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# ARTICLES

## LIBERAL LEGAL EDUCATION: THE GAP BETWEEN RHETORIC AND REALITY

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### ABSTRACT

There is within Australian legal education a widening gap between the rhetoric of liberalism and the reality of law school practice. While a liberal approach to the teaching of law is increasingly advocated by law schools and legal scholars, doctrinalism, vocationalism and corporatism nevertheless continue to dominate legal education. This paper uses a Foucauldian theoretical framework to explain why the rhetoric of liberalism so often fails to be realised.

The liberal approach to the teaching of law is characterised by a fundamental hypocrisy: despite its apparent commitment to liberation and pluralism, liberalism is in fact an exercise of disciplinary power seeking the universalisation of a specific ideology through the deployment of a range of disciplinary strategies including the colonisation and assimilation of alternative discourses. As an expression of power, liberalism is inevitably contested, and the convergence of a multiplicity of resistances contributes to liberalism's failure within the law school.

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# I INTRODUCTION

> [O]ne senses recently a concerted attempt to define the role of law schools more broadly than simply a preparation for professional (mainly private) practice. The concepts of 'liberalism', 'humane professionalism', 'interdisciplinary', 'critical', 'theoretical' and 'contextual' occur with considerable frequency in recent legal education discourse. Effort to 'liberalise' law schools has lead even to the historical nexus between 'black letter' law, legal education and employment being seriously questioned, if not entirely broken.
>
> - Andrew Goldsmith[1]

> 'Why are we learning all of this extra stuff? We just want to know the basics so we can go and practice.'
>
> - Anonymous law teacher mimicking typical law student[2]

A 'liberal' approach to the teaching of law is typically understood as one which emphasises the transformation of the law student into a rational and responsible individual. According to liberalism, education is more than simply indoctrination or vocational training, and the law school is more than simply a marketable resource of the university; consequently, the teaching of law must involve more than the transmission of legal doctrine, the inculcation of legal skills or the maximisation of customer satisfaction. Legal education must include the study of legal philosophy and law in context, liberal values must infuse teaching practice, and the law student must learn to think rationally and behave responsibly as a practitioner and as a member of the community.

There is in Australia a widening gap between the rhetoric of liberalism and the reality of law school practice. While a liberal approach to the teaching of law is increasingly advocated by law

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1 Andrew Goldsmith, 'Standing at the Crossroads: Law Schools, Universities, Markets and the Future of Legal Scholarship' in Fiona Cownie (ed), *The Law School – Global Issues, Local Questions* (1999) 73-74.

2 Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) 339.

schools and legal scholars, Australian legal education continues to be dominated by doctrinalism, vocationalism and corporatism. This paper seeks to determine how and why the rhetoric of liberalism so often fails to be realised within Australian law schools.

The paper is in three parts. The first part is a description of the liberal approach to the teaching of law, and of the apparent failure by liberalism to displace the more conservative approaches within the law school. In the second part, liberalism is shown to be characterised by a fundamental hypocrisy: despite its apparent commitment to liberation and pluralism, liberalism is in fact an expression of power seeking the universalisation of a particular ideology through the deployment of a range of disciplinary strategies. As an expression of power, liberalism is inevitably resisted, and the third part of the paper is a description of the way in which liberalism is frustrated by the refusal by many law teachers to abandon the more traditional approaches to the teaching of law, by the resistance by law students and by employers to law courses perceived as too theoretical and insufficiently vocational, and by the frequent inconsistency between liberalism's objectives and the corporatist agenda of law school and university management.

## II LIBERAL LEGAL EDUCATION

A number of legal scholars have attempted to explain what it means to teach law liberally. Anthony Bradney, in his article 'Liberalising Legal Education', began by pointing out that the notion of a liberal education is specific neither to law nor to university education. He went on to explain that the notion is built upon the proposition that education is an education for life and that life is not solely concerned with material or utilitarian matters. The idea of liberal education involves an acceptance of both the Aristotelian view of the individual as being inherently curious and the Enlightenment view that individuals can comprehend, and through comprehension control, the world.[3] Bradney referred to Barnett, who wrote that a liberal education is about 'allowing to unfold characteristics of reason and independence which lie naturally within the individual',[4] and to

[3] Anthony Bradney, 'Liberalising Legal Education' in Fiona Cownie (ed), *The Law School – Global Issues, Local Questions* (1999).

[4] R Barnett, *The Idea of Higher Education* (1990).

Margaret Davies, who wrote in her paper 'University Culture or Intellectual Culture':

> The advanced study of the human sciences involves attempting to realise the aims of the practical Enlightenment (i.e. Kant's injunction not to learn by rote what others have thought but to think for oneself); it contributes to the formation of intellectually and morally responsible citizens.[5]

Bradney added that a 'liberal legal education should always involve giving the student those materials that are necessary to help them reflect upon the values of the culture.'[6] John Goldring made a similar point in 'Better Legal Education: An Essential Element of Justice for All':

> [N]o one who wants to understand the law will succeed if he or she studies only a body of abstract rules, rather than the multitude of human and social interactions that make up the law in action: the cultural traditions, the power relationships, the political history, the emotions, the practicalities that embroider the statutes and precedents.[7]

Roger Brownsword wrote that a liberal legal education seeks to produce not just graduates, but ethical individuals and citizens who are capable of rational analysis into and debate about the nature of law and legal practice.[8] Sir Anthony Mason insisted that 'a university should aim to equip its law graduates with a broad and liberal education rather than concentrate on a narrow technical competence.'[9] Margaret Thornton recently suggested that liberal legal education discourse is also characterised by an apparent love of knowledge for its own sake, and a belief that universities be autonomous and not dictated to by agencies of the state.[10]

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5 Margaret Davies, 'University Culture or Intellectual Culture?' in B Brecher, O Fleischmann, and J Halliday (eds), *The University in a Liberal State* (1996) 24.

6 Bradney, above n 3, 18.

7 John Goldring, 'Better Legal Education: An Essential Element of Justice for All' in John Goldring, Charles Sampford, and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 158.

