recognising and rewarding law in accordance with the level of research income received.⁷⁸ He argued that the emphasis on pursuing grants has the potential fundamentally to distort the discipline of law. The premise of his thesis is that a large amount of high-quality legal scholarship can be, and is, produced without the need for external funding. This suggests, contrary to Macintyre's thesis, that law's fortunes do not align with the number of external grants it attracts since many legal scholars do not need such grants to produce work of a high standard. Instead law's ill fortune is caused by higher education policy that recognises and rewards scholars on the basis of the number of grants they attract as it down plays the importance of high-quality yet inexpensive research. Goldsworthy believes that a large part of high-quality scholarship is the product of the relatively inexpensive exercises of reading and reflection, rather than costly empirical or sociological studies. Anticipating the argument that legal scholarship would be enriched by activities that attract funding, he responded that:

it would be foolish to presume that sociological or empirical research is necessarily or even generally superior to other kinds of scholarship that have conferred in the past, and continue to confer today, national and international distinction on many of our finest legal scholars. It is the quality of scholarship that counts, not its genre.⁷⁹

In this argument law seems more closely aligned with the humanities than the social sciences. Goldsworthy's thesis suggests that research exercises are impacting on the types of research being done within the discipline of law. He suggests that the competitive process, and the way that research funding is used as a measure of success, is a significant problem.

⁷⁴ The RAE has now been replaced by the Research Excellence Framework ('REF').

⁷⁵ Twining, above n 47, 529.

⁷⁶ Ibid 528–30.

⁷⁷ Ibid.

⁷⁸ Jeffrey Goldsworthy, 'Research Grant Mania' (2008) 50(2) *Australian Universities' Review* 17, 22.

⁷⁹ Ibid.

While these leading academics address the issue of law's distinctiveness and the impact of research audits from different perspectives, their views speak of a new confidence, independence and strength within the discipline. If, as Rubin claims, '[s]ocial science and legal scholarship...are not epistemologically-derived positions' but are instead 'social practices, ways of speaking about things that are important to us,'⁸⁰ then such views are significant and speak of a new age for the discipline of law. This makes for an interesting contrast to Macintyre's portrayal of the disciplines as weak and vulnerable to external attack.

None of these comments about the distinctiveness of law should be construed as suggesting that the discipline of law should divorce the Academy or altogether abandon connections with the social sciences. Rather, the point is that current experience and attitudes suggest that law would be better off advocating on its own behalf.

V Conclusion

The important message that *The Poor Relation* relates is that over at least the past 30 years, the government has been openly sceptical of the work of the social sciences and that resultant higher education policy has eroded academic freedoms. For Macintyre, this is a great loss, his work being based on the premise that this is what is most precious to the university.⁸¹ The lesson his academic readers should take from his work is that more must be done to turn the policy tide back towards the fundamental values of the university and that new strategies for dealing with government must be devised. The experience of law suggests that it too has suffered from ill-fitting comparisons with the natural sciences and other social science disciplines and that it now has its own strong senses of identity (there are more than one) and should be judged on its own terms.

This review has, among other things, voiced some scepticism about Macintyre's proposed means. It doubts the wisdom of prompting the disciplines to better 'articulate what they do, how they do it and why it matters'⁸² in order to win the support of government and the public. It largely adopts Fish's position that

⁸⁰ Rubin, above n 57, 543.

⁸¹ For example, Macintyre describes the central plank of the Murray Report in favourable terms, is critical of the strong instrumental agenda imposed on the university by government and argues that the 'turn towards 'Mode 2' knowledge' 'ignores much that is precious in the university.' Macintyre, above n 2, 29, 91, 221. He concludes that:

the problem with the corporate structure is that it overlooks the distinctive mission of the university. It is neither a business nor a public agency but a place of learning. It has a commitment to the pursuit of knowledge by open inquiry and therefore respects the academic freedom of those who perform the principal activities of teaching and research. Academic freedom is more than a shibboleth, it is a necessary condition of the university fulfilling its purpose: the teaching requires that the grounds of knowledge be scrutinised and students develop the capacity for informed judgment; the research has to allow independent judgment. This has special force for the research in which the university specialises and which is seminal for innovation. The free play of curiosity that enables the most fundamental discovery cannot be subordinated to demand for utility. Direction of basic research is an oxymoron: Macintyre, above n 2, 334-5.

⁸² *Ibid* 336.

‘you can’t in a short time teach people to value activities they have never engaged in’, and that translating those activities into ‘the vocabulary of business or venture capitalism’ won’t help.⁸³ No matter how savvy the social sciences become in firming up their self identity, the distinctiveness of their enterprises makes it difficult for anyone to understand their worth unless they have taken the time to understand the ideas and learning within that discipline. To achieve a sufficient level of understanding policymakers would need to become academics — an unlikely proposition. This should not, however, lead to a sense of hopelessness. There are alternative strategies. For example, Fish suggests that academics and the university should instead publicly defend themselves, take issue with every false public statement made about them in the press and challenge policymakers themselves to get a better grasp of a discipline before they make decisions in respect of that discipline’s future.⁸⁴ Fish considers that the disciplines would improve their position if they operated from a position of strength rather than fear. This call for greater action has some appeal. Some of the responses to the research assessment exercises in Australia, England and New Zealand, suggest that this strength is present and growing, at least within the discipline of law, and could be used to further the strategy proposed by Fish.

Underlying Macintyre’s prescription is the idea that the social science disciplines have not done enough soul-searching. This may be true. The difficulty the Academy had in encouraging members to complete abstracts of recently published scholarship in order to provide a better understanding of current work being performed by the social sciences, supports this view. Macintyre’s thesis puts forward a case for more intellectual histories charting the ideas and major works completed by social science scholars in the 20th century. However, if this work is carried out critically then it is unlikely to provide a coherent vision for the disciplines. It may enrich the disciplines and strengthen them from within, but is unlikely to be of use in directly mounting arguments addressed to policymakers.

While there may not be an obvious way out of the present predicament, Macintyre’s work provides a solid foundation for acknowledging the true nature of the problem and for devising different methods of attack. It provides distance and perspective. Contrary to conventional wisdom, such a history promotes a depth of understanding regarding the current relationship between the university and government and how the social sciences, in particular, have been compromised through this relationship. It should not be assumed that new members of the discipline are familiar with this history. It is essential that scholars entering Australian universities understand the trajectory of the institution and the possibilities for the future. The work provides an extremely useful conceptual tool for reflection and analysis, and it is refreshing that one of Australia’s leading intellects is willing to take on such an ambitious and contentious project.

⁸³ Fish, above n 1, 164.

⁸⁴ Ibid 165–7.

