LEGAL EDUCATION, SOCIAL JUSTICE AND THE STUDY OF LEGALITY

by Ian Duncanson *

1. INTRODUCTION

The context of this paper is the recent sudden increase in the number of universities adding or seeking to add lawyers' training programs to the courses they offer.[1] Controversy about the way legal education is currently conducted arose out of the 1987 enquiry into law schools conducted under the auspices of the now defunct Commonwealth Tertiary Education Commission[2] but it is not my intention to endorse or to oppose the criticisms levelled in the CTEC document. Whether law schools fulfil the expectations which the legal professions have of them, or whether LL.B. degrees are intellectually broad enough to satisfy the demands which universities ought to require, are issues the professions and the universities will doubtless continue to debate.

My concern is with two issues. The first is that whilst the expansion of higher education generally could enable Australians to debate questions of social justice in a more informed way, opening access to discussion among a wider section of the population, the view that legal education is the most appropriate area to expand with this object in mind, is, I think, mistaken, although it is widely held.

Second, the expansion of vocational training for lawyers may well eclipse if not foreclose the academic study of legal phenomena from sites other than those selected by and for lawyers. The mere 'broadening' of vocational training to incorporate social scientific information may well not preclude such an outcome, and might accelerate it.[3] This is because lawyers' conceptions of their own and other forms of inquiry on the one

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1 Among those universities mentioned at the 1989 Law and Society workshop as starting or seeking approval for such programs were Griffith, James Cook, La trobe, Murdoch, Newcastle and Wollongong.

2 *Australian Law Schools: A Discipline Assessment for the C.T.E.C.,* Canberra, AGPS (1987).

3 This is not in any way to denigrate the attempts to make legal education in the existing law schools more theoretically informed or interesting: see C Sampford and D Wood, 'Legal Theory and Legal Education - The Next Step' (1989) 1 *Legal Educ Rev* 107.

hand display an excessive preoccupation with the taxonomy of disciplines, as though sociology, philosophy, history and so forth were sovereign territories, with frontier guards, customs inspections and immigration regulations. As Foucault suggests, however, we 'should leave it to our bureaucrats and police to ensure that our papers are in order'. As intellectuals whether we wish it or no we have the obligations of citizens of the world. It is not possible to escape these obligations by speaking merely 'as a lawyer' or by leaving that to sociologists to argue about, whatever it is. We always speak as social theorists, and social theories are syntheses, not aggregations, each part of which can be examined discretely.

On the other hand it seems inevitable to lawyers that any inquiry 'about' law must accept law as preconceived in its essence. Expert witnesses may be called to provide quantitative information about the effects or effectiveness of a law, or an ethical evaluation of 'it' in a particular manifestation - and indeed, some such witnesses develop shameful symptoms of feeling flattered at being noticed - but the possibility that from other standpoints social regulation can authentically be theorised differently from the way in which lawyers theorise it never occurs to them. The very idea may look like an invitation to intellectual and social anarchy which learning to 'think like a lawyer' is designed to forbid.[4]

It merely repeats the processes in which legal and other experts are marshalled in support of authority. Where lawyers sometimes concede that laws fail in their objectives, for example, I shall argue that this obscures and devalues the experiences of those for whom meaning is to be found in the consequences, for them, of the exercise of authority, rather than in the rhetorical flourishes of authority itself.

Vocationally-oriented expositions of legality, which are instrumentalist by disposition, are impatient with the procedures of constructing social theories in which to understand themselves.[5] The task of exploring the possibility of creating juster institutions, however, cannot afford such impatience, but implies dialogue, participation and the sympathetic search for silenced aspirations.[6]

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[4] J Bernauer and D Rasmussen, *The Final Foucault*, Cambridge, MA, M I T Press (1988), vii. I am grateful to my student K Olver for drawing my attention to the quotation.

[5] A Rhodes-Little, 'Ladders of Abstraction and Liberal Rights: The Ethics of Usefulness', (1989) 7 *Law in Context* 54; B Cassidy, 'Whose Law, Which Discourse?' in G Wickham (Ed.) *Social Theory and Legal Politics*, Sydney Local Consumption Publications (1987).

[6] R Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics and Practice*, (1985) Philadelphia U P A Press. I agree with M Thornton's pessimism about the realisation of, say, a feminist jurisprudence in the near future, if not with all of her reasons for thinking so: see M Thornton, 'Feminist Jurisprudence: Illusion or Reality', (1986) *AJLS* 5.

2. GOVERNMENT AND UNIVERSITIES: MACRO-POLICIES AND MICRO-POLITICS.

The twin aims of the Australian federal government are economic reconstruction and social justice.[7] The Department of Education, Employment and Training aims to harness higher education to the first policy, quite explicitly[8], and has presumably not unilaterally abandoned the second. Its choice of the Higher Education Charge, the collection of which may be deferred and paid for out of income tax, might be an indication of its preference for a less socially regressive version of the user-pays principle.[9]

Whether economic reconstruction at large can be pursued efficiently within a framework of 'deregulation' is not clear. Only English language economies and those in their imperial orbit have seriously attempted to combine the two, and none of them has been signally successful.[10] Whether the production of ever greater numbers of lawyers if consistent with economic reconstruction is another imponderable. Weber believed that common law practitioners had contributed positively to the development of capitalism in England[11], but studies of the more recent tendencies of the British and US economies have identified the entire professional and financial service sectors as contributors to industrial stagnation.[12]

These issues cannot be addressed here, but there is an interesting parallel between the Australian federal government's economic policy and its approach to universities. Through its Accord with organised labour, the Hawke government has held down the price of labour and allowed

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7 The most recent expression of these aims is the Governor-General's opening speech to the federal Parliament: Melbourne Age 9.5.90.

8 B Williams, 'The 1988 White Paper on Higher Education' (1988) 32 (2) *The Australian Universities' Review* 3.

9 See G Burke, 'Funding Options in Higher Education', (1988) 31(1) *The Australian Universities' Review* 28.

10 L Thurow, *The Zero Sum Solution: Building a World Class American Economy*, New York, Touchstone (1985); C Gonick, *The Great Economic Debate: Failed Economics and a Future for Canada*, Toronto, Lorimer (1987); J Laxer, *Decline of the Superpowers*, Toronto, Lorimer (1987); K Smith, *The British Economic Crisis*, Harmondsworth, Penguin, (1986); B Jesson, *Behind the Mirror-Glass: The growth of wealth and power in New Zealand in the eighties*, Auckland, Penguin (1987); A Lougheed, *Australia and the World Economy*, Melbourne, McPhee Gribble (1988).

11 The problem of England's non-rational judicial system was, in Weber's view, mitigated by the ability of lawyers, acting on behalf of capitalist clients, to design schemes 'for the transaction of business'. M. Weber, *Economy and Society*, (G Roth and C Wittich, eds) Berkeley U of CA Press (1978), 815, 1395.