8 Roger Brownsword, 'Law Schools for Lawyers, Citizens and People' in Fiona Cownie (ed), *The Law School – Global Issues, Local Questions* (1999) 27-28.

9 Anthony Mason, 'Universities and the Role of Law in Society' in John Goldring, Charles Sampford, and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) ix.

10 Margaret Thornton, 'The Idea of the University and New Knowledge Production in the Contemporary Legal Academy' (Paper presented at the

'Liberalism', in its application to legal education, is not a cohesive ideology; rather, it is an unstable and inconsistent body of statements about the teaching of law. It is possible nevertheless to identify three key themes which characterise a liberal legal education: *individual freedom*, *social responsibility,* and *informed rationality*. Liberalism emphasises individual freedom by insisting that the law student be free to direct their own education and growth, that the law teacher be free from excessive intervention by the law school, and that the school be free from excessive intervention by the university, the profession and the State. Liberalism tempers this emphasis upon individual freedom by also insisting upon the importance of social responsibility. Many of the more recent works of liberal legal education scholarship explore the ways in which ethical values can be taught to law students.[11] Other works of liberal

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Australian Law Teachers Association Conference, Brisbane, Australia, 7 July 2003).

[11] See e.g. Frank D Armer, 'The Teaching of Ethics in Australian Law Schools' (1998) 16 *Journal of Professional Legal Education* 247; Sandra Burns, 'Teaching Legal Ethics' (1993) 4 *Legal Education Review* 141; Margaret Castles, 'Challenges to the Academy: Reflections on the Teaching of Legal Ethics in Australia' (2001) 12 *Legal Education Review* 81; Adrian Evans, 'Lawyers' Perceptions of Their Values: An Empirical Assessment of Monash University Graduates in Law, 1980-1998' (2001) 12 *Legal Education Review* 209; Douglas N Frenkel, 'On Trying to Teach Judgement' (2001) 12 *Legal Education Review* 19; Jeff Giddings, 'Teaching the Ethics of Criminal Law and Practice' (2001) 35 *Law Teacher* 161; Andrew Goldsmith, 'Heroes or Technicians? The Moral Capacities of Tomorrow's Lawyers' (1996) 14 *Journal of Professional Legal Education* 1; Barbara Hamilton, 'Getting Them Early: Teaching a Critical Perspective on Legal Ethics and Adversarialism in an Introductory LLB Unit at the Queensland University of Technology' (2001) 12 *Legal Education Review* 105; Diana Henriss-Anderssen, 'Teaching Legal Ethics to First Year Law Students' (2002) 13 *Legal Education Review* 45; Judith Lancaster, 'In Favour of an Integrated Approach to the Teaching of Ethics to Business Law Students' (2001) 3 *UTS Law Review* 174; Marlene LeBrun, 'Enhancing Student Learning of Legal Ethics and Professional Responsibility in Australian Law Schools by Improving Our Teaching' (2001) 12 *Legal Education Review* 269; James E Moliterno, 'Experience and Legal Ethics Teaching' (2001) 12 *Legal Education Review* 3; Christine Parker and Paul Redmond, 'Teaching Good Corporate Lawyering' (1999) 3 *Flinders Journal of Law Reform* 97; Christine Parker, 'What Do They Learn When They Learn Legal Ethics?' (2001) 12 *Legal Education Review* 175, 177; Guy Powles, 'Taking the Plunge: Integrating Legal Ethics in Australia' (1999) 33 *Law Teacher* 315; Colleen Segall, 'Ethics in Mandatory CLE: An Overlooked Means for Improving the Standard of the Profession' (1988) 6 *Journal of Professional Legal Education* 22; Colleen Segall, 'The Teaching of Professional Responsibility and Its Role in the Ethical Socialisation of Lawyers' (1989) 7 *Journal of Professional Legal Education* 55; Colleen Segall, 'Evaluation of

scholarship encourage law school and university administrators to embrace liberal ideals of fairness and justice in relation to the admission of students to the law school[12] or in relation to the teaching of law generally.[13] Finally, liberalism is characterised

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the Professional Responsibility Programme Conducted at the College of Law July – December 1988' (1989) 7 *Journal of Professional Legal Education* 147; Thomas L Shaffer, 'On Tending to the Ethics in Legal Ethics: Two Pedagogical Experiments' (2001) 12 *Legal Education Review* 11; Richard H S Tur, 'An Introduction to Lawyers' Ethics' (1992) 10 *Journal of Professional Legal Education* 217; J W VonDoussa, 'Corporate Law Teaching and Professional Standards' (1999) 3 *Flinders Journal of Law Reform* 119; Archie Zariski, 'Teaching Legal Ethics Online: Pervasive or Evasive' (2001) 12 *Legal Education Review* 131.

[12] See e.g. David Barker, *Access to Legal Education* (1996); Mark Burdack, 'Legal Education: Changing University Law Admission Policy in New South Wales' (1993) 18 *Alternative Law Journal* 36; Kevin Dolman, 'Indigenous Lawyers: Success or Sacrifice?' (1997) 4 *Indigenous Law Bulletin* 4; Heather Douglas, 'Indigenous Australians and Legal Education: Looking to the Future' (1996) 7 *Legal Education Review* 225; Heather Douglas, 'Indigenous Pre-Law Programs: The Griffith University Experience' (1996) 3 *Aboriginal Law Bulletin* 8; Heather Douglas, 'This Is Not Just About Me: Indigenous Students' Insights About Law School Study' (1998) 20 *Adelaide Law Review* 315; Heather Douglas, 'The Participation of Indigenous Australians in Legal Education 1991-2000' (2001) 24 *University of New South Wales Law Journal* 485; Heather Douglas and Cate Banks, 'From a Different Place Altogether: Indigenous Students and Cultural Exclusion at Law School' (2000-2001) 15 *Australian Journal of Law and Society* 42; John Goldring and Sumitra Vignaendra, *A Social Profile of New Law Students in the Australian Capital Territory, New South Wales and Victoria* (1997); Daniel Lavery, 'The Participation of Indigenous Australians in Legal Education' (1993) 4 *Legal Education Review* 177; Patrick Parkinson et al., 'Secondary School and University Results as Predictors of Success in Law' (1992) 3 *Legal Education Review* 235; Carolyn Penfold, 'Indigenous Students' Perceptions of Factors Contributing to Successful Law Studies' (1996) 7 *Legal Education Review* 155; Carolyn Penfold, 'Aboriginal Lawyers: What Factors Contribute to Indigenous Students Completing Law Degrees?' (1997) 22 *Alternative Law Journal* 148; D J Phillips, 'University Academics Responding and Adjusting to the Increasing Numbers of Cross Cultural and Overseas Students' (1992) 3 *Legal Education Review* 123; D J Phillips, 'Solutions to the Dilemmas and Concerns of Teaching International Students in Universities' (1994) 5 *Legal Education Review* 47; David Weisbrot, 'Access to Legal Education in Australia' in Rajeev Dhanan, Neil Kibble, and William Twining (eds), *Access to Legal Education and the Legal Profession* (1989); David Weisbrot, 'Recent Statistical Trends in Australian Legal Education' (1990-1991) 2 *Legal Education Review* 219; Alex Ziegert, 'Social Structure, Educational Attainment and Admission to Law School' (1992) 3 *Legal Education Review* 155.

