

# THE RELEVANCE OF THE SOCIAL SCIENCES FOR LEGAL EDUCATION

---

TIMOTHY J BERARD\*

## I INTRODUCTION

The relevance of social science for our understanding of law has been suggested by a disparate variety of scholars, including many associated with such interdisciplinary fields as law and political science, law and sociology, law and economics, law and anthropology, law and psychology, and law and history.<sup>1</sup> Without in any way denigrating the relevance of traditional humanities disciplines such as philosophy and literature, which also have their established literatures on the law, many of the ‘law and \_\_\_\_’ fields represent a significant two-fold overlap between law and social science. First, the overlap reflects the intimate relations between legal phenomena and social, political, economic, cultural, psychological, historical, religious, linguistic, and other phenomena. Second, it reflects the existence and further potential of interdisciplinary scholarship, in that it is an overlap or potential overlap between the discipline of law and other disciplines which in part address legal institutions, legal professions, legal personnel, legal policies, legal arguments and legal decision-making, among other topics.<sup>2</sup> Unfortunately, the overlaps which are so easily seen and appreciated in the reality of legal practice and which are increasingly recognised in the study of legal phenomena, are not reflected particularly well in legal education. This pedagogical lag prompts the following observations and suggestions on the potential contributions of the social sciences to legal education, both in the law school and in other, emerging, contexts of legal education.

The following discussion will suggest some of the many contributions which social sciences are making with respect to legal

\* Tim Berard is an Associate Professor and Undergraduate Program Coordinator in Justice Studies at Kent State University. He holds a PhD in sociology.

<sup>1</sup> Psychology and history are discussed here among the social sciences, despite potential objections or qualifications, as they employ empirical approaches, have interests in many of the same phenomena that occupy other social scientists, and have similar relevance for legal education.

<sup>2</sup> Keith Bybee, ‘The Liberal Arts, Legal Scholarship, and the Democratic Critique of Judicial Power’ in Austin Sarat (ed), *Law in the Liberal Arts* (2004) 41, 47.

education, which they could make much more frequently and even more effectively given increased institutional and professional support for such curricular and pedagogical innovations. This article will not focus on how legal education can contribute to the social sciences, or how legal education can contribute to the goal of liberal education or the wider context of university communities and missions, or even on how social scientists would like legal education to be expanded. Rather, the focus of this article is on suggesting how the inclusion of social scientific perspectives on law could reduce the problems and gaps which legal scholars and legal organisations have themselves noted between legal education and the expressed needs of the legal profession. The article will then specifically consider the relevance of social science instruction for teaching or facilitating civics and public service; critical scholarship and reflective legal practice; professionalism and ethics; specialisation and multi-disciplinary practice; and skills training and orientation to legal practice.

Social scientific perspectives on law can complement more traditional law school pedagogies, either within the law school; within established programs of non-legal or pre-law education;<sup>3</sup> or in other contexts such as paralegal education, joint degrees and continuing legal education. Thus students can gain valuable insights and skills relevant to legal education and legal careers in many educational settings, including settings in which law professors are largely unwilling or unable to teach, and in which social scientists are both willing and able to communicate knowledge and skills that have been identified by legal scholars, law schools and bar associations as relevant to the legal profession and legal education.

## II THE HISTORY OF SOCIAL SCIENCE IN LEGAL CURRICULA

There has always been some recognition in legal education, albeit often implicit, of the fundamental fact that law cannot be adequately understood in strictly legal terms.<sup>4</sup> Both the understanding of case law and the understanding of statutory law can frequently involve

<sup>3</sup> Especially in the United States — see, eg, American Bar Association, *Law Schools and Professional Education: Report and Recommendations of the Special Committee for a Study of Legal Education of the American Bar Association* (1980), 104, 111. In Australia, the recent move of the University of Melbourne to graduate legal education opens up the same opportunity for greatly increased exposure to social science before law school.

<sup>4</sup> Charles Eisenmann, *The University Teaching of Social Sciences: Law* (Report prepared for the International Association of Legal Science, revised ed, 1973) 54–5; American Bar Association, above n 3, 118–19. Maharg, making a broader point, writes '[a]bove all, we ought to begin to recognize ... that the problems that educators are faced with every day are quite simply not solvable in any particular discipline': Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-first Century* (2007) 43.

considerations of historical context outside the legal realm. There is often a good deal of knowledge of political institutions involved in legal education; for example, with respect to the distinction between political and legal questions and the divergent roles of courts, legislatures and executives. In the United States (US), due largely to the influence of American legal realism, questions about whether and how the law can serve as an effective instrument of policy-making and governance have been part of academic legal discourse for many generations.<sup>5</sup>

During the last two generations, legal studies have further expanded due to two largely contemporaneous developments: expansion of ‘law and \_\_\_\_’ movement(s), and the rise of critical legal perspectives on law and legal education, drawing frequently upon social scientific themes such as inequality and ideology. Clark suggests, in the US context, that curricular reform beginning in the 1960s was in response to an influx of less acquiescent students.<sup>6</sup> Some of the relevant developments have been observable in law school curricula in the form of occasional courses such as law and economics, law and society, legal history and policy analysis. These developments have also been observable in more occasional ways through references to critical legal studies, feminist jurisprudence and critical race theories of law, often within substantive courses addressing conventional legal doctrines. It remains true, however, that the relevance of social science in legal education is not well reflected in law school pedagogy and curricula.

This is not to say that relevant interdisciplinary scholars and courses cannot be found in many places, but such courses are rarely if ever treated as part of the core curriculum, let alone the first-year curriculum, and interdisciplinary credentials (such as advanced social science degrees) are rarely required of law school faculty members. The exclusion or marginality of social scientific contributions can also be taken as reflective of the limited ability of legal education to convey the complexity and importance of the relations between law and society, and the breadth of scholarship on legal phenomena.

There are certainly relevant variations across institutions, national borders, and historically, in the degree to which law students are exposed to social scientific knowledge and skills, but a general discussion is no less useful despite such variations. The fact that various readers will know much more about particular institutions or nations or historical developments than can or should be addressed

<sup>5</sup> Neil Duxbury, ‘A Century of Legal Studies’ in Peter Cane and Mark Tushnet (ed), *The Oxford Handbook of Legal Studies* (2003) 950, 952–4; see more generally John Schlegel, *American Legal Realism and Empirical Social Science* (1995).

<sup>6</sup> David Clark, ‘American Legal Education: Yesterday and Today’ (2003) 10 *International Journal of the Legal Profession* 93, 100.

here suggests that general comments can inspire or provoke more contextualised evaluation and consideration.<sup>7</sup>

One of the most relevant variations is the number of years of higher education required of law students, with the US being distinctive in its treatment of law as a graduate degree following a four-year undergraduate education. By contrast, European Union countries require from three to five years of academic training.<sup>8</sup> Another consideration is that the US has produced a significant proportion of the interdisciplinary social scientific scholarship on law, and also a significant proportion of critical legal scholarship. Legal education in the US has also been subject to significant criticism and study, and has seen significant pedagogical developments such as the rise of clinical legal training and attention to skills training and theories of practice.<sup>9</sup> In these respects, improving legal education by incorporating relevant social scientific instruction arguably should have been the most feasible in the US context, so the relative lack of development in this direction, to date, is significant in a comparative sense.

Arguably, legal education has suffered from a contradictory mission for as long as lawyers have tried to marry vocational training with university-based disciplinary education.<sup>10</sup> The university affiliations of law schools and pedagogical reliance upon doctrinal analysis and the Socratic method of education have been crucial elements in the professionalisation of law. The professionalisation of law necessarily takes legal education beyond narrowly vocational interests in developing marketable legal skills, of the kind that were previously learned in apprenticeships.

For the last two generations especially, legal education has been criticised from many directions<sup>11</sup> and for reasons that can be

<sup>7</sup> The current discussion has been informed by publications from a variety of English-speaking countries, especially the US, but also Australia, Canada, and the United Kingdom, which obviously vary in important and relevant respects.

<sup>8</sup> Julian Webb, 'Academic Legal Education in Europe: Convergence and Diversity' (2002) 9 *International Journal of the Legal Profession* 139, 146.

<sup>9</sup> Richard Wilson, 'Training for Justice: The Global Reach of Clinical Legal Education' (2003–2004) 22 *Pennsylvania State International Law Review* 421, 427.

<sup>10</sup> Bybee, above n 2, 46; Eisenmann, above n 4, 17; William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (2007) 5; Douglas Goodman and Susan Silbey, 'Defending Liberal Education from the Law' in Austin Sarat (ed), *Law in the Liberal Arts* (2004) 17, 17–18; Cynthia Epstein, 'Knowledge for What?' (1999) 49 *Journal of Legal Education* 41, 41–3; John Bell, 'Legal Education' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 901, 901, 905.

<sup>11</sup> The 1960s and 1970s were important decades for the establishment of professional movements offering social scientific and critical approaches to law, including the professional growth of the law and society movement in the US (in the UK the socio-legal studies movement or 'law in context' approach) and later the origins of the critical legal studies movement in the US. The relevance of this historical turning point is mentioned in Fiona Cownie, *Legal Academics: Culture and Identities* (2004) 35, 49, 51.

entirely contradictory. It is not difficult to find critiques of legal education as overly vocational, from those who want it to be more interdisciplinary, more critical, or more ethical. Nor is it difficult to find critiques of legal education as being insufficiently vocational, from those who want it to involve more skills training and to be more relevant to legal practice.

### III LAW IS AN INTERDISCIPLINARY SUBJECT REQUIRING AN INTERDISCIPLINARY APPROACH

The basic premise of most arguments for multi- and interdisciplinary legal studies (and by extension the relevance of such studies for legal education) is quite simply that legal phenomena and studies of legal phenomena are so various that they necessarily belie the artificial boundaries of established academic disciplines.<sup>12</sup> Moreover, legal phenomena seem to be increasingly various and complex. With the rise of, for example, paralegal professions, competition between law firms and consulting firms for traditional legal work, increasing business interest in multi-disciplinary practice, and the increasing interest of law students in joint degrees, legal phenomena are arguably becoming inter-vocational as well as interdisciplinary. The discipline of law has never been up to the task of understanding law in all its facets, and this is becoming increasingly true and increasingly clear as distinctions between law, other vocations, professions and social systems become increasingly contested and confusing.<sup>13</sup> While interdisciplinary scholarship has flourished and its relevance to legal education has not gone unnoticed, the incorporation of interdisciplinary teaching and learning into legal education has certainly not kept pace. Erwin Chemerinsky, Founding Dean of the law school at the University of California Irvine, observes:

The most important change in legal education since I was a law student thirty years ago is the recognition that law is inherently interdisciplinary ... [but] [l]aw schools still do too little to bring these disciplines into their classes in a systematic way. Few schools, to my knowledge, make any coordinated effort to ensure that all students receive interdisciplinary instruction.<sup>14</sup>

<sup>12</sup> Andrew Goldsmith, 'Legal Education and the Public Interest' (1998) 9 *Legal Education Review* 143, 167; N K Sam Banks, 'Pedagogy and Ideology: Teaching Law as if it Matters' (1999) 19 *Legal Studies* 445, 461; D R Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3 *Legal Studies* 315, 315; Kim Connolly, 'Elucidating the Elephant: Interdisciplinary Law School Classes' (2003) 11 *Washington University Journal of Law & Policy* 11, 13, 17, 59–60.

<sup>13</sup> Richard Posner, 'The Decline of Law as an Autonomous Discipline: 1962–1987' (1987) 100 *Harvard Law Review* 761.

<sup>14</sup> Erwin Chemerinsky, 'Rethinking Legal Education' (2008) 43 *Harvard Civil Rights — Civil Liberties Law Review* 595, 597–8.

Law schools have never attempted to study the full range of legal phenomena; rather, as Sarat observes, '[they] largely ignore broad regions of legal knowledge'.<sup>15</sup> Morris describes the pedagogy of law as hermetic, suggesting that it needs to be increasingly interdisciplinary.<sup>16</sup> It would not be appropriate for law schools as they are currently staffed to try to encompass the full range of legal studies,<sup>17</sup> but there has been increasing recognition that traditional legal education, with its emphasis upon the analysis of legal doctrine, is too narrow a foundation for students' subsequent professional careers. In a 1980 report, a Special Committee for a Study of Legal Education, associated with the American Bar Association, suggested an ambitious agenda for social science in legal education:

The interaction of law and social science is something with which the law student will want more than a passing familiarity. Ideally, this would include exposure to the methodology of the social sciences, including some statistics; the student should be equipped to exercise some critical judgment upon claims advanced by social scientists whether in economics, political science, sociology, psychology, or anthropology. Law is a social science. The other social sciences are vital to law, since law is preoccupied with human behavior and its implications.<sup>18</sup>

The need for a broader educational framework predictably comes to many scholars outside of law school, but it also occurs to law professors and law school deans. Richard Johnstone suggests that:

Learning about law involves seeing law as a phenomenon located in society and history, inter-connected with other political and cultural institutions ... Legal phenomena can be studied and analyzed from all sorts of perspectives and legal education should be concerned with equipping students to perform these tasks.<sup>19</sup>

Charles Eisenmann, writing for the International Association of Legal Science in 1973, argues that '[l]aw teaching must necessarily be designed to convey an understanding of law in its totality, in all its aspects. It must aim and tend to cover every kind of problem relating to law.'<sup>20</sup> Mark Tushnet, speaking about predicting how the law will be applied in particular circumstances, also offers

<sup>15</sup> Austin Sarat, 'Situating Legal Scholarship in the Liberal Arts: Introduction' in Austin Sarat (ed), *Law in the Liberal Arts* (2004) 1, 6; see also Bethany Henderson, 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53 *Journal of Legal Education* 48.

<sup>16</sup> Robert Morris, 'Globalizing and De-Hermeticizing Legal Education' [2005] *Brigham Young University Education and Law Journal* 53, 53.

<sup>17</sup> Duxbury, above n 5, 957; Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (2<sup>nd</sup> ed, 2004) 161; David Trubek and Sheldon Plager, 'The Place of Law and Social Science in the Structure of Legal Education' (1985) 35 *Journal of Legal Education* 483, 485.

<sup>18</sup> American Bar Association, above n 3, 118.

<sup>19</sup> Richard Johnstone, 'Rethinking the Teaching of Law' (1992) 3 *Legal Education Review* 17, 25.

<sup>20</sup> Eisenmann, above n 4, 50-1.

relevant observations.<sup>21</sup> Tushnet observes that case outcomes do have a predictability about them, but that there is a gap between the indeterminacy of the law and the predictability of legal outcomes. Tushnet observes further that the legal academy (in the US context) does not treat this gap as a pressing concern, but that the social sciences can be informative about how cases are resolved despite legal indeterminacy, including how they are resolved as if the outcomes were determined by applicable law.<sup>22</sup>

Another powerful argument for law student familiarity with the social sciences was offered by Bayless Manning, a past Dean of Stanford Law School. Manning suggested the ideal that a lawyer should have an awareness of the non-legal environment of legal issues:

By awareness of total non-legal environment, I refer to the first-class lawyer's ability to comprehend the non-legal environment of the problem at hand, to evaluate the impact that non-legal considerations will have upon the outcome, and to perceive the ways in which the knowledge and insight of non-lawyers can be mobilized and brought to bear. Every legal problem arises in its own unique setting of economic and political considerations, historical and psychological forces; each legal situation raises its own problems of data accumulation, ordering, and weighting. The legal process is a part of a vast surrounding social process; the first-class lawyer never loses sight of that larger picture ...<sup>23</sup>

It follows that lawyers should know when and how to call upon professionals from other disciplines, as Manning suggests. But it is also inherent in this ideal that the lawyer would have enough familiarity with the social sciences to know when another's insights are relevant; whom to consult; what to ask of them; and how to employ the expertise in question.

More broadly, Packer and Ehrlich suggest that a proper study of law

focuses the student's attention on the conception of a legal system; who operates in it, how they function, what impact they have, how the system changes, the impact the system has on other elements in our society, and vice versa. Here the effort is to give the student an idea of law as a social process, the functions it performs, the institutions involved, and how change takes place. It gives at least an introductory idea of the structures and processes involved in society's efforts to shape and organize individual and group behavior — a view of law as an ordering process ... a study of law opens up questions of how social ends and means interact and reveals the complications involved in attempting to create or recreate

<sup>21</sup> Mark Tushnet, *Legal Scholarship and Education* (2008) 68.

<sup>22</sup> *Ibid.*

<sup>23</sup> Bayless Manning, 'American Legal Education: Evolution and Mutation — Three Models' (Speech delivered at the Western Assembly on Law and the Changing Society, San Diego, 21 June 1969) quoted in Herbert Packer and Thomas Ehrlich, *New Directions in Legal Education* (1972) 23.

the ongoing, working institutions of a society. Theory and practice meet and interact. Values, ends, means, information, and theory all intersect. Such a study of law is not so much another discipline as an education in the relation of specific social problems to various sources of knowledge and modes of thought.<sup>24</sup>

This notion that the study of law is not one discipline, but rather the study of a substantive topic which is illuminated from a variety of disciplinary perspectives, is an insight worth preserving and implementing.

The knowledge and insight imparted by social science instruction in law may not always have an immediate payoff for law students in their careers, but can be helpful in a variety of practical as well as academic senses. A general knowledge-base in the social sciences can help students to maximise the professional benefits from a legal education and develop legal competence.<sup>25</sup> Many employers/recruiters will appreciate lawyers with ‘meaningful exposure to broad societal issues’, as suggested by a report from the International Academy of Legal Studies in Business.<sup>26</sup> Social science instruction in law also stands to contribute directly to students’ professional careers in that:

‘legal advice’ is rarely just that. The complexity of modern society increasingly creates ... problems in which it is virtually impossible to separate the legal component from components more traditionally associated with other disciplines ...<sup>27</sup>

These contentions will be supplemented with more specific discussions below.

<sup>24</sup> Packer and Ehrlich, above n 23, 60–1.

<sup>25</sup> American Bar Association, ‘Preparing for Law School’ <[www.abanet.org/legaled/prelaw/prep.html](http://www.abanet.org/legaled/prelaw/prep.html)> at 17 December 2009; see also American Bar Association, ‘Legal Education and Professional Development: An Educational Continuum’ (the MacCrate Report) (1992) 10 <[www.abanet.org/legaled/publications/onlinepubs/maccrate.html](http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html)> at 17 December 2009.

<sup>26</sup> Academy of Legal Studies in Business, ‘Legal Studies in General Education: Phase I Final Report’ (1999) 17 *Journal of Legal Studies Education* 161, 162.

<sup>27</sup> Mary Daly, ‘What the MDP Debate Can Teach Us about Law Practice in the New Millennium and the Need for Curricular Reform’ (2000) 50 *Journal of Legal Education* 521, 521–2, 544.

#### IV THE RELEVANCE OF SOCIAL SCIENCE PERSPECTIVES FOR PROMOTING CIVIC RESPONSIBILITY AND PUBLIC SERVICE

One of the most widely reported and discussed crises in legal education is the perceived failure of legal education to foster notions of civic responsibility and public service. Indeed, many suggest that even those law students who are motivated to study law partly for idealistic reasons of public service are frequently disabused of such notions before completing their degrees.<sup>28</sup> Sarat argues, for example, that:

Law schools generally try hard to undo the naïve, innocent impulses of their entering students, in particular their impulse to think about law in moral or political terms. Much of the effort of law professors is devoted to differentiating law from moral reasoning or political argument, and to focusing the mind of the would-be lawyer on the content of the positive law, and to teaching the skills of manipulating, distinguishing, and evading rules.<sup>29</sup>

Scheingold suggests a similar concern, noting that ‘law is not a parlor game, it is a social institution bound up with the most important dimensions of human freedom and oppression ... the rule system is important primarily as it relates to societal goals; it is a means rather than an end.’<sup>30</sup> Scheingold goes on to note that ‘lawyers are led to think of their services as a product which is sold rather than as a vital public necessity.’<sup>31</sup> Liberal arts instruction in legal studies, according to Sarat, ‘provides an arena in which the complex, contingent, and varied ways in which law expresses, and/or represses, moral judgment and political position can be brought to the center of concern.’<sup>32</sup> This is particularly true with respect to social scientific studies of law. Despite concerns to avoid indoctrinating students, and despite obstacles to teaching ‘civics’ such as the increasing consumerism and juridification of faculty–student relations,<sup>33</sup> still the social sciences remain invaluable for engaging students with civic concerns. This is true whether engaging students means teaching them civic values,

<sup>28</sup> Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* (1992) 8, 11; Scheingold, above n 17, 168–9; Kim Economides, ‘Cynical Legal Studies’ in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (1997) 26, 29; Henderson, above n 15, 48–9; Douglas Litowitz, *The Destruction of Young Lawyers: Beyond One L* (2006) 45–50.

<sup>29</sup> Austin Sarat, ‘Crossing Boundaries: From Disciplinary Perspectives to an Integrated Conception of Legal Scholarship’ in Austin Sarat (ed), *Law in the Liberal Arts* (2004) 84, 87.

<sup>30</sup> Scheingold, above n 17, 157.

<sup>31</sup> *Ibid* 167.

<sup>32</sup> Sarat, ‘Crossing Boundaries: From Disciplinary Perspectives to an Integrated Conception of Legal Scholarship’, above n 29, 87.

<sup>33</sup> Goodman and Silbey, above n 10, 19, 38.

awakening an interest in questions of public life or exposing them to alternative perspectives on issues facing society and nation.

Law school education often does little to expand the understanding of law as a professional calling, and a form of public service and civic participation, for those students motivated primarily by salary and status. Another parallel concern is that law schools themselves are becoming increasingly corporate and vocational.<sup>34</sup> The argument that legal education obfuscates the role of morality and politics in the law, and stunts or poisons students' moral development with a servile careerism, is perhaps most associated with critical legal studies,<sup>35</sup> critical race theory and feminist legal theory. More mainstream professional expressions of concern include increasing course offerings on professional responsibility and increasing opportunities for students to be exposed to clinical legal education, although these opportunities largely remain minimal and marginal (if not outright stigmatised) elements of legal education. The message that a lawyer's responsibility is to represent clients and to handle legal business competently is a very ingrained element of legal education and professional ideology.<sup>36</sup> This makes it a significant challenge to teach the ideals of civics and public service in the law school setting and within conventional law school coursework, in a way that would facilitate a broader sense of responsibility, whether this be understood as responsibility to the legal profession, to the legal system, to the public good, to justice or democracy, to underserved populations, or to other institutions, groups or principles of public life. But the difficulties of fostering such notions of civic responsibility and public service are astronomically greater due to law students' lack of exposure to and engagement with social scientific research and discourse on law; the legal profession, law societies and bar associations; and legal education itself.

## V CRITICAL SCHOLARSHIP AND REFLECTIVE LEGAL PRACTICE

A related concern shared by many critics of legal education, both outside and inside the legal profession, is that law students are not taught to question prevailing legal doctrine, established professional conventions, or the role of the legal profession in society. Not only is there an issue that students are not sufficiently exposed to critiques of legal doctrine and critical discussions of the legal profession but, more generally and importantly, law students are often not even led to reflect upon such issues. A legal education which is oriented to the

<sup>34</sup> Economides, above n 28, 26.

<sup>35</sup> Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (first published 1983, revised ed, 2004).

<sup>36</sup> The MacCrate Report, above n 25.

professional status quo and the political and corporate establishment in an uninformed and unthinking manner leads naturally to a legal system staffed by practitioners who are neither critical nor particularly reflective about the social and political implications of the work they do, let alone the work that lawyers often avoid (pro bono work and staffing legal aid clinics, all varieties of public interest law, prosecution of white collar criminals, among other varieties). Johnstone suggests that law students ‘need to be able to “think like lawyers” and at the same time stand back and reflect on “how lawyers think”’.<sup>37</sup> In 1983, Duncan Kennedy’s *Legal Education and the Reproduction of Hierarchy* brought critical legal studies to bear upon legal education. Kennedy suggested 20 years later that ‘the time for analysis and protest will come around again,’ implying that the time for critical scholarship had past, but certainly not for lack of problems to analyse and protest.<sup>38</sup>

The importance of understanding law in a critical and reflective manner is suggested by the ideological nature and function of law. As Granfield suggests, ‘[law] is a loose collection of propositions that constitute and reify ideas about such principles as rights, authority, obligations, and justice. Law then is ideological, and to study law ... is to engage in a course study in ideology.’<sup>39</sup> To be exposed to ideology in this manner without knowing that one is being exposed to ideology, without knowing what ideology is and what it does, would be indoctrination and would be inconsistent with any academic, liberal arts, or civic conception of legal education.

Trubek and Plager argue, for example, that ‘[l]egal studies research requires us to stand aside from the reproduction of practitioners, to stand aside from the way things are at the moment, free to question and criticise.’<sup>40</sup> While not arguing that it is impossible to accomplish this goal in law school, they suggest that it is very difficult to achieve the distance needed to criticise. Trubek and Plager argue for ‘an alternative institution within the university ... with the mission of producing knowledge about law.’<sup>41</sup> Kahn makes a parallel call for a new discipline.<sup>42</sup>

While an alternative institution or a new discipline may be appealing or promising for a number of reasons, the reality for the

<sup>37</sup> Johnstone, above n 19, 26.

<sup>38</sup> Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (revised ed, 2004), above n 35, 7.

<sup>39</sup> Granfield, above n 28, 2.

<sup>40</sup> Trubek and Plager, above n 17, 485.

<sup>41</sup> *Ibid.*

<sup>42</sup> Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (1999) 27, quoted in Sarat, ‘Crossing Boundaries: from Disciplinary Perspectives to an Integrated Conception of Legal Scholarship’, above n 29, 89: ‘[a] new discipline of law needs to conceive its object of study and its own relationship to that object in a way that does not, at the same moment, commit the scholar to those practices constitutive of the legal order.’

vast majority of law students now and in the foreseeable future is that they have a much better chance of receiving this type of education either by continuing reforms within law schools, or by engaging in interdisciplinary studies which partly or completely step outside the law school curriculum into other available institutions and disciplines. In either case, existing social scientific approaches to law will be central, contributing the bulk of the empirical research relevant to a critical study of law and many of the available pedagogical resources and reference points, including much of the theory and criticism which would inevitably be involved. As Goodman and Silbey contend, the goal of liberal arts education should be that ‘concerns about money and power are, as much as possible, made topics, rather than determinants, of discussion.’<sup>43</sup> If the role of money and power in the legal profession is to be made a topic of discussion, the relevance of social sciences such as economics, sociology and political science cannot be questioned.

Even central elements of ‘insider’ legal criticism, such as the indeterminacy of legal rules stressed by critical legal studies, cannot be properly understood without drawing extensively upon social scientific contributions such as those on ideologies and legitimacy (legal formalism as a legitimising ideology); professions (lawyers and judges as members of professions with economic, political and bureaucratic interests in portraying their work as applying pre-given rules in a neutral, scientific or mechanical fashion); and discretion (interpretation and application of legal rules as involving discretionary decision-making in institutional contexts). As Sarat notes:

When the indeterminacy of legal language is thus exposed, students confront law as something more than a system of rules. They see it as a system of human choices and moral or political judgments shaped, constrained by, and constructed out of social institutions and practices.<sup>44</sup>

This is a central lesson to be learned from critical legal studies; but the lesson would be rather superficial without being informed and illustrated by a range of social scientific insights and observations which reference the social institutions and practices referred to by Sarat. In addition, the cynicism which often results from legal education<sup>45</sup> is due in part to the fact that many law school professors have more competence to teach the manipulation of legal rules or to critique legal ideologies than they have to educate students to understand or appreciate informal institutional processes

<sup>43</sup> Goodman and Silbey, above n 10, 35.

<sup>44</sup> Sarat, ‘Crossing Boundaries: From Disciplinary Perspectives to an Integrated Conception of Legal Scholarship’, above n 29, 95.

<sup>45</sup> Granfield, above n 28, 8.

and discretionary decision-making as involving much more than arbitrary, discriminatory or self-serving case handling.

Increasing the critical and reflective approaches to law in legal education would not only answer a perceived need, but would also contribute to a variety of more specific pedagogical goals which have been discussed in the literature on legal education. One consequence of such reforms would be a more effective and more interdisciplinary teaching of theory.<sup>46</sup> Hunt notes that legal education could emulate the social sciences in trying to integrate theory throughout the curriculum at different levels of instruction as well as with respect to a variety of substantive topics.<sup>47</sup> The theories of the social sciences themselves will be applicable to legal study in many cases, and could therefore serve as more than an illustration of how to teach theory, but also of many of the theories which are helpful for understanding legal phenomena. Exposure to social science would also provide experience with a variety of types of reasoning, including not only theoretical but also methodological reasoning from a variety of social sciences, which would stand to complement skills in legal reasoning and analysis.<sup>48</sup>

Another contribution consists of making legal education more accessible and more interesting to a variety of students, with non-traditional students arguably deserving special mention. As Banks observes:

Students bring their own meanings and ideological backgrounds, beliefs and histories with them to the classroom. These beliefs are suffused with their own class, race, ethnic, gender and sexuality-specific interests, through which they engage in learning and which colour and shape their needs and their understanding of information.<sup>49</sup>

Whether students are privileged or marginalised, they often learn more effectively by having their beliefs and their interests addressed rather than ignored. These beliefs and interests can be addressed by acknowledging the relevance of social identities and group relations for the understanding of the legal profession and the legal system,<sup>50</sup> and by covering social issues and social problems which many students will be motivated to study and discuss.<sup>51</sup> Such issues are not merely 'hooks' to catch students' attention — they are also issues which can enrich teaching and learning about law and the legal profession, because they represent topics where personal interests and legal scholarship are likely to overlap in interesting and informative ways.

<sup>46</sup> Alan Hunt, 'The Role and Place of Theory in Legal Education: Reflections on Foundationalism' (1989) 9 *Legal Studies* 146.

<sup>47</sup> *Ibid* 150.

<sup>48</sup> Johnstone, above n 19, 25.

<sup>49</sup> Banks, above n 12, 459.

<sup>50</sup> Johnstone, above n 19, 25.

<sup>51</sup> Henderson, above n 15, 48.

Legal education therefore stands to benefit greatly from increasingly critical and reflective approaches to law. Critical and reflective questions about law will speak to or increase many students' motivation to learn,<sup>52</sup> and they will also lead to a higher quality of graduates. More critical and reflective graduates will be capable not only of solving conventional legal problems instrumentally, but also of reflective practice involving a greater ability to draw connections between general knowledge and particular cases, and increasing potential for adapting previous knowledge and skills to new situations.<sup>53</sup> Perhaps most importantly, cultivating critical and reflective skills will counteract a widely perceived shortcoming in legal education. Legal scholarship in the social sciences, among other liberal arts disciplines, seeks 'to reconnect what professional legal education seeks to separate',<sup>54</sup> with beneficial results for legal education and the legal profession.

## VI PROFESSIONALISM AND ETHICS

A related set of concerns over legal education has to do with legal professionalism and ethics. Lawyers have long been criticised for insufficient respect for ethics, a concern which has been expressed more and more frequently with reference to the ethical codes of professional associations and the more informal ethical expectations of society for lawyers as members of a profession. And while it is undeniable that the law has become more and more professionalised, including the development of ethical codes for the profession, it is much less clear that the professionalisation of law has led to a proportionally greater respect for ethics in legal practice. The conference program introducing a plenary session at the 1999 meeting of the Association of American Law Schools stated:

Concerns about professionalism have never been greater, both within and outside the bar. Recent commentary describes a profession 'lost,' 'betrayed,' 'in crisis,' or 'in decline.' Most Americans register serious doubts about lawyers' honesty, integrity, and compassion. And most lawyers perceive significant problems in legal practice, such as increasing adversarial abuses; chronic inadequacies in bar regulatory processes; persistent bias based on race, gender, and sexual orientation; and insufficient access to legal services for low- and middle-income citizens.<sup>55</sup>

<sup>52</sup> Johnstone, above n 19, 27.

<sup>53</sup> See also Bell's discussion of the 'reflective practitioner' model of professionalism developed by Donald Schon. Bell, above n 10, 912–13, see also 901.

<sup>54</sup> Sarat, 'Situating Legal Scholarship in the Liberal Arts: Introduction', above n 15, 9.

<sup>55</sup> 'The Professional Responsibilities of Professional Schools' (1999) 49 *Journal of Legal Education* 23, 23.

More recently, the Carnegie Foundation report, *Educating Lawyers*, suggests that ‘[a] focus on the formation of professionals would give renewed prominence to the ideals and commitments that have historically defined the legal profession in America.’<sup>56</sup> Apropos of ethics, this report states ‘[t]here is evidence that law school typically blares a set of salient, if unintentional, messages that undercut the likely success of efforts to make students more attentive to ethical matters.’<sup>57</sup> Another recent review of legal education in the US asserts that ‘[l]aw schools do not currently foster professional conduct; just the opposite. Some fundamental changes are needed if law schools want to teach professionalism effectively.’<sup>58</sup>

These concerns are by no means limited to the US. Economides reports that ‘every recent major review of legal education throughout the common law world has called upon law schools to promote understanding of legal ethics and fundamental lawyering values at all stages of the educational continuum.’<sup>59</sup>

Although many law schools have added various courses in professional responsibility and/or ethics, these steps have not sufficiently addressed the relevant concerns. The content, even when it is mandatory, is generally too little, too late, and also too marginal to the course of legal education. Bell argues that ‘[v]iewed more generally ethics is about encouraging self-critical awareness that is appropriate to any reflective professional.’<sup>60</sup> Questions of instruction in ethics and professionalism therefore overlap with questions about teaching critical perspectives and fostering reflective practitioners of the law. Neither can be taught effectively without the other, and neither can be taught by an add-on course as if these questions were supplemental.<sup>61</sup>

Although many of the concerns about professionalism and ethics in legal education have been voiced by those inside the legal profession and from within the ranks of law faculties, and although some steps have been taken within law schools to combat this problem, social science instruction is a resource which has largely been left unexplored. Yet social science is invaluable both for informing students of the social facts and conditions which occasion ethical decision-making, and for offering them a rigorous

<sup>56</sup> Sullivan et al, above n 10, 13.

<sup>57</sup> Ibid 31.

<sup>58</sup> Clinical Legal Education Association, *Best Practices for Legal Education* (2007) 100.

<sup>59</sup> Economides, above n 28, 28–9; see also Roger Burrige, ‘Landmarks, Signposts, and Directions in Legal Education in the United Kingdom’ (2001) 51 *Journal of Legal Education* 315, 322–3.

<sup>60</sup> Bell, above n 10, 917.

<sup>61</sup> Ibid.

and informative framework in which to discuss professionalism and ethics. Henderson notes that:

To effectively act in accordance with professional norms, students must have basic knowledge of the role of law and lawyers in our society, the rules of professional conduct, and the reasons for those rules.<sup>62</sup>

While bar associations and other specifically legal institutions occasionally sponsor or facilitate research into such questions, and such research is at times recommended as having pedagogical value,<sup>63</sup> it is the social sciences including sociology and political science which offer the bulk of the relevant research.

With respect to social scientific research, the teaching of professional responsibility and ethics is greatly enhanced by factual information relating to such matters; for example, how few legal services are available to the poor or the middle class; how much these legal services are needed; the social costs of white collar crime and political corruption; the institutional environments and pressures which facilitate or motivate unethical behavior.

With respect to teaching professionalism, it is important to recognise that the study of professions is a social scientific endeavour. As Packer and Ehrlich note, law professors often have only a minimal understanding of what a profession is,<sup>64</sup> and they may even be ‘remarkably vague and inarticulate about the purposes of law school’.<sup>65</sup> David Wilkins goes so far as to suggest that ‘the law school’s systematic and pervasive failure to study and to teach about the profession’ amounts to an ethical failure to serve students, the bar and society.<sup>66</sup> While social scientists are generally not members of the legal profession and therefore lack ‘standing’ in many respects to teach about the content of law or how to do legal work, lawyers and law professors are generally not familiar with social scientific studies of their own profession which do discuss such issues as: what makes law a profession, the role of lawyers and the legal profession in society, and the role of legal education and law schools in the professionalisation of legal work (including the important relationships between law, politics, and economics).

Lawyers and legal scholars can be very good at talking and writing about values, but legal education arguably does much more to prepare students to discuss values rhetorically than to hold or practice values. Indeed, a common complaint about legal education is not just that it does not adequately teach values, but that it essentially unteaches

<sup>62</sup> Henderson, above n 15, 68.

<sup>63</sup> See also American Bar Association, above n 3, 105.

<sup>64</sup> Packer and Ehrlich, above n 23, 22.

<sup>65</sup> Ibid 33.

<sup>66</sup> David Wilkins, ‘The Professional Responsibility of Professional Schools to Study and Teach about the Profession’ (1999) 49 *Journal of Legal Education* 76, 76.

values.<sup>67</sup> The MacCrate Report,<sup>68</sup> as a good example, illustrates both the importance of values for the legal profession, and the tendency to emphasise service to clients, which can certainly lead to a narrow or superficial conception of professional values.<sup>69</sup> The MacCrate Report delineates broad fundamental values of the profession, especially the second set of values they discuss:

(2) As a member of a profession that bears special responsibilities for the quality of justice, a lawyer should be committed to values of: (2.1) Promoting justice, fairness, and morality in one's own daily practice; (2.2) Contributing to the profession's fulfillment of its responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them; (2.3) Contributing to the profession's fulfillment of its responsibility to enhance the capacity of law and legal institutions to do justice.

The third set of values has to do with improving the profession, including through 'striving to rid the profession of bias ... and to rectify the effects of these biases.'<sup>70</sup> Social science education can certainly contribute to the training and professional development of competent lawyers. More obviously, social sciences provide invaluable resources for understanding problems and controversies in legal systems and the legal profession such as access to legal services, differential treatment of white collar defendants versus street criminals, the representation of women and minorities in the legal profession and throughout the legal system, and the uses and abuses of discretion. In a follow-up article, MacCrate has noted that 'continuing attention and effort need to be devoted to improving law school instruction in the values that lend purpose to a law school education and the profession for which it prepares.'<sup>71</sup>

Cramton puts the matter baldly but incisively when he argues:

My defense for putting larger normative questions on our teaching agenda rests on a notion that a university law school has a broader function than a cooking institute, a barber college, or some other trade-oriented technical school.<sup>72</sup>

Continuing, he observes that:

To the extent that law students and lawyers become single-mindedly absorbed in status and gain, law ceases to be a profession, and the law

<sup>67</sup> Henderson, above n 15, 49.

<sup>68</sup> The MacCrate Report, above n 25.

<sup>69</sup> Scheingold, above n 17, 165; Epstein, above n 10, 41–2; Henderson, above n 15, 62, 69; Harry Edwards, 'The Role of Legal Education in Shaping the Profession' (1988) 38 *Journal of Legal Education* 285, 291.

<sup>70</sup> The MacCrate Report, above n 25, 24.

<sup>71</sup> Robert MacCrate, 'Yesterday, Today and Tomorrow: Building the Continuum of Legal Education and Professional Development' (2004) 10 *Clinical Law Review* 805, 823.

<sup>72</sup> