AN EMPOWERING EXPERIENCE: REPOSITIONING CRITICAL THINKING SKILLS IN THE LAW CURRICULUM

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In a changing market driven university context, law teachers and students are questioning the role of critical thinking and theoretical analysis in the subjects taught and learnt. This article re-positions the role of critical thinking in legal education. It relies on empirical data and draws support from educational scholars in concluding that both the teacher and the student can benefit from the integrated incorporation of theoretical perspectives as a means of developing critical legal skills.

I INTRODUCTION

The role of legal education in Australia has been explored thoroughly in the past.[1] Law schools and legal education have gone through many changes over the last 30 years. The experience in both the United Kingdom and Australia suggests that the move has been from the liberal law school of the 1960s to the student/consumer driven law school, where the profession has a significant influence.[2] These changes have been both paralleled by and propelled by many

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1 For example, see: Higher Education Group, Department of Education, Science and Training, *Learning Outcomes and Curriculum Development in Law* (January 2003) 453 (ATUC Report); Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Commission* vol 3 (1987) (Pearce Report); Eugene Clark, 'Australian Legal Education a Decade after the Pearce Report' (1997) 8 *Legal Education Review* 121; Craig McInnis and Simon Marginson, *Australian Law Schools after the Pearce Report* (1994); Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709.

2 See Christine Parker and Andrew Goldsmith, '"Failed Sociologists" in the Market Place: Law Schools in Australia' in Anthony Bradney and Fiona Cownie (eds), *Transformative Visions of Legal Education* (1998) 33, 45; for the Australian perspective see Margaret Thornton, 'The Idea of the University and the Contemporary Legal Academy' (2004) 26 *Sydney Law Review* 481, for the changes in Australia. See also, Margaret Thornton, 'Portia lost in the groves of academe wondering what to do about legal education' (1991) 9 *Law in Context* 9.

factors including the corporatisation of the university, cuts in funding and the general shift to a market based economy.[3] Despite these changes, there remains widespread consensus among law academics that law schools should not return to their old-fashioned trade school origins creating legal professionals and instead should actively embrace a broad conception of legal knowledge.[4] Although many law teachers agree that legal education should be broad based there is little consensus on how this can be done. Responses range from teaching the whole subject from a theoretical perspective to encouraging the consideration of historical origins of the subject.

We propose that developing critical thinking skills through the incorporation of theoretical analysis throughout the curriculum is a sound way of construing a broad conception of legal knowledge and should form the basis of legal education. Adopting such an approach brings enormous benefits to both students and teachers. Critical thinking skills will positively affect students on two levels. First, it will facilitate deep approaches to learning and secondly, and more importantly, it will enable students to become engaged and active agents both in the workplace and life, whereby they participate in the discourses on legal, political and social issues as well as expertly applying the knowledge of legal doctrine. Incorporation of critical thinking skills will also have an empowering effect on teachers whereby they will be training students to participate in various aspects of democratic life as well as training them as knowledge

3 See Margaret Thornton, 'The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy' (2001) 8 *International Journal of Legal Profession* 37; Margaret Thornton, 'Among the Ruins of Law in the Neo-Liberal Academy' (1991) 20 *Windsor Book of Access to Justice* 3; Margaret Thornton, 'Gothic Horror in the Legal Academy' (2005) 14(2) *Social and Legal Studies* 267; cf Fiona Cownie and Anthony Bradney, 'Gothic Horror? A Response to Margaret Thornton' (2005) 14(2) *Social and Legal Studies* 277.

4 For example, see: Fiona Cownie, *Legal Academics: Culture and Identities* (2004) for the view that most legal academics wish to teach more than the technical skills. For an alternate view, see Thornton, 'Gothic Horror in the Legal Academy', above n 3; Richard Collier, 'We're All Socio-Legal Now? Legal Education, Scholarship and the "Global Knowledge Economy" – Reflections on the UK Experience' (2004) 26 *Sydney Law Review* 503; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality and Prospects for the Future' (2004) 26 *Sydney Law Review* 537.

workers.[5] This paper develops a rationale for incorporating critical legal thinking skills into the law curriculum by drawing on empirical research and educational theory. In doing so, we address the possible hurdles to the adoption of this approach to legal education by examining the arguments that the students do not wish to learn broad philosophical ideas and are more interested in solely attaining professional skills. Another hurdle is represented by the increasing corporatisation of the academy wherein students commonly seek out easily marketable skills. Moreover, it is commonly said that the legal academics have to serve two masters, the profession and the academy. We conclude that the hurdles are real but not insurmountable and it is possible for legal academics to carry the responsibility of engaging with the critics in an effort to make education a truly empowering experience both for the teachers and the students.

This paper is divided into four main parts. The first explores the empirical study on the students' view of the profession and student learning. The second part analyses the role of the legal academics in the contemporary higher education discourses. The third part explores the work of the educational theorist Henry Giroux and makes an argument for incorporating his ideas into the discourse of legal education. The final section develops an argument as to the manner in which such critical thinking skills could be developed by using theoretical analysis in the legal curriculum.

II WHAT STUDENTS WANT FROM LAW SCHOOL?