[13] See e.g. Judith Dickson, 'Teaching About Justice as Well as Law' (2003) 28 *Alternative Law Journal* 18; Jeff Giddings and Jody Thomas, 'Teaching the Law as It Relates to Older People' (2002) 27 *Alternative Law Journal* 78;

by an insistence upon the inculcation of an 'informed rationality', that is, an intellectual ability beyond mere doctrinal expertise or vocational skill. Some liberal scholars insist that this is best achieved by the teaching of more legal theory.[14] Others encourage law teachers to teach law in a more contextual manner and to incorporate insights about law from other disciplines and other cultures.[15]

How has liberalism succeeded in its effort to transform the teaching of law in Australia? Certainly many law schools today *advocate* a liberal approach to the teaching of law. The Uni-

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Mary Anne Kenny and Anna Copeland, 'Legal Education: Clinical Legal Education and Refugee Cases: Teaching Law Students About Human Rights' (2000) 25 *Alternative Law Journal* 252.

[14] See e.g. John Goldring, 'The Place of Legal Theory in the Law School: A Comment' (1987) 11 *Bulletin of the Australian Society of Legal Philosophy* 159; John Goldring, 'Tradition or Progress in Legal Scholarship and Legal Education' in John Goldring, Charles Sampford, and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998); Katherine Hall, 'Theory, Gender and Corporate Law' (1998) 9 *Legal Education Review* 31; Patrick Kavanagh, 'A Foundation Course for the Law School Curriculum: History and Philosophy of Law' (1988-1989) 5 *Australian Journal of Law and Society* 133; Mary Keyes and Graham Orr, 'Giving Theory 'a Life': First Year Student Conceptions of Legal Theory' (1996) 7 *Legal Education Review* 31; John McLaren, 'The Legal Historian, Masochist or Missionary? A Canadian's Reflections' (1994) 5 *Legal Education Review* 67; Charles Sampford and David Wood, 'Legal Theory and the Law Curriculum: Responding to Pearce' (1987) 61 *Law Institute Journal* 1258; Charles Sampford and David Wood, 'Theoretical Dimensions of Legal Education' in John Goldring, Charles Sampford, and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998); Simon Young, 'Re-Examining the Bricks and Mortar: Case Law, the Doctrine of Precedent and Contemporary Legal Education' (1996) *Queensland University of Technology Law Journal* 138.

[15] See e.g. Paula Darvas, 'How to See the Forest for the Trees: What's the Point of So Much Corporate Law? ' (2002) 9 *Murdoch University Electronic Journal of Law* 1; Ian Duncanson, 'Broadening the Discipline of Law' (1994) 19 *Melbourne University Law Review* 1075; Ian Duncanson, 'Degrees of Law: Interdisciplinarity in the Law Discipline' (1996) 5 *Griffith Law Review* 77; Paul R Joseph, 'A Course Whose Time Has Come: Using Science Fiction to Teach Law' (1997) 22 *Alternative Law Journal* 111; Anthony O'Donnell, 'Thinking 'Culture' in Legal Education' (1996) 7 *Legal Education Review* 135; Anthony O'Donnell and Richard Johnstone, *Developing a Cross-Cultural Law Curriculum* (1997); Andrea Rhodes-Little, 'Teaching Lawyering Skills for the Real World: Whose Reality? Which World? Or the Closing of the Australian Legal Mind' (1991) 9 *Law in Context* 47; Klaus Ziegert, 'The Day in Court: Legal Education as Sociolegal Research Practice in the Form of an Ethnographic Study' (1990) 2 *Legal Education Review* 59.

versity of Adelaide Law School, for example, promotes itself as encouraging students

> to have a broad perspective on the law and its place in the community, and to be conscious of the creative and constructive roles of the law. This means it is important not to approach the study of the law from a 'rules based perspective': there is no aspect of the law that is static, and this is one of the most important understandings of the law a lawyer must have. The theoretical and historical underpinnings of legal principle are as essential to an understanding and use of the law as is a proper reading of the latest High Court decision.[16]

Similarly, students at the Macquarie University Law School

> won't simply learn 'about' the law. We in the Division of Law and in the Division of Humanities want you to learn the 'whys' and the 'why nots' as well – to learn about the underlying historical, social and philosophical dimensions that underpin the way law is, and the ways it can go. Our goal in providing your legal education is to provide an expansive liberal education, one which promotes intellectual breadth, strong analytical skills and an ethical sense of the role and purpose of lawyers in society.[17]

La Trobe University teaches law 'in its social and economic context, not just in a formalistic way', and aims to teach students to 'appreciate the variety in legal understandings and practices, including those of other cultures; and use the law as a constructive tool in the diagnosis and remedy of social problems, both domestic and international.'[18] At Monash University Law School, the study of law promotes 'ethical thinking and a focus on justice and fairness. To study law at Monash is also to grow as a person.'[19]

How is this apparent commitment to liberalism on the part of many law schools reflected in legal education practice? Today, every law school in Australia offers at least one legal philosophy or jurisprudence law subject, many offer more than one, and

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[16] University of Adelaide, *Law School Homepage* (2003) <http://www.law.adelaide.edu.au/> at 14 May 2003.