12 C Leys, *Politics in Britain: From Labourism to Thatcherism*, London, Verso (1989); Business Week (US), 20.4.87 and 6.6.88, 'Can America Compete?' P Anderson, The Figures of Descent (1987) 161 *New Left Review* 20.

capital's share of national income to increase.[13] At the same time no systematic regulation has been attempted of the use of increased profits. It is still unclear whether the result has been to encourage property speculation, which is one possible outcome, to increase the consumption of consumer goods in excess of domestic supply, which is a second possibility, or to permit the movement of funds offshore, which is a third. Treasury statements and recent election promises build on the hope that increased profitability will be an incentive to proportionately enhanced investment in manufacturing, but it is hope backed simply by facilitation and exhortation.

In higher education, again, the price of labour has been held down. Academic salaries have declined in line with wages, perhaps more, but, more worryingly, recurrent funding to universities is being reduced.[14] The funds which are being withheld, and private sources which the government hopes will become available, are to be deployed for specific projects for which detailed applications must be made. Success will be determined in accordance with national research priorities.

But, just as profits in a deregulated economy are as likely to go into speculative projects as into productive investments, so the 'profits' of withheld recurrent funding could well end up in unproductive schemes plausibly garbed to suit the fashionable anxieties of the moment. One problem is that of predicting what research will be fruitful. A second is that vetting procedures by government appointed senior academics are likely to display the enthusiasm for radically new ways of looking at things which committees of senior (which generally means male, too[15]) people usually display. A third problem is the notorious reluctance of Australian business to take risks and invest in innovatory ways. The financial sector does not encourage it.[16]

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[13] Unit labour costs have fallen 13% since Hawke took office in 1983; the total wage share of GDP has fallen from 64% in 1983 to 57% in 1989. Melbourne Age 14.3.90, 21.3.90. See generally, S Carney, *Australia in Accord: Politics and Industrial Relations Under the Hawke Government*, Melbourne, Sun Books (1988).

[14] B Williams (1988).

[15] The parity which women are achieving with men in their proportion of the undergraduate population is not matched by their representation on tracks which lead to senior posts either in universities or elsewhere: B Probert, *Fit Work*, Melbourne, McPhee Gribble (1989); A Yeatman, 'The Green Paper: remarks concerning its implications for participation, access and equity for women as staff and students'. The news is not all good even in the public service, where feminist issues have been raised with particular success in Australia, S Watson (ed) *Playing The State*, London, Verso (1989); M. Sawer, *Sisters in Suits*, Sydney, Allen and Unwin (1990).

[16] One thinks of the commercial fate of the revolutionary Sarich engine, to be developed by Ford in Detroit; or of the 'gene shears' technology developed by the CSIRO and in default of local interest sold to a French company: Melbourne Age 24.9.89; 10.5.90. A point made consistently in histories of economic development is that the exploitation of technology and its impact upon the overall improvement in the conditions of life, standards

The not unnatural response of universities whose budgets are cut is to invest resources in areas which are safe, which are conventionally popular, and from which a quick return can be anticipated. Such a response reinforces the supply of personnel to those areas in which business is prepared to invest, but which seem unlikely to produce transformations in manufacturing productivity: accountancy, law and business management, for example. Experience in the UK, the US and Australia has demonstrated the capacity of this combination of expertise to generate paper wealth and large negative trade balances. Japanese critics have highlighted the proclivity of such people to plan for the next ten minutes in the current corporate context, rather than for the next ten years.[17] For the universities, graduate business schools attract high fees from corporately sponsored students, accountancy courses can count upon, among others, fee-paying overseas students, and law schools represent the respectability of professional training at a modest infrastructural price. There is an apparently inexhaustible demand from students with high grades - that is, largely middle class people among whom the private school educated are disproportionately represented. These are, of course, students whose votes, and whose parents' votes the Australian Labour Party is eager to gain or not to lose. From the Commonwealth's point of view, moreover, an expansion of legal education has the advantage of being relatively cheap, since law schools are traditionally funded at a lower rate per capita than other disciplines.[18]

3. SOCIAL JUSTICE AND LEGAL EDUCATION

The argument in the preceding section was that the Australian government's response to a perceived crisis caused by the decline in the manufacturing sector of the economy has led, by a curious paradox, to, among other things, a move to expand legal education. There are three possible consequences for manufacturing. The first is that there may be no impact at all. The second is that, by diverting scarce educational resources away from disciplinary areas more directly relevant to manufacturing[19], that sector will suffer relative disadvantage. The third

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of living and the ecology depends upon the culture of the society in question: D Boorstin, *The Discoverers*, Harmondsworth, Penguin (1983); H Perkin, *The Structured Crowd*, Brighton, Harvester (1981); M Berg, *The Machinery Question and the Making of Political Economy*. It may be relevant that in Germany and Japan, emphasis is placed on the production of humanities graduates as well as of technologists: D Davis, 'Flexibility and Future Labour Needs in the Light of the Green Paper (1988) 31(1) *The Australian Universities Review* 6; D Ashenden, 'Using Our Graduates is the Real Problem' at p. 24 of that issue.

17 Sydney Independent March 1990, 'Tokyo Uncensored'.

18 A point made during the discussion preceding the release of the CTEC Report, at the Adelaide meeting of the Australasian Law Teachers' Association (as it now is) in 1985.

19 And for the reasons given it cannot be assumed that the finance-corporate lawyer nexus makes a positive contribution in this area, at least when harnessed to private sector goals to which the high remuneration attracts its experts.

possible consequence is that an increase in expertise available to the financial and professional parts of the economy will lead to an increase in its activity, to the proliferation of tax minimisation schemes, asset stripping, overseas borrowing to fund paper restructuring and foreign takeovers. The attraction of such activity to law graduates is the high rate of remuneration, but as a national priority its credentials are dubious.

In this section I want to examine the expansion of legal education in the context of the federal government's social justice aim. Quite plainly, legal education and social justice would fit neatly together given two strategic preconditions. One precondition is that under-privileged groups in the community could, through the use of legal expertise, make significant gains which would narrow the gap between themselves and the privileged. The second precondition is that, in anticipation that the first is possible, large funds were about to be made available so that people without means might gain access to a legal resolution of their problems.

Neither of these, however, seems to be the case.[20] The problems which produce underprivilege are, I shall argue on the basis of social change over the past quarter century, structural, and scarcely amenable to legal remedy. Secondly, far from increasing the resources available to give underprivileged people access to legal expertise, a government obsessed with the aim of achieving and maintaining budget surpluses has reduced those resources in real terms, and is unlikely to reverse this process during its period in office.[21]

Before examining this point further, a preliminary argument should be noticed. It is that since legal training can lead to remunerative and satisfying careers, social justice requires that access to it be broader than is currently the case. As a general aim, an increase in the participation rates at the senior end of high school and in the universities is laudable, at least if by participation is meant more than merely physical presence, and one for the achievement of which the states and Commonwealth governments can take some credit. Whether, for the reason given above, the expansion of legal education should claim a share of the resources employed for this purpose is something more open to question.

And, of course, whilst anti-poverty strategies must proceed on a wide front, special entry schemes and enlarged law school intakes begin to seem

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[20] Informal dispute resolution, much of which is sometimes made, has a long tradition among business organisations, but whilst it may work well among economic equals, its contribution to the rectification of inequality may be dubious: S Macaulay, 'Non-contractual Relations in Business: A Preliminary Study', (1963) 28 *Amer.Soc.Rev.* 55; H Beale and T Dugdale, 'Contracts between Businessmen', (1975) 2 *Brit.Jo.Law and Soc.* 45; H W Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England*, Toronto, U of T Press (1985).