It is often suggested that law teachers and law student have different views on the subject matter they study. Law students are said to have a pragmatic view on the subject matter they study and are interested in identifying the connection between the subject matter and the job that the study will lead them to.[6] This pragmatic attitude often has a

5 Thornton, 'Among the Ruins of Law in the Neo-Liberal Academy', above n 3.

6 J Pitcher and K Purcell, 'Diverse Expectations and Access to Opportunities: Is There a Graduate Labour Market?' (1988) 52 *Higher Education Quarterly* 179, quoted by Cownie and Bradney, 'Gothic Horror? A Response to Margaret Thornton', above n 3, 281.

direct effect on the design of the subject materials and is the topic of many desultory discussions among law teachers. Anecdotal evidence suggests that many law teachers see their students as focusing on legal doctrine and being dismissive of all other interdisciplinary, contextual or theoretical materials. While law teachers themselves want to make the connections between doctrine and theory, they are often left wondering whether such connections are indeed what students really want or whether it does constitute good educational practice.

However an earlier study we undertook on the connection between the students' view of the profession and student learning did not support these commonly held views.[7] This study concluded that there existed a strong connection between these two factors and that the students' perceptions of their professional work strongly influenced the way they learn. Law students were no different to their counterparts in music, design, statistics and mathematics, where a similar connection was found to exist.[8] It is necessary to briefly expand on these findings as it has important ramifications for the proper approach to adopt when teaching law students. Table A provides a diagrammatic representation of this discussion.

In our study we examined the view students had of law as a professional entity and the manner in which they approached learning in their degree using a phenomenographic methodology. We defined the 'professional entity' as the work that is undertaken by legal professionals.[9] The professional entity seemed to be an overarching construct through which students described their views

7 Anna Reid, Vijaya Nagarajan and Emma Dortins, 'The Experience of Becoming a Legal Professional' [2006] *Higher Education Research and Development* 85.

8 The professional classification as developed by Reid and Davies was used here, see Anna Reid and Allan Davies, 'Teachers' and Students' Conceptions of the Professional World' in Chris Rust (ed), *Improving Student Theory and Practice – Ten years on* (2003) 88.

9 We found that many students had little exposure to the legal profession.

of their future professional work and then were also able to describe how this view influenced their learning experiences.[10]

We found that student views of law as the professional entity fell into three categories.[11] The first was the Extrinsic Technical View,[12] where students understood the professional entity of law as a collection of rules or doctrine that defined social action. The perception that students had of their professional work is that it consisted of a set of technical components that can be learnt and used when the work situation demands. The term 'extrinsic' was used because students saw their professional work as something that simply exists, and is experienced as being quite external to themselves. And we used the term 'technical' – as it reflected the view that law consists of a set of rules. The second view was the Extrinsic Meaning View,[13] where students viewed the professional entity as a dynamic system, which can change society and be changed by it. This was a broader view of the law than the former category. However, here too, students saw their professional work as external to their personal lives and looked to define their professional work in terms of the discipline. The third view was the Intrinsic Meaning View,[14] where students saw law as a way of thinking and acting. These students saw the professional entity and their personal lives as interrelated. These students viewed themselves as actors within a dynamic system and in this role expected to change the system as a result of their own engagement with it.

10 For a discussion of the professional entity in a variety of disciplines see Reid and Davies, above n 8, 88.

11 Reid and Davies adopted the categorisation used herein, ibid.

12 We also called this the Content View.

13 We also called this the Sociological View.

14 We also called this the Personal View.

Professional Entity		***Learning Law***		
		Acquisitive	**Discursive**	**Reflective**
Extrinsic Technical	Content View: Law is a collection of rules and regulations	Learning is about acquiring a qualification		
		Learning is about acquiring legal tools		
Extrinsic Meaning	Sociological View: Law is a dynamic system	Learning is about acquiring the context of legal tools	Learning is about critiquing the law	
Intrinsic Meaning	Personal View: Law is an extension of self			Learning is about constituting a reflective and engaged idea of law

Table A: Student views of the profession and learning law

In our study we compared the above views of the professional entity with the manner in which students experience learning within their law degree. These findings fell into three categories and showed a strong connection between how they perceived the professional entity and how they experienced learning. The first category of student learning was the acquisitive orientation to learning, where students viewed the law degree as a way of acquiring legal tools that would prepare them for practice. These students approached learning as doing what was necessary to obtain the legal qualification. Whereas some of these students emphasised the importance of concentrating on legal doctrine, others saw a place for an interdisciplinary context in their education, as it gave them a clearer understanding of the origins of the legal doctrine. The focus

nevertheless was on acquiring tools for practice. Many of these students had a narrow view of the professional entity falling into the Extrinsic Technical category of the professional entity. They saw the legal profession as a collection of rules and regulations and consequently viewed learning as acquiring knowledge of the doctrine. Although some of these students fell into the Extrinsic Meaning category they only saw its relevance as it helped them in learning about the origins, political and historical contexts of these rules and regulations.

The second category was the discursive approach to learning law and these students saw learning as more than acquisition of knowledge about the doctrine. To these students learning meant critiquing legal doctrine and questioning the objective nature of such doctrine. They found theoretical frameworks and interdisciplinary approaches to be essential to their learning as it explained the legal doctrine and the values inherent therein. Often these students saw themselves as a 'change agent' whereby they could empower others. These students had a broader view of the legal profession, adopting the Extrinsic Meaning View of the law as a dynamic system.