[17] Macquarie University, *Law School Homepage* (2003) <http://www.law.mq.edu.au/> at 2 April 2003.

[18] La Trobe University, *Law School Homepage* (2003) <http://www.latrobe.edu.au/law/> at 27 March 2003.

[19] Monash University, *Law School Homepage* (2003) <http://www.law.monash.edu.au/> at 13 May 2003.

most require students to have undertaken at least one compulsory legal theory law subject as part of their degree.[20] These law subjects require students to learn about philosophical, contextual and/or interdisciplinary perspectives upon law and legal doctrine. Compulsory introductory law subjects at at least ten of the law schools are described as including legal theory.[21] Some law schools also offer elective law subjects such as *Law of the person*, *Law and society*, *Law and economics*, and *Law and literature*. Most law schools offer law subjects which are described as concerned solely or principally with the study of legal ethics. Many offer subjects which, while primarily doctrinal or vocational, incorporate the teaching of legal theory and the inculcation of social responsibility, such as law subjects concerning the relationship between indigenous peoples and the law, human rights, civil liberties, consumer protection, welfare, and equal opportunity and discrimination. Law subjects indirectly endorsing liberal values include interdisciplinary law subjects such as *Criminology*, *Justice studies*, *Law and psychology*, *Law and the environment*, *Law and medicine*, *Law and religion*, and *Law and culture*.

On the other hand, many law subjects, despite their liberal titles and objectives, are still either about the transmission of legal doctrine or training in legal skills and procedures. 'Legal theory' – the category to which most non-doctrinal and non-vocational perspectives on law are allocated – is still a central component of only a minority of law subjects. Contextual, interdisciplinary and cross-cultural approaches are offered to students, but are generally taught in elective law subjects or at the fringes of doctrinal law subjects. The integration of legal theory throughout the curriculum – necessary, according to liberal scholars, in order to avoid the marginalisation of theoretical issues – does not occur to any significant degree in Australian legal education.[22]

According to the 2003 Johnstone Report and its survey of 27 of the 28 Australian law schools, only four law schools distinguish themselves as emphasising interdisciplinary legal theory, only one law school distinguishes itself as emphasising social justice,

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[20] Johnstone and Vignaendra, above n 2, 124.

[21] Based upon a review of online law subject descriptions conducted in 2003. According to Johnstone and Vignaendra, these schools take the view that it is important to introduce students to legal theory early in their studies, before they develop an uncritical and atheoretical approach to the study of legal rules. Ibid.

[22] O'Donnell and Johnstone, above n 15, 14.

only one law school distinguishes itself as committed to the university intellectual tradition of inquiry for its own sake, and only one law school distinguishes itself as focussing on ethics.[23] On the other hand, 11 law schools distinguish themselves as a professional law school or as having an orientation to the profession, and 13 law schools distinguish themselves as having a focus on legal skills in the curriculum.[24] The Report reviewed the teaching of legal theory in Australian law schools and concluded that, while most schools require students to do at least one law subject in legal theory, and some schools require students to do further legal theory law subjects and encourage staff to incorporate theoretical perspectives into substantive law subjects, not many schools have a rigorous process of ensuring that different threads of legal theory are integrated into the curriculum. Some law schools have tried to co-ordinate the infusion of legal theory into substantive law subjects and have met with resistance from staff who have little interest in, or who are threatened by, legal theory.[25] Only a few schools require students to engage with legal theory more than once in the degree program in dedicated legal theory law subjects, and only one law school engages more than twice with legal theory in the LLB program.[26] It appears the liberalism's efforts to encourage informed rationality and social responsibility are often frustrated.

What of liberalism's advocacy of individual freedom for the student, for the teacher and for the school? The day-to-day working lives of most Australian law teachers and law students are closely regulated by the administrative requirements with which all within the law school are obliged to comply. Administrative policies address and seek to control all aspects of the legal education process in the names of efficiency, accountability, and marketability. Similarly, the law school is itself is far from autonomous; rather it's freedom is constrained by pressures from the profession, the university and the State. Despite the protestations of many law schools to the contrary, it would appear that in most locations liberalism is being submerged beneath the rising tide of corporatism.[27]

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[23] Johnstone and Vignaendra, above n 2, 26-29.

[24] Ibid.

[25] Ibid 132.

[26] Ibid 166.

[27] I explore these and other impacts of corporatism in much greater detail in Nickolas James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26 *Sydney Law Review* 587.

As long ago as the opening the Wollongong Faculty of Law in 1991, Sir Anthony Mason expressed doubt that 'all the rhetoric in the past about the importance of providing law students with … a broad and liberal education has been matched by the results'.[28] More recently, one of the interviewees in the Johnstone Report described the state of Australian legal education as follows:

> I do think that we have made enormous strides in Australia in terms of changes, both in terms of substance and in terms of pedagogy, and so that our curricula changed enormously from the seventies, became much richer, inclusive, much more attention to context and, well, inter-disciplinary as well I suppose. … But all of that has changed, or is changing. From reading and talking to people and visiting institutions, we see a move away from this. We suddenly had an interest in diversity, but as we move more to the notion of competition and strict competition between institutions, that actually means more standardisation. We become more similar. And so the things that are distinctive, as indeed with my own institution here, we have an international reputation in terms of socio-legal research. Well, 'No we're not to have that' we're told by someone on high who knows nothing about law. We're supposed to be doing commercial law![29]

While there are no doubt many law teachers who practice the liberal principles they preach, and some law schools which actually encourage individual freedom, social responsibility and the teaching of theory, philosophy, interdisciplinarity, multi-culturalism and ethics, the espousal by many of the merits of a liberal legal education appears to be little more than rhetoric. Despite enthusiastic claims to the contrary, the programs of many law schools and the teaching practices of many law teachers emphasise doctrinal coverage, vocational employability or corporatist efficiency rather than freedom, responsibility and rationality. Why does the rhetoric of liberalism so often fail to be realised?

## III HYPOCRISY

The central assertion of this paper is that liberal legal education discourse is characterised by a fundamental hypocrisy.

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[28] Anthony Mason, 'Inauguration of the Faculty of Law at the University of Wollongong' (1991) 34 *Australian Universities Review* 24.

[29] Johnstone and Vignaendra, above n 2, 86-87.

Liberalism is more than simply a category of knowledge about legal education, to be contrasted with alternative categories such as doctrinalism, vocationalism and corporatism. Despite its intellectual, emancipatory and moralistic claims, liberalism is itself an expression of power seeking the achievement of certain objectives through the deployment of disciplinary strategies.

This is a perspective upon the relationship between knowledge and power most famously propounded by the French social theorist Michel Foucault. Foucault coined the term 'power-knowledge' to indicate the close relationship between the two concepts.[30] He insisted that the production and dissemination of knowledge is always an expression of power, and that the expression of power always involves the production and dissemination of knowledge. Discourses designate the conjunction of power and knowledge: it is through discourse that the production of knowledge takes place and through which power is exercised and power relations are maintained.[31] It is power-knowledge, in the form of discourse, that determines what is allowed to be said and thought within a discipline, and 'who can speak, and when, and with what authority'.[32] A legal education discourse such as liberalism is both a form of knowledge about the teaching of law and an expression of power seeking to regulate law teachers, law students and others.

The first point to note about Foucault's notion of power is that it is *non-judgemental*. The word 'power' often has a negative connotation: it is something possessed and used by the powerful at the expense of the powerless, it is used to repress and control, and it distorts truth and knowledge. According to the Foucault, however, power is not solely negative, it is also productive. Power produces meaning, it produces subjects and what they do, it produces how subjects see themselves and the world, and it produces resistance to itself. Power leads to dominance and hegemony, but power also undermines dominance and

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[30] He did not suggest, however, that power and knowledge are the same thing. Many believe that Foucault insisted that 'power *is* knowledge' or that 'knowledge *is* power' but, as Foucault remarked, if they were the same thing it would have been a waste of most of his scholarly life to analyse their relation. Gavin Kendall and Gary Wickham, *Using Foucault's Methods* (1999) 51.

[31] Michel Foucault, *The Will to Knowledge: The History of Sexuality 1* (1998) 101.

[32] Stephen J Ball, 'Introducing Monsieur Foucault' in Stephen J Ball (ed), *Foucault and Education: Disciplines and Knowledge* (1990) 2.

hegemony.[33] Legal education texts, including the books and articles written by legal scholars, the papers that they present, law school websites and course descriptions, and even classroom and meeting room dialogues, are all expressions of power seeking to achieve particular objectives. This need not be viewed as a controversial assertion if it is understood that designating something as an exercise or as a technology of power is not a criticism. Power exists and is exercised within the law school but it is not necessarily exercised repressively or unjustly. Power is what keeps the engine of legal education working.

The second point to note about the Foucauldian notion of power is that it is *non-subjective*. A discourse may privilege or favour certain subjects,[34] and those subjects may appear to cooperate willingly in the achievement of the discourse's objectives, but it is not an exercise of power *by* those subjects. Subjects are not the initiators of discourse, they are rather the products of discourse and the means by which discourses are propagated. According to Foucault, the notion of a subject who exists prior to language and is the origin of all meaning is an illusion.[35] Liberalism, then, is an

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[33] In 'Truth and Power' Foucault wrote: 'But it seems to me now that the notion of repression is quite inadequate for capturing what is precisely the productive aspect of power. In defining the effects of power as repression, one adopts a purely juridical conception of such power; one identifies power with a law which says no – power is taken, above all, as carrying the force of a prohibition. Now I believe that this is a wholly negative, narrow, skeletal conception of power, one which has been curiously widespread. If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression.' Michel Foucault, 'Truth and Power' in James D Faubion (ed), *Power: Essential Works of Foucault 1954-1984 Volume 3* (2002) 120. Foucault wrote in *Discipline and Punish*: 'We must cease once and for all to describe the effects of power in negative terms: it "excludes", it "represses", it "censors", it "abstracts", it "masks", it "conceals". In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.' Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1991) 194.

[34] The word 'subject' as used by Foucault has two senses: people are both subjects (self-conscious beings) but they are also subjected (power acts produce subjection). Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994) 29.

[35] *Foucault wrote:* 'If there is one approach that I do reject [it is the one] which gives absolute priority to the observing subject, which attributes a

exercise of power which *favours* the liberal legal scholar but it is not a deliberate machination *by* the liberal legal scholar.

Liberal legal education discourse creates the spaces within which power is exercised by establishing a series of differentiations: between liberty and restriction, between responsibility and selfishness, and between rationality and irrationality. Liberal discourse creates the distinctions between the members of each pair of notions, and then privileges the former over the latter. Liberalism privileges those approaches to the teaching of law which respect the autonomy of the student, of the teacher and of the law school over those which seek to intrude upon these academic freedoms. Liberalism privileges those approaches which emphasise intellectual rigour, theoretical depth, cultural awareness and the social responsibility of the student, the teacher and the school over those which focus upon the inculcation of doctrinal expertise, vocational excellence or the financial 'bottom-line' of the university. An approach to the teaching of law which assumes that legal education only takes place within the law school is inferior to one which recognises the value and importance of lifelong learning. In creating these spaces for the exercise of power, liberalism privileges some members of the law school over others. Those law school subjects who advocate the liberal values of individual freedom, social responsibility and informed rationality are accorded a higher status by liberalism than those who advocate alternative values. There are many possible approaches to the teaching, the study and the practice of law; liberalism categorises those whose beliefs and actions are consistent with liberal values as normal, and those whose beliefs are intrusive, selfish, narrowly doctrinal or overly vocational as abnormal.