[21] See J Disney *et al*, *Lawyers*, North Ryde, Law Book (1986), ch. 14; Melbourne Age 1.2.90, for a discussion of some of the problems.

trivial, affecting hundreds, perhaps a few thousand students, when hundreds of thousands of teenagers live on the streets, and millions of others live in severe poverty. Perhaps if one at the same time saw a massive redirection of resources: to provide adequate housing, school, retraining, child care, public transport, health and job security for the working class, for sole parents, Aboriginal people and the enclaves of deprived ethnic minorities, the changes proposed in higher education might seem less tokenistic. One could see it as part of a general reconstruction designed to benefit the less well off.

As it is, one wonders what equal opportunity means, when applied to schemes such as special entry to higher education, law included. To begin with, the schemes are not genuinely equal at all, given the large numbers of people handicapped from the beginning of their lives by debilitating conditions, to the amelioration of which little attention is paid.[22] Again, how valuable as a social instrument is expenditure designed to give people an equal opportunity to be unequal?[23]

Equality of opportunity, in a society which values as an important freedom the purchase of privilege for the children of the rich, leaving the poor relatively uncompensated, looks suspiciously like mere rhetoric. Meritocracy, in a society in which the intergenerational transfer of advantage is encouraged, looks like a sham. The most that can be expected is that a small minority of the less privileged will be inducted into the middle class, something borne out by studies conducted in the US upon blacks.[24]

This is important in looking at other possible justifications for increasing resources specifically devoted to legal education. One might argue, for example, that if more working class people, ethnic minorities and women, all of whom have in the past been under-represented in law schools, were to be represented there in the proportions they form of the population as a whole, they would, in the special attention they would pay to the plight of their erstwhile peers, be an equalising force.

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[22] The recent spectacular rise in youth unemployment in the English speaking world and elsewhere is largely class-specific, and reinforces the conclusions of P Wedge and H Prosser, *Born to Fail*, London, Arrow (1973). The generally disqualifying effects of poverty are detailed in the literature summarised in P Townsend, *Poverty in the United Kingdom*, Harmondsworth, Penguin (1979). There seems little ground for supposing that the current situation in Australia is significantly different.

[23] For theorists like Rawls, equal opportunity can justify some degree of inequality: see J Rawls, *A Theory of Justice*, Oxford OUP (1973). But he is coy about the radical implications of any program which could realise equality of starting points in practice. See the discussion of equality of outcome in I Duncanson, 'Finnis and the Politics of Natural Law', (1990) *UWALR*, forthcoming.

[24] T D Boston, *Race, Class and Conservatism*, Boston, Unwin Hyman (1988).

There are two dimensions to this argument. The first has distinctly Hegelian overtones[25], noticing the alienating effects of representative democracy: the homogenising category of citizenship fails on this view to recognize individuality adequately. The second dimension, which is of course related, envisages an empowering effect, both upon the underprivileged group as a whole, and upon the particular member of it who qualifies as a lawyer, of that qualification.

Hegel wrote of three kinds of social order.[26] First there was the limited altruism of the kin-based order which granted individual difference and provided care and concern for members of the kin group, but not for outsiders. In time, he supposed, the viability of this was undercut by bourgeois civil society, with its superior productive capacity and its division of labour, indifferent and insensitive to the characteristics constituting the uniqueness of individuals and quite the reverse of altruistic in its organisation. Inequality could not, he thought, be cured by extending the franchise, since becoming one voter among tens of thousand for one representative among hundreds in a legislative assembly, would merely reinforce one's sense of helpless inability to control one's destiny.

His solution was a third kind of ordering, a synthesis and transcendence of the other two. The estates would have their interests registered and co-ordinated by a universal class of disinterested public servants. Thus would the cacophony of contradictory interests be orchestrated into the state. Lawyers and courts often seem to be constructed in legal writing so as to substitute for the Hegelian machinery. For lawyers in this tradition, mistrustful of legislative politics, with its compromises, law under the supervision of the judiciary generates fair and principled outcomes which unaided democracy cannot achieve. For them 'law's empire'[27] takes the place of Hegel's state, lawyers that of Hegel's universal class. Harmony emerges as the adversary process resolves disputes through the constructive interpretation of precedent.[28]

The problem with this approach to social justice is that it ignores the extent to which legal regulation and the existence of social injustice together form part of a larger political structure. Unequal distributions of resources are not accidents which persist as a result of oversight, or

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25 S Avineri, *Hegel's Theory of the Modern State*, Cambridge, CUP (1972), ch. 3.

26 Avineri (1972), chs. 7 and 8. Hegel was drawing on the work of the Scottish Enlightenment writers, Ferguson and Adam Smith.

27 The phrase is, of course, Dworkin's: R Dworkin *Law's Empire*, London, Fontana (1986).

28 The tradition which is to inform the process of interpretation is a curious blend of Coke's 'artificial reason' and Gadamer's hermeneutics: see I Duncanson, 'Law, Democracy and the Individual', (1988) 8 *Legal Studies* 303; 'Power, Interpretation and Ronald Dworkin', (1989) 9 *U of Tas L R* 278. Such traditions often form, in Eagleton's words, 'a monologue of the powerful to the powerless': T Eagleton, *Literary Theory: An Introduction*, cited in Duncanson (1989) 299.

because there happen not to have been laws passed forbidding them. Historically, the common law and the fiscal process out of which it is and always has been largely funded have been the means of setting up and maintaining the bourgeois state, which is, among other things, dedicated to the preservation and augmentation of property in relatively few hands.[29]

As E P Thompson and others have noted[30], there have been benefits for the non-propertied, but in conflicts between those who control resources and those who do not, common law has not been signally active in promoting the interests of the latter. Its introduction into Australia is ironically described by Henry Reynolds:

> In 1937 R T Latham, a prominent legal scholar, remarked that when the first settlers reached Australia "their invisible and inescapable cargo of English law fell from their shoulders and attached itself to the soil ... Their personal law became the territorial law of the colony". It is a graphic image. What is not mentioned is that in transit from shoulder to soil the inescapable cargo struck the Aborigines such a severe blow that they still have not recovered from it.[31]

If the common law has been implicated in the processes of marginalising and silencing groups of people and has even been in part the means by which this has been accomplished, can it be the means by which they move from the margins and be heard? The Aboriginal writer, Roberta Sykes, sums up the current Aboriginal view:

> The Black community sees the white legal system as part of their oppression. That legal system did not (in 1788) and does not (in 1988) protect the interests of the Black community.[32]

Where women, working class people and ethnic minorities have achieved significant social changes in their favour it has been because they have been able to change the environment within which social, legal and economic regulation exist. Where, despite their initial success, that environment is once again transformed to their detriment, the law, as part of that environment, will not protect them. Their only recourse is

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29 I Duncanson, 'The Politics of Common Law in Theory and History' (1989) 27 *Osgoode Hall LJ* 687,

30 E P Thompson, *Whigs and Hunters*, London, Allen Lane (1974), Conclusion.

31 H Reynolds, *The Law of the Land*, Ringwood, Vic., Penguin, (1987), 1.

32 R Sykes, *Majority: an analysis of 21 years of Black Australian experience as emancipated Australian citizens*, Hawthorn, Vic., Hudson (1989) 118.

renewed struggle, and the social analysis and tactical alliances which render their chances of success more likely.[33]

This brings us to the second dimension that legal education has an empowering effect. Pursuing the idea that education empowers its recipients, one wants to know what it empowers them AS. Thus although common sense may suggest that the more one finds out about one's world, the more one is able to act in it, much depends on the extent to which it is indeed one's world and not someone else's; much depends on the character of the world which is constructed in the particular discovery.

If the world a knowledge makes available is one in which the knower is devalued, in which, for example he or she is hidden from history[34], or in which his or her expertise and experience is rendered inauthentic, disempowerment is the more likely result.

Thus, Koorie people have long been coerced into seeing their culture through white eyes.[35] The same is true of working class and peasant cultures. Folk songs, the techniques of cultivation and the art of cooking seem on some accounts to have sprung into the realm of culture only upon their discovery by upper classes who did not share the lives the songs express, plow, or even set foot in a kitchen. Women, too must learn their limitations from their place in the universe of male philosophy delineated for their benefit by Brian Magee.[36]

He has no quarrel with feminism, he tells them, but observes that although they may have a few novels to their credit, musical composition and the plastic arts require testicles for their production. Hidden are the Highland Chantreuses who were buried face down lest their songs of injustice return after their deaths to haunt the living. Gone are the abstract designs on the quilts male painters later celebrated by critics may have slept beneath as children - quilts made by their mothers and grandmothers. And what is one to make of poor Brian who, had he been but sculpted by a man instead of being raised by a woman, might have stood forever mute in a museum, a monument to art?[37]

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[33] C A MacKinnon, *Toward a Feminist Theory of the State*, Cambridge, MA, Harvard U Press (1989); M. Burawoy, 'The Limits of Wright's Analytical Marxism and an Alternative', in E Wright *et al*, *The Debate on Classes*, London, Verso (1989).

[34] In Rowbotham's evocative phrase: S Rowbotham, *Hidden from History: 300 Years of Women's Oppression and the Fight Against It*, London, Pluto Press (1973). See also R S Neale, *Writing Marxist History: British Society, Economy and Culture since 1700*, Oxford, Blackwell, (1985).

[35] B Attwood, *The Making of the Aboriginals*, Sydney, Allen and Unwin, (1989).

[36] B Magee, Melbourne Age, Saturday 10.2.90.

[37] The culturally specified nature of 'culture' in the typologies of knowledge seems to escape some commentators entirely. One is reminded of the medieval peasant jingle. When Adam delved and Eve span Who was then the gentleman? C Hampton, *A Radical Reader: The struggle for change in England 1381-1914*, Harmondsworth, Penguin, (1984).

The world, in short, is not an inert and innocent object, proficiency in knowledge about which can be assessed in a neutral or disengaged way. What is to count as authentic is designated as true by those with the institutional authority to determine what is true.[38] Law as a form of knowledge about the world is authorised in the representational practices of the legal professions, and they in turn are empowered by the political processes in which they exist.[39]

The operation of power can be traced through the study of meanings as they are established in legal routines. In McBarnet's study of Glasgow magistrates' courts, an accused who waived the right to silence upon arrest might by doing so incriminate him or herself; but so might an accused who availed him or herself of it. The *meaning* of the use of the right to silence, in other words, was authoritatively constructed by the common sense of the magistrate about the guilt or innocence of the accused person and then represented to be independently obvious.[40] Non-consensual sexual intercourse seems uncomplicatedly forbidden by law, but, as MacKinnon demonstrates, consent obtains its meaning in the male gaze, in the operation of power.[41] To hitchhike, to be in an ill-lit street, to be a prostitute, or not to wear a bra, can all be invitations to men to have sexual intercourse, regardless of how the woman victim understands her intentions.[42] When women are assailants, too, the provocation defence is available as constructed to suit the social situations occupied and made sense of by men.[43]

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38 Grbich writes: '... the search for criteria of knowledge, the search for certainty, can be abandoned only when one occupies a position of social power'. Paper presented to the Third Annual Feminism and Legal Theory Conference, Madison, WI July 1987, published in M Fineman (ed), *At the Boundaries of Law: Feminism and Legal Theory*, New York, Routledge, (1990).

39 J Grbich, 'Feminist Jurisprudence as Women's Studies in Law: Australian Dialogues', in E Kingdom, (ed) *Women's Rights and the Rights of Man*, Aberdeen, Aberdeen U Press (1990); I Duncanson 'Legality in Perspectives' (1990) *ARSP*, forthcoming.

40 D. McBarnet, *Conviction: Law, the State and the Construction of Justice*, London, Macmillan, (1981). See also P Carlen, *Magistrates' Justice*, Oxford, Martin Robertson (1976).

41 C A MacKinnon, *Feminism Unmodified: Discourses on Life and Law*, Cambridge, MA, Harvard U Press (1987), ch 7.

42 C Smart, *Feminism and the Power of Law*, London, Routledge (1989), ch. 1.

43 The case of *R v Falconer* in which the judgment of the W A Supreme Court was delivered on 21.12.89, involved the killing by a wife of a husband whom, it was alleged, had sexually abused her and her daughters over a number of years. When he taunted her about it she fetched a gun and shot him. The provocation defense seems to require something more immediate by way of response, but such a requirement ignores the usual physical strength differential between men and women, which can be expected to produce a different kind of response.

In Grbich's study of 'family dealing'[44], a wife might be a property owner in the interpretation of a tax minimisation scheme, but a mere trustee for the benefit of her husband in the interpretation of property rights on the breakdown of marriage. None of these meanings is at all random or at all 'obvious' until constituted as such within legal professional discourse.

This is not to suggest that meanings are never contested within legal discourse[45], nor that the resolution of such contests can be predicted with complete accuracy. But one can predict that contests will cluster around issues involving powerful actors - since they have the funds to finance lawyers' expertise - and that the range of meanings within which contests can occur will be restricted by knowledges generated within power relations.[46]

There is no suggestion either that oppositional knowledges are impossible. Whatever judges say, women are intimidated, humiliated and outraged when their employers or superiors at work treat them as sexual objects.[47] Whatever judges say, non-white people know that they have suffered discriminatory treatment, although they cannot prove that an identifiable person intentionally committed an act of unlawful discrimination.[48] The elected councillors of Poplar knew that they were paying fair wages, but the judges in the House of Lords knew that the council was engaging in irresponsible, worse, socialist philanthropy.[49] Authorised knowledges prevail over unauthorised knowledges, however, in sites constituted by power relations.

4. THE POWER RELATIONS OF LEGAL PRACTICE.

We are returned to the question, if people are empowered by legal training, what are they empowered AS? Not as women, as blacks, nor as members of the working class. I would argue that, whatever their biology, lawyers are usually *qua* lawyers, white males; but it is unnecessary to

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44 J Grbich, 'The Position of Women in Family Dealing: the Australian Case', (1987) 15 *Int'l Jnl of the Soc of Law* 309.

45 See P Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis*, London, Macmillan (1987).

46 This is, of course, Foucault's point about scientific truth and argument: '... it's not so much a matter of knowing what external power imposes itself on science, as of what effects of power circulate among scientific statements, and what constitutes, as it were, their internal regime of power, and how and why at certain moments that regime undergoes a global shift. C Gordon (ed) *Michel Foucault: Power/Knowledge*, Brighton, Harvester Press (1980).

47 See *Hall & Ors v Sheiban & Anor* (1988) EOC 92-227 28.7.88; M. Sawer, 'Human Rights: women need not apply', *Australian Society*, September 1988.

48 See *Department of Health v Arumugam* (1988) V R 319.

49 N Branson, *Poplarism 1919-1925: George Lansbury and the Councillors' Revolt*, London, Lawrence and Wishart (1979).

argue for the class nature of professionalism. Professional training exists in order to secure loyalty to professional standards, including shared understandings of the proper limits to deviant activity.[50] Decorum covers issues like styles of dress and modes of speech, but there are also understandings about with whom it is appropriate to socialise and under what circumstances, and what political views, publicly, or in one's professional capacity, may be properly expressed.[51] The profession as a whole must retain the confidence of those from whom it obtains the bulk of its living[52] Cain writes of the 'strategic ... ideological reproduction process' of the English bar[53], but there can be little doubt that the Inns of Court are not at all unique. Moreover, lawyers are officers of the court, subordinate to a judiciary sworn, as the judicial oath has it, to do justice according to law.

Access to the people who 'make law' in the form of legislation is preponderantly by those who have power in a social order[54]: in capitalist societies these are the owners and controllers of the means of production, within whose rationality other actors may be allowed to make a contribution. The economic agendas for policy-construction are bounded by such considerations as profits, defined in a particular way[55], exchange values, and incentives. The meanings given to legal regulation are, I have suggested, those authorised, made obvious, sensible, by a white male bourgeoisie.

Within this system of practices and representations lawyers are employees or partners in corporate structures, or, as a member of the New South Wales Law Society recently described them, 'small businessmen' (*sic*). They, too, must make profits, as the 'organic

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50 D Kennedy, 'Legal Education as Training for Hierarchy', in D Kairys (ed), *The Politics of Law: A Progressive Critique*, New York, Pantheon (1982); M Maloney and J Cassels, 'Critical Legal Education: Paralysis with a Purpose' (1989) 4 *Canadian J of Law and Soc* 99.

51 M Sexton and L Maher, *The Legal Mystique: The role of lawyers in Australian Society*, Melbourne, Angus and Robertson, (1982); R Hazell (ed), The Bar on Trial, London, Quartet (1978).

52 '... clients are typically the institutions (legal persons) of capitalist society: the model professional in the occupation's own terms deals even more disproportionately with clients such as these ...' M Cain, 'The General Practice Lawyer and the Client', in R Dingwell and P Lewis (eds) The Sociology of the Professions, London, Macmillan (1983). Her point is that lawyers do not exercise significant power independently of these typical clients.

53 M Cain, 'Necessarily out of touch: thoughts on the social organisation of the bar', in P Carlen (ed), *The Sociology of Law*, U of Keele, Sociological Review Monograph 23 (1976) 247.

54 See P O'Malley, 'Law-making in Canada: Capitalism and Legislation in a Capitalist State' (1988) 3 *Canadian J of Law and Soc*, 53.

55 See F Green and B Sutcliffe, *The Profit System: the economics of capitalism*, Harmondsworth, Penguin (1987). Non-tradeable goods, such as those produced in leisure time, or as unpaid domestic labour, and unspoiled forests and unpolluted beaches, are not part of the profit system. The ideological drift of economic discourse is evident.

intellectuals of capital'[56], behind the mirror glass downtown, or as the conduits linking banking capital to those seeking to buy homes.[57] Very few can become champions of the underprivileged, and even those few must re-represent their clients in terms of the representations already made by legal regulation for its subjects.[58]

This, as we have seen, is the world in which the idealist conceptions of lawyers are substituted for the experiences of social actors. It is the world in which the conclusions of people to whom things happen are subordinated to the privileged access lawyers have to the realm of what was intended. The law, as we have seen, intends to prohibit rape, discrimination, and other forms of social oppression, and to allow self-defense, according to lawyers' interpretations. If the tactical calculations some actors are compelled to make appear to belie this intention, a range of savings clauses are mobilised by lawyers: since the world is not perfect, we must not expect the law to be perfect either, and it will naturally fail to meet its goals on occasions. The point is, though, how many failures is it allowed before we revise our evaluation of what it is trying to accomplish, and upon whose behalf?

Before we go too far with that line of reasoning, lawyers will want to reduce the quantity of failures by invoking some conception of human frailty. Perhaps she led him on, perhaps she began to enjoy it, perhaps she changed her mind afterwards ... Or, as a tax lawyer exclaimed when Grbich gave her paper, 'it WAS the husband's property. She was only intended to hold as trustee for his benefit, to minimise his tax liability'.

How are lawyers from non-traditional social recruiting areas expected to maintain solidarity with their backgrounds when so much of their professional training makes sense only on the assumption that their pre-professional understandings were mistaken? How are they to assist those whom they have left behind except by sending remittances from the place in which they have established citizenship, like guestworkers who do not intend to go home, who have a new home? Departure from lawyers' perspectives from within is treated like an immigrant's renunciation of his or her new oath of allegiance in favour of the old country, as a departure from the rule of law, which is, of course, what it is. How fiercely lawyers defend their perspectives is demonstrated in the extreme hostility directed at the critical Legal Scholars - even in Australia, where there are perhaps

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[56] Q Hoare and G Nowell-Smith (eds and transl), *Selections from the Prison Notebooks of Antonio Gramsci*, London, Lawrence and Wishart (1971) II:2. Maureen Cain has done more than anyone to draw attention to the relevance of Gramsci's analyses for an understanding of legality.

[57] M. Cain (1983); Sexton and Maher (1982), ch. 2.

[58] Carlen (1976); McBarnet (1981).

half a dozen[59] - and in the machismo of Law's Empire, the putative handbook of the legal Imperial General Staff:

> ... the historian cannot understand law as an argumentative social practice, even enough to reject it as deceptive, until he has a participant's understanding ... We need a social theory of law, but it must be jurisprudential ... Theories that ignore the structure of legal argument for supposedly larger questions of history and society are therefore perverse. They ignore questions about the internal character of legal argument, so their explanations are impoverished and defective, like innumerate histories of mathematics ...[60]

The shock troops of jurisprudential purity are not unaware that the status quo is safest in the hands of those most saturated in 'participants' understandings'.

All this is in a sense to state the obvious: that the capacity of the legal system to produce social change is exceedingly small unless the pre-conditions have already been established by struggles of a political, social, economic and cultural kind.[61] The power of the legal professions is derived from the social forces with whom they are integrated, within whose agenda 'participants' understandings' are constructed.

One can see illustrated in recent US experience the weak purchase of legal reform which purports to be in the van of political and other changes rather than the consequences of them. There, for a significant period of time a combination existed of a progressive federal supreme court, a federal legislature sympathetic to the abolition of the apartheid regimes of the southern states, and a courageous and energetic civil rights movement which included lawyers.[62] The result was an impressive range of legal measures apparently calculated directly or indirectly to improve the conditions of black people. School de-segregation was only the beginning; affirmative action might have been the end. Along the way the new commitment to fairness and justice took in women, gay people, the poor, voters and many others whose enhanced individual rights were to constitute the 'Great Society'.

The material consequences for blacks at least would be hard to under-estimate. Almost all the indices reveal, in Alphonso Pinckney's words, 'the myth of black progress'.[63] In the last four years, for example, the life

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59 See, eg, G Walker, *The Rule of Law: Foundation of Constitutional Democracy*, Melbourne, Melbourne UP (1989).

60 R Dworkin (1986) 14.

61 S Scheingold, *The Politics of Rights*, New Haven Yale UP (1974), ch. 9.

62 The beginnings are chronicled in R Kluger, *Simple Justice: the History of Brown v Board of Education and Black America's Struggle for Equality*, New York, Knoof (1976).

63 A Pinckney, *The Myth of Black Progress*, New York, CUP (1984).

expectancy of black people of both sexes has slowly fallen, in contrast to that of whites. The black infant mortality rate, at 17.9 per 1000 live births, is double that for whites.[64] More blacks are in prison than in higher education, whilst the ratio of white tertiary students to white prisoners is 10:1.[65]

In post-secondary education, the improvement in take-up by blacks is largely in two-year community colleges and the less prestigious universities.[66] Black males' earnings as a proportion of those of whites' have declined steadily since 1964.[67] Unemployment rates for blacks of all ages are roughly double those for whites.[68] Voter turnout, a measure of the confidence reposed in the political system, has diminished in recent years[69], but among those in poverty - and 34% of blacks compared with 11% of whites survive beneath the US poverty line[70] - turnout has plummeted.[71]

If US blacks had hoped that landmark legislation and juridical activism would ameliorate their underclass position, they hoped in vain. The most that can be said is that they are not alone, only disproportionately represented among the poorest 20% of the US population whose incomes have fallen 9% in the last ten years. Without the legal changes things may have been even worse, but counter-factuals are bound to be speculative and there is not much ground for this one.

Across the English-speaking world, despite increased spending on legal aid, legal advice centres and community law centres, despite, for a time an industry devoted to the discovery and measurement of unmet legal need, there has been a growth of inequality of income and wealth, and a steady erosion of the quality of life of those at the bottom. Despite increases in the size of law schools and the number of them, many with progressive additions to their curricula, the plight of the worst off in several countries has deteriorated, if not everywhere as much as among the black people of the United States.[72]

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64 Melbourne Age 27.3.90.

65 Figures quoted by Troy Duster, The Afro-American Underclass, National Centre for Sociolegal Studies seminar, La Trobe University, 4.4.90.

66 Pinckney (1984) ch viii.

67 Family incomes have declined for blacks since 1975 as a proportion of white incomes, as more white women have joined the labour force.

68 Pinckney (1984) ch v; and figures applied by Duster.

69 F Piven and R Cloward, *Why Americans Don't Vote*, New York, Pantheon (1988); Melbourne Age 8.5.90.

70 Sydney Morning Herald 20.4.90.

71 Piven and Cloward (1988), Epilogue.

72 J Rentoul, *The Rich Get Richer: the growth of inequality in Britain in the 1980s*, London, Unwin Hyman (1987); J Gibson 'The Working Class under Thatcher' (1987) *Confrontation* 31; S Roosewarne, 'Economic Management, The Accord and Gender Inequality' (1988) *J of Australian Pol Economy* 61.

Workers, tenants, home buyers and social security recipients, have all suffered. Lawyers are not to blame for the situation, of course, they seem rather to have been irrelevant.

5. ALTERNATIVE PERSPECTIVES

The puzzle is not why augmenting the number of lawyers or, until recently, expanding legal service provision, have failed so conspicuously to arrest the impoverishment of the under-privileged. The puzzle is why anyone would have expected them to succeed.

The under-privileged themselves - if those with whom I worked in England in the seventies are typical - are rarely optimistic about the legal process, but equally rarely does anyone bother to ask them.

It is to the political processes instituted by ruling classes that most people have looked for improvement in the condition of their lives, at least since the eighteenth century. Sometimes alternative institutions, such as trades unions or friendly societies have been preferred, but a great deal of effort has been expended in trying to make government representative and accountable, in America, in the UK and in Australia. Those who sought representation and accountability have rarely looked to the juridical arm of politics, which has generally served a conservative purpose, softening the impact of democratisation upon the propertied[73], for example, or narrowing workers' rights.[74] The checks and balances embodied in the US constitution, and for most of US history guarded by a conservative Supreme Court, indicate, according to Howard Zinn, that the founding fathers:

> ... did not want a balance except one which kept things as they were, an equal balance among the dominant forces at that time. They certainly did not want an equal balance between masters and slaves, property-less and property-holders, Indians and white.[75]

Juridicialising politics is not the only response of privilege to the threat of encroaching democracy. At home and in their colonies, the British devised a number of strategies, quite as effective, at least for a time, as restraints upon popular government. The lower chambers of Australian colonial legislatures, elected on a broad franchise, were 'balanced' by upper chambers drawn from more responsible elements in colonial society.[76]

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[73] K Buckley and T Wheelwright, *No Paradise For Workers: Capitalism and the Common People in Australia* 1788 - 1914, Melbourne, OUP (1988) 192; H Zinn, *A People's History of the United States*, New York, Harper and Row (1980) ch 5.

[74] J Griffith, *The Politics of the Judiciary*, London, Fontana, ch 5.

[75] Zinn (1980), 101.

[76] Buckley and Wheelwright (1988), ch 6.

This reflects a line of reasoning espoused by conservatives everywhere, from Cromwell and Ireton during the English civil war[77], through the new American rulers and Edmund Burke: that the rich have a special stake in the community, which ought to be protected by their having extra power; that securing their property, which that extra power enables them to do, is somehow in the interests of all.

Upon Australian federation, at Colonial Office insistence, two important restrictions were placed on popular government. The ultimate meaning of the constitution was to be decided in London, by permitting appeals from colonial courts to the Judicial Committee of the Privy Council. Secondly, state governors and the Commonwealth Governor-General were given the authority to dismiss elected governments.[78] Twice it has been Labour governments that have been dismissed under this authority, in 1932 and 1975, unsurprisingly since it was the spectre of politically organised labour which prompted Chamberlain to insist on the reserve powers in his comments on thi draft constitution in 1897.