The third category was the reflective approach to learning law, where students saw the legal process as equipping them to become critical agents. These students adopted the Intrinsic Meaning View of the professional entity and saw no disjuncture between their personal and professional lives. To these students the learning process developed them both personally and professionally and did not stop with the law degree. For them learning went beyond the acquisitive or discursive stages. Their approach to learning included learning the doctrine and its sociological underpinnings as well as critiquing the doctrine. But it went further as they view the process of learning as an empowering one that equips them to be reflective and active members of the profession.

All students clearly do not share the same view of the legal profession or law study. There is a great diversity out there and the challenge for law academics is to determine how they will educate this diverse body. We would like to assume that most law teachers wish to educate their students in a broader manner than just

imparting technical knowledge,[15] and the impetus for choosing the broader version of legal knowledge, in part, develops the potential that all students may be convinced to adopt the reflective approach to learning.

III THE ROLE OF ACADEMICS IN LEGAL EDUCATION

It is not only the desire of some academics but a sound pedagogical rationale for teaching law in a theoretical framework that informs our argument. The rationale for doing so is that law students, as future professionals, will legitimise ideas about the role of law in regulating the private lives of people. They ought to be able to understand their role in the legitimation of ideas about law. We propose that legal education should aim at enabling students to become reflective thinkers and to understand the nature of legal knowledge. However, the market driven changes in the Higher Education sector at least cast a doubt on the feasibility of such a direction for legal education.

The recent market oriented reforms to universities have witnessed a good deal of planning and discussion around the law schools' identity, the university's branding of its law degree and the positioning of the law school compared to its competitors in the market. This has lead to a range of responses from law schools in how they have addressed learning and teaching.[16]

Thornton has made a persuasive argument about the corrosive effects of the corporatisation of universities on academic creativity and autonomy.[17] Even though Cownie and Bradney have strongly disagreed with Thornton's thesis, we suggest that there is no inherent contradiction in their positions. Thornton actually agrees with Cownie and Bradney's argument that it is important to

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15 Cownie and Bradney, 'Gothic Horror? A Response to Margaret Thornton', above n 3, 282.

16 For example, a comprehensive review of Australian law schools' practices is presented in the ATUC Report, above n 1.

17 See Thornton, 'Gothic Horror in the Legal Academy', above n 3; cf Cownie and Bradney, 'Gothic Horror? A Response to Margaret Thornton', above n 3.

understand what academics actually do in the law schools. The extent of resistance to increased bureaucratisation may be a point of disagreement but there is a general consensus that individual academics are striving to retain a commitment to intellectual development. At present this commitment is demonstrated by individuals rather than by the institution as a whole.[18] We seek to develop the central idea of this debate, that individual teachers wish to enable students to have a meaningful experience of their studies. And we fuse it with the above insight that students learn better when they view the learning process as an empowering one.

The important issue here, is what is the possibility in the present context of increased corporatisation that we do more than less.[19] Even though individual academics are striving hard and putting a wider philosophy of education into practice, the real need is for an institutional commitment to this goal. As Peter Goodrich argues, '[t]he scholarly, just as much as the pedagogic, is an institutional function, and it implies a series of relationships within the law school'.[20] We propose that one way of making that happen is to have an open debate about our philosophies of teaching, why we teach and, necessarily, what and how we teach. We argue that the objective of education as creating critical thinkers is widely accepted, but how we put these objectives into practice remains at least a matter of debate if not outright disagreement.

Legal academics have, to a large part, found themselves in a difficult position compared to their counterparts in disciplines such as

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18 Thornton, 'Gothic Horror in the Legal Academy', above n 3, 273, agrees that the diversity within the system fosters undeniable pockets of resistance and individual academics retain commitment to intellectual development. For a similar argument, see Cownie and Bradney, 'Gothic Horror? A Response to Margaret Thornton', above n 3. They argue that resistance, rather than being an occasional and diminishing feature of the law school, characterises the work of many British academics.

19 We acknowledge the pressures of this environment where 'academic performativity is another name for a focus on achievements which are quantitative, it negates the importance of content in the name of productivity': Richard Collier, 'The Changing University and the (Legal) Academic Career – Rethinking the Relationship Between Women, Men and the "Private Life' of the Law School' (2002) 22 *Legal Studies* 1, 20.

20 Peter Goodrich, 'Of Blackstone's Tower: Metaphors of Distance and Histories of the English Law School' in Peter Birks (ed), *What Are Law Schools For?* (1996) 59, 66.

history, philosophy or even the sciences. The task of preparing students for the profession has become of primary importance, with many law schools responding by incorporating professional training programs into their degrees. It has been suggested that academics in many non-law disciplines, for example history or science, are preparing students for a life similar to their own – and there is continuity between the pedagogical and the scholarly sides of their work.[21] This, however, is not the case with legal education. The professional focus of legal education has been addressed in Australia and it has been suggested that an 'integrated legal education environment', whereby legal education should move out of the traditional law library and embrace the role of serving the public interest, should be adopted.[22] It has been argued that this may be best achieved by teaching a diversity of students within a law school as well as expanding the manner in which legal knowledge is currently perceived.[23] Further, calls for a liberal law degree have suggested that the degree not be bounded by the concerns of the practising profession including anything resembling the Priestley 11.[24] These viewpoints illustrate the continuous concerns of legal academics over their role compared to their colleagues in the other disciplines of the academy.[25] Our argument is that within the constraints of external and internal pressures there is room for legal academics to create a space for sound pedagogical functioning: of

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21 Anthony T Kropman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (2003) 264.

22 See Andrew Goldsmith, 'Legal Education and the Public Interest' (1998) 9 *Legal Education Review* 143.

23 It is worth noting that this proposal is at odds with Kropman's views, who sees a limited role for non-legal disciplines in legal education: see Kropman, above n 21, 257; see also, A Goldsmith, 'Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers' (1996) 14 *Journal of Professional Legal Education* 1, where the author cautions against over emphasising professional competence as a goal of legal education.

24 Parker and Goldsmith, above n 2, 47.

25 For an interesting interpretation of the defensiveness of legal academics see Goodrich, above n 20, 59. He argues that the critical issue is not that of raising the status of legal academics but rather of dethroning the judges and removing the mystical aura of lawyers.

creating the possibility that students can learn to be critical, independent and reflective thinkers.

IV THE DISCIPLINE OF LAW AND THE DISCOURSES IN EDUCATION

We propose that Giroux's work on critical pedagogy provides us with a better understanding of the education process as well as a framework for addressing these concerns.

Critical thinking as the aim of education has become somewhat of a cliché and it is necessary to articulate our use of the concept.[26] The concept of critical thinking is directly related to the critical theory of education. Giroux's work is particularly relevant,[27] as he analyses the relationship between schooling and the capitalist societies of the industrialised west.[28] But, unlike other scholars, he argues that while education serves to reproduce a hierarchical social order it nevertheless leaves room for resistance. Not only is there a need for an analysis of ideology that shows how education sustains and produces ideologies but also how individuals or groups in concrete relationships negotiate, resist or accept them.[29] Therefore, critical

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26 Stephen Brookfield, *Developing Critical Thinkers: Challenging Adults to Explore Alternative Ways of Thinking and Acting* (1987) 3-4, gives a list of educational literature that recommends an emphasis on critical thinking. He also discusses various interpretations of the concept of critical thinking: at 11-14.

27 For a review of the developments in the area of critical education see Henry Giroux, *Critical Theory and Educational Practice* (1983) 28-33.

28 Henry Giroux, 'Hegemony, Resistance, and the Paradox of Educational Reform', in H A Giroux, A N Penna and W F Pinar (eds), *Curriculum and Instruction: Alternatives in Education* (1981) 400. They are the theories of social reproduction articulated by Althusser and Bowles and Gintis; theories of cultural reproduction as developed by Bourdieu and Bernstein; and theories of resistance represented in the works of Willis and cultural studies. All these theorists are trying to explain the existence of domination without necessarily a repressive state apparatus. Giroux objects that Althusser's notion of ideology exists without the benefit of human agents. Similarly Bordieu's concepts of cultural capital and habitus are useful in explaining how the educational system transmits the dominant culture but ultimately the concept of habitus is not that different from a form of hegemony that denies the possibility of social change.

29 For this he relies on Gramsci's concept of hegemony but cautions that hegemony does not represent a cohesive force. The tensions and contradictions within the concept

pedagogy raises the issue of how hegemony functions in the education system and how various forms of resistance and opposition either challenge or help to sustain it.[30] For Giroux, critical pedagogy is the key because it equips students with the knowledge to understand the institutional conditions that influence their lives, and provides the ability to participate in ongoing conversations about important political and social issues that is central to democratic life.[31] Giroux argues that critical pedagogy seeks to provide students with the competencies they need to cultivate the capacity for critical judgment, thoughtfully connect politics to social responsibility, and expand their own sense of agency in order to curb the excesses of dominant power, revitalise a sense of public commitment, and expand democratic relations.[32]

A strand of critical educational theory combines critical and post-structural ideas to argue that every individual is implicated in the construction and legitimation of knowledge. The aim of exposing the students to the constructed nature of knowledge is to make it

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make counter hegemonic struggle possible. Hegemony thus is a form of control that has to be constantly fought for. Foucault uses the concept of power as something that is exercised rather than possessed and it helps in understanding that it not only constrains but also constitutes the subject. In that sense it has both negative and positive aspects. The negative aspect of power institutionalises ideology as a form of hegemony by denying the critical possibilities. In its positive aspect it refers to the latent and manifest modes of critical discourse and practices that are the core of ideology: ibid 418-19. Giroux's views on critical pedagogy have generated extensive critique. For a feminist critique see Sue Jackson, 'Crossing Borders and Changing Pedagogies: From Giroux to Feminist Theories of Education' (1997) 9(4) *Gender and Education* 457; see also, for an argument that the literature on critical pedagogy omits disability as a marker of marginalisation, Susan Gabel, 'Some conceptual problems with critical pedagogy' (2002) 32(2) *Curriculum Inquiry* 177.