What are the objectives of liberalism-as-power? Liberalism seeks to universalise a subjective form of knowledge. It seeks to persuade all who came into contact with it that its particular, arbitrary, and contingent perceptions of the nature of legality and legal education are in fact inevitable and universal. Liberalism may advocate liberty and academic freedom, and criticise

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constituent role to an act, which places its own point of view at the origin of all historicity – which, in short, leads to a transcendental consciousness. It seems to me that the historical analysis of … discourse, in the last resort, be subject, not to a theory of the knowing subject, but rather to a theory of discursive practice.' Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (1973) 172.

excessive interference by the State, but, like all discourses, it seeks to establish and enforce a regime of truth.

The liberal approach to the teaching of law is one element in the vast endeavour that began with the Enlightenment: the assimilation of all knowledges, all disciplines and all perspectives into a single worldview, a worldview characterised by and consistent with liberal rationality. This 'liberal project' is aimed at encouraging everyone to see things the same way, the rational way. It takes it as axiomatic that there is only one possible way to answer any question, and it presumes that there exists a single correct mode of representation which can be uncovered through scholarly endeavour. While it is true that liberalism recognises alternative disciplines, multiple theoretical frameworks and other cultures, the implicit objective is the reconciliation of all of these differences. Liberal legal education discourse's objective in incorporating theory, context and interdisciplinary and cross-cultural perspectives into the law curriculum is to ensure that the knowledge taught to law students is as complete as possible. This complete knowledge is still, however, an attempt to universalise the liberal ideology. Justice is liberal justice; morality is liberal morality; equality is liberal equality; and truth is rational, liberal truth.

Liberal legal education texts portray certain values – individual liberty, social responsibility, informed rationality – as universal ideals, and tend to downplay or disregard the possibility that each of these values is subjective, local, and contestable. Rationality, for example, is a criteria based upon the veneration of 'reason' as a process of interpreting and judging experience, but rationality is a historically situated (and, according to some feminist theorists, particularly masculine) criteria, and liberalism's emphasis upon rationality denies the value of more holistic and intuitive approaches to experience. The liberal approach to teaching law is still concerned with the discovery of truth; it is suggested that by learning about the theory of law, the philosophy of law and law in its social, cultural and political contexts, the truth of law will be uncovered. Liberal scholarship, then, is modernist in its insistence that there is a correct way of perceiving legal phenomena, and that this correct way can be established using the tools of rationality and scholarly effort.

Liberal scholarship also values individualism and individual liberty, but individualism assumes the existence of an autonomous and self-directing individual, an assumption which is also contestable. The liberal assumption ignores the possibility of

other approaches such as communitarianism, which sees the self as embedded within existing social practices, or postmodern ideas about the illusory nature of identity and individuality. Liberalism assumes the individual, as a willing and intentional actor, to be natural and inevitable, the primary agent of social action and the creator of meaning. Foucault and other 'postmodern' theorists, on the other hand, view the individual as historically contingent, as a notion constructed by belief and assumption.

Even when liberalism insists that the teaching of law embrace pluralism and interdisciplinary, feminist and cross-cultural perspectives, it is still the liberal project which is of paramount importance. The objective is assimilation: liberal scholarship implies that the perspectives of 'other' disciplines, 'other' genders and 'other' cultures can and should be assimilated into the liberal worldview. Western masculine culture and the traditional legal perspective continue to be privileged by their placement at the centre of the legal education enterprise and the focus upon their enhancement through the incorporation of broader, cross-cultural and interdisciplinary knowledge.

This colonisation and assimilation of competing discourses is an important tactic employed by liberalism. Some liberal legal education statements are explicit criticisms of other legal education discourses;[36] a more common strategy, however, is to agree with these discourses while at the same time subtly suggesting that they would be improved by placing them into the liberal context. Liberalism thereby simultaneously appears academically and ethically superior due to its pluralism, and quietly assimilates and reinterprets the ideas and scholarship of those competing discourses. A liberal text may acknowledge that the purpose of legal education is to prepare for legal practice but at the same time argue that legal practitioners should be taught liberal values; it may agree with most of the points made in a work of vocational legal scholarship while at the same time suggesting that some of those points would be improved by being reconciled with the liberal worldview.[37] A liberal head of school

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[36] Sir Anthony Mason, for example, criticised vocationalism when he warned that 'law schools must resist the temptation to become business schools'. Mason, above n 9, x.

[37] In 'Incorporating Dispute Resolution and Drafting Skills into a Substantive Law Course', for example, Ross Buckley outlined ways to teach drafting and dispute resolution skills together in the one substantive law subject, and examined the role of values in skills teaching. He argued that the teacher has an obligation to address issues of values, justice and ethics and not simply to

may appoint a radical legal scholar to emphasise the perception that liberalism is broad enough and flexible enough to accommodate all points of view.[38] This strategy of assimilation is also apparent in those works of liberal legal education scholarship which acknowledge the plurality of ideologies, perspectives and approaches within the discursive field of legal education but which seek to reconcile the differences between them. These texts insist that any analysis of legal education should seek to acknowledge all viewpoints, including the doctrinal, the vocational and the liberal, and that to argue that one is more important than the others is to make a false distinction.[39] They argue that the fundamental divisions in the

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present legal skills as technical skills shorn of a moral dimension. Ross P Buckley, 'Incorporating Dispute Resolution and Drafting Skills into a Substantive Law Course' (1998) 16 *Journal of Professional Legal Education* 261. In 'Integrating Procedure, ADR and Skills: New Teaching and Learning for New Dispute Resolution Processes', Kathy Mack took radical critique and its emphasis upon dominance and diversity, and applied it to the achievement of liberal objectives such as justice and ethicality: 'Critical examination of the real world of dispute resolution will naturally raise concerns of access to justice and compel consideration of dominance and disadvantage and diversity, of gender, class, race, sexuality, and power. Teaching effectively about these questions requires us to draw on theory and especially what is called 'outsider' legal scholarship, based on gender, race, critical legal studies and some of law and literature. This scholarship is often criticised as impractical, but its value is in deepening understanding of self and of others and understanding the world as something people see and experience differently. For a law student or legal practitioner or judge to grasp these profound differences in perspective leads to valuable practical insights about basic practice skills such as interviewing, counselling, negotiation, witness examination and advocacy. Recognising differences in this sense will also generate substantial questions about the very nature of law and justice which all participants in the legal system must consider. Linking these questions to a concern about process leads to identification and examination of assumptions about the relation between law/power/process and emphasises the ambiguous and morally complex real world. These insights reinforce the need for law schools to teach ethics in the broadest sense.' Kathy Mack, 'Integrating Procedure, ADR and Skills: New Teaching and Learning for New Dispute Resolution Processes' (1998) 9 *Legal Education Review* 83, 90-91.