When the 'parliamentary oligarchy' of mid-nineteenth century Britain

> ... finally faced the appalling prospect that had haunted the propertied classes ... that the formidable powers ... concentrated in Parliament would be within the reach of other social classes, even the property-less ...

they discovered the 'justification for shifting power from the Parliamentary to the executive branch of government'.[79] The civil service reforms recommended by the Northcote-Trevelyan report of 1854 established as the criterion for appointment to the elite sections possession of the knowledges transmitted in the so-called public schools. When those knowledges became more widely available, the criteria of appointment were changed, in order to preserve the socially exclusive nature of the service.[80] A bureaucracy there had to be, the administration of empire demanded it, but an equal imperative was that it be composed of the right sort of people against the day when the legislature might be dominated by the wrong sort of people.

Occasionally, this settlement seems threatened by, in Hailsham's words, 'majoritarian tyranny', which appears to mean the possibility of a non-conservative government retaining office for too long and allowing scope for the transgression of civil service agendas.[81] In such a situation,

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77 A Woodhouse, *'Puritanism and Liberty: Being the Army Debates from the Clarke Manuscripts, Part 1: The Putney Debates'*, London, Dent (1986).

78 Buckley and Wheelwright (1988) 212.

79 P Gowan, 'The Whitehall Mandarins' (1987) 162 *New Left Review* 4, 31.

80 Gowan (1987) 32, and footnote 87.

81 This is discussed in I Duncanson, 'Law, Democracy and the Individual' (1988) 8 *Legal Studies* 303.

conservative forces have mooted various solutions, from military intervention[82], to the less draconian suspension of democratic processes[83], to the deferral of legislative authority to the judiciary through the agency of a bill of rights.[84] Conservative appraisal of the role of the Constitution and the Bill of Rights in the US is more acute than the rather wide-eyed and historically narrowly based enthusiasm evinced by some social democrats.[85]

The fact that it is frustrated social democrats who see in an Australian Bill of Rights the possibility of improving upon 'the wretched history of the Australian constitution in the twentieth century'[86] probably attests to the strength of the constitution's foundations[87]: radical responses to novel problems are handicapped by its cumbersome restraints. It is the power behind the restraints, however, which needs to be addressed, if change in the direction of improvements to the condition of citizenship is to be accomplished. The continued appeal of Bills of Rights to non-conservative political thinkers, despite such devices having no record elsewhere in the world of improving the conditions of citizens' lives any more effectively than the democratic process, may look like the triumph of hope over experience. It is better seen, I believe, as evidence of the power of hegemonic ideas.

This returns us to the site of the original problem. I explained the projected expansion of legal education in Australia as the result, in part, of the fortuitous convergence of a number of social forces. I suggested that the expansion was moreover justified *post hoc* by the belief that investment in law and lawyers offered the best conceivable means of securing improvements in social justice. For the reasons given, that belief seems to me to be unjustified. The value to a social order of lawyers, public servants, and other managerial experts is indisputable, subject to their being accountable to that social order. Now, as part of the process of accountability something other than a self assessment of what they do is necessary in order to answer the questions; should there be more of them? Will the achievement of publicly discussed social goals be enhanced by the production more of any particular category of expert, or could resources be more effectively be deployed in other ways?

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82 P Wright, *Spycatcher*, New York, Viking (1987) 368 *et seq.*

83 I Gilmour, *Inside Right*, London, Hutchinson (1977) 211.

84 J Griffith, 'Chorley Lecture' (1979) 42 *MLR* 1.

85 I Duncanson and V Kerruish, 'The Reclamation of Civil Liberty' (1986) 6 *Windsor Yearbook of Access to Justice*, 3; A Petter, 'Canada's Charter Flight: Soaring Backwards into the Future' (1989) 16 *JLS* 151; H Glasbeek and M Mandel, 'The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms' (1984) 2 *Socialist Studies* 84.

86 Buckley and Wheelwright (1988) 213.

87 J McMillan, G Evans and H Storey, *Australia's Constitution: Time for Change?* Sydney, Allen and Unwin (1983); H Charlesworth, 'Individual Rights and the Australian High Court' (1986) 4 *Law in Context* 52.

Similar questions can be asked, for example, in the area of medicine. We can and should ask whether vast resources ought to be devoted to enabling infertile women to have children when, in the absence of limitless funds this may divert efforts away from research into preventive medicine or into the production of a healthier environment, or perhaps into improving the conditions of lffe for hundreds of thousands of already existing children whom societies would often rather forget.

The relevance of the analogy is that the calculation is not a crude cost-benefit one. The disappointment of not being able to have a child is often exacerbated into tragedy by a prevailing social norm which celebrates motherhood as THE major female virtue. Whether a reassessment of that norm is possible or desirable is a political issue, beyond and perhaps prior to medical issues. It certainly cannot be resolved by the application of medical expertise. Medical researchers involved in the task of 'curing' infertility, quite understandably do not always see things in this way. But a rejection of their priorities is not a rejection of medicine's value.

So research in the field of legality cannot remain engulfed in the domain of legal professional expertise. It cannot even remain, in the form of political, social or economic questions, dominated by lawyers' ways of thinking. But here, in terms of my argument, we encounter a serious difficulty. For I have suggested that the empowerment which legal competence confers is not the empowerment which comes from learning how the social world works *tout court*, and therefore from knowing how to accomplish just anything within it.

In the one dimensional analyses of much of the jurisprudence which informs legal scholarship the empowerment thesis is persuasive because it is not noticed that we do not all live in the same world. Or if it is noticed it is promptly dismissed. The power of the legal profession to establish paradigmatic ways of thinking about legality is not the product of ineffable wisdom, but derives from those interests which lawyers serve. The empowering knowledge which lawyers gain from their training is empowering precisely because it explains how the world is for some people - those who happen, some of the time, to express their power through legal forms.

The difficulties in trying to establish an alternative perspective are threefold. First, it is important both to lawyers' professional self images and to the credibility of the rule of law story that lawyers should appear powerful by virtue of their relation to the law and that they should seem to act independently in their discernment of the law. The proposition that lawyers' power exists only insofar as they are agents of other social forces undermines both of these. Second, since power in a complex social order is seldom exercised monolithically, even if we were to conceptualise legality as a mode of the self-government of socially dominant groups, we would expect to find struggles among them, sometimes struggles with

subordinate groups, and, as Hay and Thompson[88] point out, we would find examples of very powerful people ensnared in the outgrowth of that mode. There is irony but no impossibility in their being hoist on their own petard. It remains their own - hence the irony, but relatively speaking, the rarity. The trouble is that government through law could be construed as evidence of the social neutrality and governing capacity of that particular institution in its everyday working. Not only, as Marx points out, are ruling ideas the ideas of those who rule, but one of their features and one of the ways in which they rule is by purporting to be universal, the ideas of everyone, commonsense, obvious.

The third difficulty in establishing alternative perspectives is that one is confronting, in however small a way, power, the power to define, to authenticate. One should not in denying it merely not anticipate a hero's welcome, but rather expect to be deemed a traitor, in academic terms a writer of nonsense.

There are, though, two dangers in failing to theorise alternative perspectives. Both are ultimately practical and political. Power may be exercised through legal forms, and if we accept lawyers' views we can come to conclude that therefore legal forms constitute a reliable restraint upon power. Yet, so far from being a substitute for 'eternal vigilance', the glorification of legality as anything other than a set of useful techniques for mundane though important purposes positively erodes the instinct for vigilance and suspicion which alone restrain power.

Again, if we accept that law simply is as it appears in lawyers' discourses about it, which is what Dworkin as well as the introductory guides for students of law want us to do, we collude in the silencing of those for whom law does not seem like that at all. We condemn them as ignorant, which Dworkin is quite content to do, but we are not compelled to join him. Those who judge legality as it affects them survive and are competent social actors, too: those for whom rape is regulated not prohibited, for whom discrimination is condoned not proscribed, or who are property owners or not according to their husbands' requirements of them.

The question is what institutional sites can be constructed on which to aggregate these fragments of experience, contextualise them and theorise them? The problem is not at first sight unlike that faced by scholars of 'history from below', women's history and the histories of recently independent colonies. It is a problem of displacing an authorised version of events and substituting one which is designed to operate as one of many. It is a problem of establishing the explanatory credentials of a narrative without resort to claims of certainty, without, in other words, engaging in epistemological circularity or insisting on epistemological privilege.

[88] Hay (1974); Thompson (1974).

The crude image of multi-disciplinarity does not help when it is projected in the notion of the university as comprehending a single shared endeavour, however complex and multi-faceted, to disclose the nature of the world.[89] Disciplines are inadequately specifiable and too internally diverse to represent discrete theoretical approaches. They are neither monolithic, nor can they be seen as illuminating the 'same' pre-theoretical mystery each from a distinct perspective. So how can we study legality without simply accepting lawyers' stories?

6. A PROGRAM FOR STUDYING LEGALITY

Theory is never subordinated to its object in the way in which 'a theory of ...' suggests. It is a social practice collectively organised to order concepts obtained from other theories so as to make sense of the world. Like talking prose, theorising is something social actors do much of the time. If this seems to leave too little room for the world, which is what theorising seeks to make sense of, it must be remembered that worlds do not exist for us as abstractions, generally speaking, which would be theoretical devices, but as arenas for practical action, which are theoretical constructions. The earliest conscious tool-making involved selective reconstructions of the past as relevant experience, and the relating of the present to possible futures.[90]

Who, where, how, and why I am, together with the context, what the world was, is will be and could be, are all assembled in social, theoretical practices. Endless contingency is forestalled by the existence of social relations, which explain to us how to go on. Social relations also of course foreclose options, and whether we are being rescued from senselessness or deprived of choices is never entirely clear.

The phenomenon of regulation is a continuum, a pattern of directions in all senses of the word, throughout social relations. At what point we start referring to it as legality cannot be decided without fairly detailed cultural specification, nor without asking who is inquiring and for what purpose. Legality is, then, constituted within particular sets of understandings. The meaning of law in history is to be found in the history that is being written, for example, and we may take exception to some versions of history without demanding the power to legislate it out of existence: from whom could we obtain the power and still object to the practice of foreclosure by silencing?

Thus all the aboriginal people of New South Wales became British subjects in 1787 by virtue of the New South Wales Act of the Westminster parliament. Their view of the matter at the time was necessarily silent

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89 J Derrida with G Bennington, 'On Colleges and Philosophy (1986) *ICA Documents* 5, 66.

90 C Woolfson, *The Labour Theory of Culture*, London, RKP (1982); P Hirst and P Woolley, *Social Relations and Human Attributes*, London, RPK (1982).

and has been subsequently foreclosed, if not entirely unarticulated. We find Michael Kirby, in an essay in a collection dedicated to 'black Australia and the law' telling us that 'a society such as ours' is characterised by the 'absence of sudden departures from what has gone before'. Its 'very history, with its absence of revolution, the continuity of its constitutional law, and no civil war of any magnitude all teach the lessons of gradualism'.[91] No black Australian could fail to have noticed a series of very sudden departures after 1788 by European reckoning, many of them fatal. Yet no white lawyer, one would have thought, could fail to recognize a most prolonged civil war in the resistance to conquest put up by those same Koories constituted as subjects of George III in the *New South Wales Act* 1787. But even among lawyers it seems that the concept of law has a changeable nature in historical understanding. Even among the well-meaning the politics of foreclosure finds theoretical expression.

The lesson is that if we want to find theories of legality for purposes other than those of lawyers, and those who make most use of them, their priorities must be forgotten for the moment. We can, if it helps understanding, find legality in the social ordering of pre-conquest Aboriginal people[92], although whether it does will depend very much on who 'we' are. We can, by listening to Aboriginal people like Sykes, discover the meaning of legality for Aboriginal people now.

Equally, if our theory allows such categories, and to the extent that it informs us about them, we can find the meanings of legality for working class people, for women and for immigrant ethnic minorities.[93] It will be necessary to forget, however temporarily, lawyers' versions of how theoretically to constitute law, and how to ascertain the boundaries of its meaning by reference to an authorised 'intention'. We shall need to listen to others' accounts of how they are regulated, how they understand the effects of that regulation and what tactics their understandings lead them to adopt.

There must be dialogue with those of whom understanding is sought, sometimes reflexive understanding, since sometimes inevitably the people we wish to understand will be ourselves. Conjectural, plural and participatory knowledges escape the control of their initiators and empower by becoming part of a shared world. The distinction between knower and known about disappears in its static, one-way form, and politics takes its place in epistemology.

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91 K Hazlehurst (ed), *Ivory Scales: Black Australians and the Law*, Kensington, NSW, UNSW Press (1987) xvii.

92 See, for example, R Tonkinson, 'Mardujarra Kinship', in D Mulvaney and J White, *Australians: To 1788*, Sydney, Fairfax, Syme and Weldon Associates (1988); R and C Berndt, *The World of the First Australians: Aboriginal Traditional Life - Past and Present*, Canberra, Aboriginal Studies Press (1988).

93 Greta Bird makes an interesting start in G Bird, *The Process of Law in Australia: Intercultural Perspectives*, Sydney, Butterworth (1988).

Marx's suggestion that in a socialist society a person might

> ... hunt in the morning, fish in the afternoon, rear cattle in the evening and criticise after dinner ... without ever becoming hunter, fisherman, herdsman or critic
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> (*The German Ideology*, any edition, Vol 1 IA1)

points in a similar direction. The implication is not that all forms of the division of labour should or ever could be abolished, but that the divisions could in a differently organised society be arranged so as not to force themselves on people and to appear to define the people who occupy places with them. Marx was concerned principally with the disempowering effect upon the occupants, but one can equally think of alienating effects of techniques which are rendered inaccessible when they are allowed to become defined in the exclusive possession of those who then 'know'.

The point of this paper is not to object to the teaching of legal technique, but to sugeest that the construction of social justice requires the meaning of legality to be established in another context than the law school, plurally and dialogically. Legality, like social justice itself, is not something which experts can define and for which they can devise 'delivery systems' but something which people themselves must interpret from determinate social positions, negotiate, order and reorder.

The contribution that educational institutions can make to this process is not, however, in Beatrice Webb's parody of humility, to 'educate our masters' but to render accessible the social resources with which we can all educate ourselves.