30 Giroux, 'Hegemony, Resistance, and the Paradox of Educational Reform', above n 28, 419. For contrary views, that question the presence or effectiveness of such agency, see Eric Margolis (ed), *The Hidden Curriculum in Higher Education* (2001).

31 Henry A Giroux, 'Pedagogy of the Depressed: Beyond the New Politics of Cynicism' (2001) 28(3) *College Literature* 1, 14-15. See Gregory Jay and Gerald Graff, 'A Critique of Critical Pedagogy' in Michael Berube and Cary Nelson, *Higher Education Under Fire* (1995) 201, for a critical view of critical pedagogy and the difficulties of applying Paulo Friere's concept of 'the Pedagogy of the Oppressed' to North America. They propose ethical pedagogy as the appropriate approach.

32 Giroux, 'Pedagogy of the Depressed: Beyond the New Politics of Cynicism', above n 31, 11.

possible for students to take responsibility for the views they hold and defend their choices as conducive to creating a just social system. Therefore, everyone has the responsibility to be self reflective of their position and acknowledge that certain viewpoints privilege and advance their interests.[33] Such an approach will also be a transformative enterprise in that students will see how they, and every one else, is implicated in creating knowledge and justifying or changing social relations.

A broad based theoretical curriculum can enable students to understand how knowledge, especially legal knowledge is constructed. The more important task, however, is to drive home the fact that any viewpoint carries certain consequences and the individuals must bear the responsibility for justifying their views. This could be uncontroversially described as the capacity for critical thinking. It is common for jurisprudential courses to present the students with a multiplicity of perspectives on basic issues like the definitions of law, the nature of judicial reasoning and the legitimacy of legal regulation. While students get to see examples of various schools of thought, invariably they are not equipped to judge their relative strengths or weaknesses. This is a function of theorising in an abstract manner. The choice that many teachers make when deciding how many perspectives to include nonetheless leaves intact the suggestion that all these theories are equally plausible, apolitical or objective. The students are not equipped to identify and analyse the assumptions on which various theories are built.

For example, the claim that all knowledge comes from some perspective has long been part of the feminist scholarship but mainstream theories and certainly mainstream legal theories manage to disregard it. Law students learn the mainstream legal theories and, increasingly, they also get an exposure to the so-called critical perspectives. However, what they often do not get is any training in how to judge or assess the relative strengths or weaknesses of these

33 Henry Giroux and Peter McLaren, *Critical Pedagogy, The State and Cultural Struggle* (1989). See, for an argument that individual intellectual work is political action, W Pinar, 'The Abstract and the Concrete in Curriculum Theorizing' in H A Giroux, A Penna and W Pinar (eds), *Curriculum and Instruction: Alternatives in Education* (1981) 431.

different perspectives. A critical reflection requires the person to be able to step back from each perspective and identify the assumptions on which the perspective is built. We agree with Cotterrell that the partial nature of normative legal theory can only be exposed (and challenged) if we are able to identify the non-theoretical conditions that make a certain theory possible.[34]

We find that Giroux's concept of 'border pedagogy'[35] is particularly useful in enabling the students to uncover the assumptions on which various theories are built. The assumptions, once identified, can be or should be critically examined to expose the exclusions they cause and the consequences that flow thereby. In law this is a relevant task, as jurisprudential theories carry substantial status in laying the basis for the ideas about the objective and universal nature of law. The critical theories that challenge the truth claims of mainstream theories are easily portrayed as partial, biased, less worthy perspectives.

In contemporary legal education more often than not students are unable to realise that the design of their education can empower or dis-empower their own sense of agency in the construction of legal knowledge. But this could happen if the teachers take the responsibility of showing how ideologies are not simply individual expressions of feeling, but are 'historical, cultural, and social practices that serve to either undermine or reconstruct democratic public life'.[36] Giroux makes this point in respect of anti-racist pedagogy but we believe it is applicable to all forms of pedagogy that seeks to train critical thinkers.

In teaching jurisprudence this could mean that the non-mainstream or critical perspectives are analysed to expose how representations and practices that name, marginalise and define differences as the 'devalued other' are actively learned, internalised, challenged or transformed. This is not only about being 'progressive' or

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34 Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (1989) 17.

35 Henry Giroux, 'Post-Colonial Ruptures and Democratic Possibilities: Multiculturalism as Anti-Racist pedagogy' (1992) 21 *Cultural Critique* 5.

36 Ibid 28.

'magnanimous' and allowing the differences of others to be acknowledged. Rather it is about how 'we' are implicated in designating the 'we' and the 'other', the 'centre' and the 'margin', the 'mainstream' and the 'critical' (or alternative) viewpoints. In this way both the educators and the (mostly privileged) students can come to understand their agency in reproducing legal authority and meaning.