[38] '[T]he centre marginalises the extremes by incorporating them – or, to change the metaphor, inoculates itself by accepting a harmless dose.' Dennis Nolan, 'The Status of American Legal Education' (1989) 1 *Legal Education Review* 183, 206-210.

[39] William Twining, for example, has made this point repeatedly. In 'Preparing Lawyers for the 21st Century', he wrote: 'The standard dualistic conceptions of legal education – academic versus practical, theory versus practice, liberal versus vocational, educating for practice versus educating for the other uses to which law degrees are put – are false dichotomies. They do not represent dilemmas but different facets of legal education, and far from being in

ongoing debate about legal education are in fact illusory: legal education can and should be doctrinal *and* practical *and* theoretical.[40] All forms of knowledge can be reconciled and slotted seamlessly into place in the grand liberal metanarrative, the universal and rational story of creation written by Western man.

Liberalism has certainly been successful within the discursive field of legal education scholarship. The totality of legal education, however, includes teaching practices, curricula and law school policies, and these fields are more likely to continue to be dominated by discourses such as doctrinalism, vocationalism and corporatism. Liberalism's failures stem from its fundamental hypocrisy: despite its apparent commitment to liberty and pluralism it is, at heart, an effort to universalise a subjective worldview by colonising and assimilating all competing worldviews, and as an expression of power, liberalism's efforts are always and inevitably resisted.

## IV RESISTANCE

Foucault insisted that every exercise of power engenders resistance. He also insisted that resistance is not monolithic, consistent or stable; instead, resistance arises from numerous sources in numerous ways:

> Where there is power there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power … These points of resistance are present everywhere in the power network. Hence there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case; resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant or violent; still others that are quick to compromise, interested, or sacrificial …[41]

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conflict, it is often the case that neither can be effectively addressed without the other.' William Twining, 'Preparing Lawyers for the Twenty-First Century' (1992) 3 *Legal Education Review* 1, 2.

[40] See, for example, Bruce Dyer, 'Making Company Law More Practical and More Theoretical: Curriculum Design' (1995) 5 *Australian Journal of Corporate Law* 281; John Henry Schlegel, 'Legal Education: More Theory, More Practice' (1988) 13 *Legal Service Bulletin* 71.

[41] Foucault, above n 31, 96.

The opposition to liberalism, then, is not the result of some singular conspiracy. As Foucault insisted, 'points of resistance are everywhere in the power network'. Liberalism is resisted by law teachers, by law students, by school and university administrators, by employers and by the State.

Liberalism is resisted by the many law teachers who fail to implement the ideals of individuality, responsibility and rationality in their teaching. Some do so simply because they are ignorant of the precise nature of a liberal legal education. E H Levi wrote in *Point of View: Talks on Education*: 'Practically everyone is in favour of liberal education. The enthusiasm is aided by uncertainty and confusion as to what it is.'[42] Charles Sampford and David Wood described how many Australian law teachers are ignorant of the possible alternatives to the traditional approach to the teaching of law: even amongst those law teachers who appreciate that legal education should be about more than just the learning of legal rules and principles, there is uncertainty about what the 'extra' should be, and those who have formed an opinion as to what that extra should be often lack the training or the interdisciplinary expertise to confidently teach it.[43]

Other law teachers resist liberalism because they are compelled to do so by teaching conditions. The number of law students in Australia has expanded considerably in recent years, and most law teachers find themselves teaching and coordinating larger and larger classes. An ever greater proportion of teachers' time is consumed by both teaching and administrative tasks, and many of these teachers continue to take a traditional, doctrinal approach to teaching law because of the limited time and resources available them. It takes less time and less effort to teach a law subject in the same way and using the same materials as used in previous years.

Still other law teachers choose deliberately to resist and to oppose liberalism. Aware of liberalisms implicit ideological positions, some law teachers simply make the choice to prioritise non-liberal values, such as employability over individuality, or doctrinal breadth over theoretical depth, or the profitability of the law school over the inculcation of ethical values. Even those teachers and scholars concerned with the failings of doctrinalism, vocationalism and corporatism may decline to embrace the

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[42] E H Levi, *Point of View: Talks on Education* (1969).

[43] Sampford and Wood, 'Theoretical Dimensions of Legal Education', above n 14, 113.

liberal ideology; they may be equally concerned with the failings of liberalism, and prefer to ally themselves with more radical discourses such as feminism, critical legal theory, critical race theory or postmodernism.

Similarly, liberalism is resisted by those law students who prefer to prioritise non-liberal values, including the many who prefer that the law degree retain a primarily vocational emphasis. According to Vivienne Brand, any shift to a liberal degree at the cost of coverage of legal doctrine and training in legal skills would have negative consequences for law schools competing for students:

> [A]ttempts to broaden the degree, to introduce wider non-law perspectives, and to generally improve teaching may be at risk of being negatively impacted by a student-as-consumer market in which preparation for high-paying work is given high importance.[44]

The Johnstone Report described how many law schools report that students resist legal theory because it is seen as 'too dry' or 'irrelevant to legal practice'.[45] There are some students who press for more law subjects which focus upon social justice and human rights; most, however, call for more commercially-focused law subjects. According to one interviewee quoted in the Report:

> Students more and more work in paid employment, which not only limits the time they can spend on their studies, but also makes them more assertive about negotiating with academics the way in which they're course should operate and what they should be able to do etc. Particularly since a lot of them are working in legal practice. There is this sort of a bit of a push to say, 'Why are we learning all of this extra stuff? We just want to know the basics so we can go and practice' and convincing them that they need to learn to be critical and learn the theory.[46]

Johnstone noted that as a result of these attitudes amongst students, enrolments in some human rights and theory-based law subjects are very small, and these law subjects are sustained only by teachers committed to offering such law subjects.[47]

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[44] Vivienne Brand, 'Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education' (1999) 10 *Legal Education Review* 109, 138.

[45] Johnstone and Vignaendra, above n 2, 166.

[46] Ibid 339.

[47] Ibid 107.

Liberalism is resisted by law school and university administrators who are more concerned with the achievement of the corporatist gorals of accountability, efficiency and marketability. There are of course instances where liberal and corporatist objectives coincide; the concept of 'self-directed learning', for example, is consistent with both the liberal emphasis upon student autonomy and the corporatist concern to minimise the cost of delivering legal education. There are many instances, however, where a liberal legal education is inconsistent with the corporatist goals. The inculcation of an informed rationality, for example, is often time consuming and requires substantial effort on the part of both the teacher and the student; the rewards earned as a result of this expenditure of time and effort cannot always be measured in terms of quality and profit, and corporatist decision makers may not recognise its value. Appeals to liberal values are a frequent selling point for law schools, as demonstrated earlier in the paper, but the actual implementation of liberal objectives in teaching practice is difficult to measure, costly to deliver and potentially unpopular for students as consumers.

The expectations of employers generally oppose liberalism. It has been argued that a liberal legal education can achieve the goals of vocationalism more effectively than a purely vocational approach to teaching law.[48] It would appear, however, that most who favour a vocational approach to the teaching of law do not support a liberal approach.[49] Employers often complain about the

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[48] In 'Theoretical Dimensions of Legal Education', Charles Sampford and David Wood justified a liberal legal education by pointing out that 'it is often argued that knowledge of legal rules and skills is a hopelessly inadequate form of training, leaving students with no knowledge of the context within which those rules and skills operate, and no capacity to criticise them. The best form of training for law is arguably a university education which should include the extra. In particular, it includes an overview of law that is necessary for the student to conceive of the whole, not only to understand the context of legal practice better but also to enable him or her to choose whether to enter legal practice, the kind of legal practice entered and to understand any changes in the context so that compensatory changes in practice can be made. Sampford and Wood, 'Theoretical Dimensions of Legal Education', above n 14, 101.

[49] An attitude typified by the 1983 statement by Rod Meagher: 'In the whole of Australia … there are only one or two academic teachers of any real value in real property, in contracts or in torts; yet there are about seventeen law schools. … There are, to be sure, multitudes of academic homunculi who scribble and prattle relentlessly about such non-subjects as criminology, bail, poverty, consumerism, computers and racism. These may be dismissed from calculation: they possess neither practical skills nor legal learning. They are failed sociologists.' Rod Meagher, 'The Scope and Limitations of Legal Practice Courses: Should They Replace Articles and Pupilage? How Can

lack of skills training within legal education, that there is too much emphasis upon legal theory, and that legal education is deficient if graduates cannot practise law when they finish their law degree and enter employment.[50] Employers resist liberalism by pressing for less theory and more skills, and for the inculcation of technical excellence rather than informed rationality.

Finally, liberalism is often resisted by state agencies. While particular government programs sometimes support inter-disciplinarity or improved access to legal education, government policy generally does not encourage liberal approaches to the teaching of law. Most government programs, policies and inquiries favour vocationalism and corporatism over liberalism. Even the Pearce Report, despite frequent use of liberal terminology, was concerned primarily with the achievement of corporatist objectives: efficiency, quality and marketability. The Report explicitly criticised Australian law schools for neglecting the critical and theoretical dimensions of law, but it

> contradicted itself by seeing the legal curriculum as predicated solely upon satisfying professional admission requirements. The critical and theoretical dimensions of higher education would have to remain conditioned by the higher demands of a vocationalism defined by the practising profession and business consumers of legal services.[51]

Confronted by these and other such resistances by law teachers, law students, school administrators and employers, liberalism's earnest appeals to values such as liberty, justice, moral responsibility and theoretical rigour, while perhaps laudable, appear woefully inadequate.

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You Learn Practice in Theory?' (Paper presented at the 7th Commonwealth Law Conference, Hong Kong, 18-23 September 1983) 175.

[50] According to the Johnstone Report, 'most employers interviewed expressed similar views to each other about the emphasis given in the LLB to practice-related skills – they thought it was insufficient. This view was held even by those interviewees who had no other criticisms of the LLB. Most commonly, interviewees thought there was not enough of an emphasis on communication skills and 'team work'. Employers from commercial law firms were furthermore dissatisfied with law graduates' lack of business-related skills, and thought that most law graduates could not 'hit the ground running'. Johnstone and Vignaendra, above n 2, 246.

[51] Christine Parker and Andrew Goldsmith, 'Failed Sociologists' in the Market Place: Law Schools in Australia' (1998) 25 *Journal of Law and Society* 33, 35.

## V CONCLUSION

Within the context of the Foucauldian theoretical framework, liberalism is both a body of knowledge about the teaching of law and an expression of power within the law school which seeks the universalisation and normalisation of liberal ideology through the deployment of certain disciplinary strategies including the advocacy of liberal values by liberal scholarship and the appropriation and reinterpretation by liberal scholarship of competing perspectives.

Law schools more than ever before explicitly acknowledge the importance of adherence to liberal ideals. There is, however, a significant gap between this rhetoric and the content of the contemporary law degree, the administration of legal education and the classroom practices of Australian law teachers. Liberalism competes, often unsuccessfully, with doctrinalism, vocationalism and corporatism. Liberalism's efforts to universalise liberal values are effectively resisted by the many law teachers who persist with more doctrinal approaches, the many students and employers who call for a more vocationally oriented legal education, and the school, university and government administrators who prioritise the corporatist objectives of accountability, efficiency and marketability.

If the gap between liberal rhetoric and law school reality is to be narrowed, liberal scholars must cease to rely solely upon earnest appeals to universal values such as liberty, morality, justice and reason. They must accept that they are engaged in a struggle for power within the law school, and consider the deployment of some more compelling disciplinary strategies.

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