The students, if expected to engage with the views of various authors as well as of their co-students, will benefit in a number of ways: by discussing ideas amongst themselves in a group they would at once see the possibility of various interpretations of the same information or facts. The multiplicity of interpretations necessitates that everyone should choose their viewpoint and be able to justify that choice. This would enable everyone to reflect on the assumptions made by various opinion holders and articulate reasons why certain assumptions are acceptable or unacceptable.[37]

This is what it means to develop the critical thinking skills of learners. The necessity of developing critical abilities however is not universally accepted but the difficulty is not specific to the discipline of law. In another context, Joan Scott responding to cynicism for critical thinking asks,

> if political survival is imperilled by critical reflection, where will radical critiques come from, and how are we to value them? If there is no fundamental criticism and no place where it is practiced, taught, and perfected, what will be the sources of renewal and change? Without critical thinking, and the conflicts and contests it articulates, will there be democracy at all?[38]

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37 Cf the objections of Jay and Graff, that critical pedagogy cannot guarantee that students will arrive at a predetermined political stance, and students will rightly experience this expectation as dogmatic: Jay and Graff, above n 31, 207. But, see also, Michael Apple, *Power, Meaning and Identity: Essays in Critical Educational Studies* (1999) 113-34, for a view that critical educators must challenge the resurgence of rightist conservative views.

38 Joan Scott, 'Rhetoric of Crisis in Higher Education' in Michael Berube and Cary Nelson (eds), *Higher Education Under Fire* (1995) 293, 302.

Therefore, we argue that the legal educators ought to carry the responsibility to translate the extensive legal scholarship that exposes the constructed nature of legal knowledge in a manner that enables their students to think for themselves and understand their active involvement in legitimising ideas about the law. Translated into legal education this at least means that the students who are critical thinkers therefore need to understand the constructed nature of legal knowledge. Such an approach also constitutes a deep approach to learning.[39]

In law, as in many other social sciences, the post-structural theorists have challenged the possibility of finding objective knowledge.[40] Extensive legal scholarship exists which critiques law in various forms and challenges the claim that law is autonomous, objective, neutral or principled. In addition to critiquing the doctrine there is lively interest in the interdisciplinary analyses of law. One consequence of these theoretical developments is that they challenge the adequacy of curricular models that primarily emphasise doctrinal knowledge. However, this extensive scholarship does not find adequate or systematic representation in most curricula. As Martha Fineman has argued, the existence of women in law, and feminist legal theory, have yet to substantially alter the nature of legal

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39 In the higher education literature it is widely accepted that the objective of education or teaching should be to facilitate learning. For a good overview of developments, see N J Entwistle and Paul Ramsden, *Understanding Student Learning* (1983); N J Entwistle, 'A Model of the Teaching-Learning Process' in J Richardson, M Eysenck and D W Piper (eds), *Student Learning: Research in Education and Cognitive Psychology* (1987) 13. The literature on approaches to learning, particularly that of the two categories of deep and surface learning, is well known and it is not the aim of this article to review this literature in any depth. For a good introduction, see Paul Ramsden, *Learning to Teach in Higher Education* (1992); Michael Prosser and Keith Trigwell, *Understanding Learning and Teaching: The Experience in Higher Education* (1999) 91.

40 For an accessible introduction to this literature, see Margaret Davies, *Asking the Law Question* (2nd ed, 2002); Stephen Bottomley and Stephen Parker, *Law in Context* (1997). In education literature there is a relatively recent shift from a behaviourist to a cognitive view of learning. See Brent Wilson and Peggy Cole, 'A Review of Cognitive Teaching Models' (1991) 39(4) *Educational Technology Research and Design* 47. We are using the idea of constructed knowledge as found in the post-structural writings. See A Rhodes-Little, 'Teaching lawyering skills for the real world! Whose reality? Whose World? Or the closing of the Australian mind' (1991) 9 *Law in Context* 47.

discourse or the dominant legal constructs and concepts.[41] We are arguing for inclusion of theory in the legal curriculum not for its own sake but because it enables students to learn the skills of independent thinking. The presence of diverse theoretical developments at the very least challenges the adequacy of curricular models that primarily emphasise doctrinal knowledge. Our philosophy of education, therefore, does not restrict itself to inclusion of abstract theoretical knowledge but relies on theoretical emphasis in the curriculum as a basis for creating critical thinkers.[42]

Since the nature of legal knowledge is contested in the literature, it is only right that the law students are acquainted with the controversies rather than be content with gaining a competent understanding of the legal doctrine. This suggests that the students must be able to analyse theoretical arguments and develop the capacity to critique whatever 'knowledge' is presented to them. For this reason they need to be acquainted with theories of law other than mainstream jurisprudential theories announcing the neutral, objective and universal nature of law. Students need to be able to assess the merits or adequacy of any theory about the nature of law. Ian Duncanson says there are two ways of being critical, in a popular sense it means being able to recognise faults. In a more significant sense (for us here) it means the refusal to accept objects of knowledge as unproblematic. Instead one should be able to see them as the product of particular practices whose nature and effects can be judged in context.[43] And this is what Giroux means when he says that critical pedagogy must enable students to engage in border crossing.

41 Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (1995) 100.

42 See also, Fiona Cownie, 'The importance of theory in law teaching' (2000) 7(3) *International Journal of Legal Profession* 225, 231.

43 Ian Duncanson, 'Legal Education and the Possibility of Critique: An Australian Perspective' (1993) 8(2) *Canadian Journal of Law and Society* 59.

V REPOSITIONING THEORY AS A WAY OF DEVELOPING CRITICAL THINKING SKILLS

The important role for theoretical and critical perspectives in the law curriculum was raised in the Pearce Report,[44] and again in the ATUC report.[45] Whereas the former report makes it clear that theoretical insights are desirable, the later report points to the diverse manner in which the issue is tackled in law schools. In an analysis based on the later report, Nickolas James shows that Australian law schools still give a relatively low priority to teaching legal critique. Only five out of 27 law schools expressly promote themselves as concerned with legal critique. Only 17 law schools are guided by teaching and learning policies that encourage legal critique, and of those 17 policies only four contain more than a couple of token references to legal critique. In an analysis based on the former report, Nickolas James shows that none of the law schools has adopted a clear definition of what it means to teach law critically.[46]

We agree with Toddington that a ritual endorsement of the need for an inter-disciplinary perspective is not of much use if we continue making the assumption that we can take 'law' for granted and address ourselves to its content in terms of gender, race, class, social policy etc. This way all that is achieved is that the concept 'law' remains unexamined but there are some exotic and ingenious interpretations of the same old stuff. Instead what is required is that the radical and critical perspectives should be subjected to philosophical scrutiny in order to validate or reject their fundamental premises.[47]

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44 Pearce, Campbell and Harding, Pearce Report, above n 1. The same issue is also raised in McInnis and Marginson, above n 1, 253.

45 ATUC Report, above n 1, 453. See also, Clark, above n 1.

46 Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne Law Review* 965.

47 S Toddington, 'The Emperor's New Skills: The Academy, The Profession and The Idea of Legal Education' in P Birks (ed), *What Are Law Schools For* (1996) 69, 73-4.

There already exists extensive literature on why theory is significant in legal teaching.[48] We are in agreement with these rationales but are mindful of the ground reality that, in practice, legal teaching is nevertheless an eclectic mix of educational philosophies.[49] It is in our effort to reflect the insights of this extensive legal scholarship in teaching across the board that we propose mainstreaming theory in the legal curriculum.

However, the definition of legal theory itself is problematic – does it mean traditional analytical jurisprudence, post-modern jurisprudence or interdisciplinary approaches?[50] We rely on a conception of theory that enables an analysis of the constructed nature of knowledge. It is essential to deconstruct the claims of objectivity as well as the ahistorical and acontextual nature of mainstream legal theory. This is a basic conception of legal theory as it enables critical thought. We propose that theoretical analysis is the ideal tool for developing critical thinking skills among law students as a theoretical analysis of law achieves certain unique insights about the nature of law not otherwise available in doctrinal analysis,[51] even when such analysis

48 As an introduction to the debates, see Charles Sampford and Diana Wood, 'Theoretical Dimensions of Legal Education in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 100; J Webb, 'Why theory Matters' in J Webb and C Maugham (eds), *Teaching Lawyers Skills* (1996) 23; Anthony Bradney, 'Law as a Parasitic Discipline' in Anthony Bradney and Fiona Cownie (eds), *Transformative Visions of Legal Education* (1998) 71. Another strand of scholarship argues that skills and theory ought to be combined, see Goldsmith, above n 23; M LeBrun and R Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (1994); Parker and Goldsmith, above n 2; see also, a collection of articles in a special issue of the (2000) 7(3) *International Journal of Legal Profession.*

49 See also, James, above n 46, 981, for the comment that legal critique is strong in Australian scholarship and many individual teachers choose to incorporate critique in their teaching but ultimately it remains a marginalised approach to the teaching of law.

50 See ATUC Report, above n 1, 123–4.

51 We are well aware of the pitfalls of using theory in an effort to maintain hierarchies. See, for example, bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* (1994) 64, where she comments that '[i]t is evident that one of the many uses of theory in academic locations is in the production of an intellectual class hierarchy where only work deemed truly theoretical is work that is highly abstract, jargonistic, difficult to read, and containing obscure references.' However we find support in Ian Duncanson's argument that there should be a more reciprocal relation between the disciplines of law and humanities. He argues that law as a discipline needs to keep

includes an ad hoc selection of theoretical articles in the materials. As Naffine says, the new courses in law may give spice to the law degree but they do not reshape the basic pedagogy.[52]

A direct consequence of introducing theoretical analysis is to allow students to make a conscious decision whether to accept any theoretical views of legal knowledge or to reject them, in the sense of wishing to modify them. Their decisions would be informed by their value systems and aspirations but in so far as the students will articulate such preferences they will be encouraged to be self reflective, ethical agents. As Webb argues, 'if an education is to be Liberal, it needs to be liberating. It needs to create in us the ability and confidence to make judgment calls and to act upon them in the social world'.[53] However, we wish to emphasise that it is not enough to deploy law in a socially just manner. Rather, as Duncanson says, the task is one of creating the capacity for doubt and the extent to which one is able to doubt is a useful measure of the degree of participation at work in the construction of knowledges. If one does not realise that doubt is possible it is because the framework itself is constructed to claim certainty and conceal the optional nature of certainty that it is founded upon.[54] It is our task to enable every one to question such claims about knowledge and in particular legal knowledge. This is reflected in Giroux's description of teaching as transgressing the boundaries, that is, no one has a choice but to acknowledge their responsibility in making choices in constructing theories.

This is the very minimum an adequate legal education ought to aim for and, therefore, avoidance of engaging with the theoretical and philosophical aspects of legal knowledge is less than optimum. However, both the teaching of professional conduct at the vocational

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pace with the innovation and theoretical heterogeneity in the humanities: Ian Duncanson, 'Broadening the Discipline of Law' (1993–94) 19 *Melbourne Law Review* 1075.

52 Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990) 33.

53 Julian Webb, 'Ethics for Lawyers in Ethics for Citizens: New Directions for Legal Education' in Anthony Bradney and Fiona Cowney (eds), *Transformative Visions of Legal Education* (1998) 139.

54 Duncanson, above n 43, 65.

stage and much academic jurisprudence, by themselves, do not address the problem of moral agency, for example, what should one do when faced with a moral dilemma?[55]

Obviously it is difficult and undesirable to prescribe a specific theoretical position. It would be possible, for example, to look at contract law through a critical legal studies lens or use feminist legal theory to assess its impact or indeed look at it from the viewpoint of relational contract theory. Alternately, an interdisciplinary approach will allow a critical examination of contract law. A sociological analysis may allow the student to consider the role of norms in regulating business relations and assess the effectiveness of formal legal sanctions. This may lead to an examination of statutory developments, recognising such norms,[56] and the increasing shift from traditional modes of dispute resolution to alternative dispute resolution mechanisms could also be examined here to allow students to consider the roles of the court and legislature within our legal system.

Presented with this literature, the students would not have the option of relying on the view that contract principles represent an objective reality. In deciding which analysis to accept, the students will have to assess the relative strengths and weaknesses of the accompanying political, economic or sociological theories. Thus the course content, of necessity, will be inter-disciplinary. Similarly, the need to justify their choices would bring into full focus the agency of the individual student in legitimising some ideas while delegitimising others. Students will appreciate how they are involved in putting into practice the theoretical ideas about the constructed nature of law. The outcome of this exercise would be to expose that the assumptions underlying any position are not natural or neutral, but rather associated with our particular position in the world.[57]

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55 Webb, 'Ethics for Lawyers', above n 53, 139.

56 The statutory developments could include ss 52 and 51AC of the *Trade Practices Act 1974* (Cth); see also, Vivian Goldwasser and Tony Ciro, 'Standards of Behaviour in Commercial Contracting' (2002) *Australian Business Law Review* 369.

57 Davies, *Asking the Law Question*, above n 40, 182.

At the same time this model does not diminish the autonomy of the academics. Which theory or theories one selects would be up to the individual teacher. However, just like the students, the teachers would carry the responsibility of justifying the choices they make and, in the process, they would articulate their agency in the construction of legal knowledge. The choices would not be capricious because of this need to articulate reasons for their particular preferences. The fact that the students would be exposed to many theoretical perspectives across the curriculum would enable them to judge the relative strengths and weaknesses of various theories. Arguably this would be an adequate safeguard against indoctrination and imposition of one view rather than another.

An interdisciplinary education and the capacity for critical thinking are not elitist but necessary for every one, practitioners included.[58] Even a family law practitioner or, for that matter, a mediator in Alternative Dispute Resolution in family disputes, works with the idea that the *Family Law Act 1974* (Cth) requires an equitable and just distribution of property at the end of a marriage.[59] However, what constitutes a just and equitable distribution can only be answered adequately if one has a firm grasp of the consequences of gender roles on the economic status of the parties.[60] This, at the very minimum, demands an understanding of the feminist critiques of work, wages, part-time employment and tax systems that encourage dependency of mothers in an intact marriage. A cursory survey of Family Court judgments reveals a changing, if slow, trend of judges taking note of relevant sociological literature. It bears repetition that the source of this change is the practising lawyer and not the

58 However, we are not trying to justify the need for theory as a facilitator for professional training and agree with Toddington that 'legal education should not be regarded as solely or even primarily a matter of preparing professionals': Toddington, above n 47, 72; see also, for a slightly different argument, Parker and Goldsmith, above n 2, that the current market pressures for Australian law schools provide an opportunity to implement the broader conception of legal knowledge in which theory, critique and practice merge.

59 *Family Law Act 1975* (Cth) s 74.

60 While court decisions provide some guidelines, the nature of family disputes is such that no two cases are alike and it is necessary to make an assessment of the justice and equity of the proposed distribution of property in every dispute.

judiciary. Therefore, the skills that all law students require are the generic skills of critical analysis. And it has been argued that teachers (and other cultural workers) can rediscover themselves as agents rather than passive subjects.[61]

VI CONCLUSION

The objective of this article is to propose a scholarly basis for incorporating critical thinking skills into the law curriculum by viewing legal doctrine through a variety of theoretical lenses. Doing so has wide ramifications. It provides students with a much wider conception of the professional work they will encounter and equips them with lifelong skills necessary to cultivate the capacity for critical judgment and to thoughtfully connect politics to social responsibility. It provides the law academic with a raison d'être – that of equipping students to become active participants in the democratic process.

61 Barry Kanpol and Peter McLaren, 'Introduction: Resistance, Multiculturalism and the Politics of Difference' in B Kanpol and P McLaren (eds), *Critical Multiculturalism: Uncommon Voices in a Common Struggle* (1995) 1, 5.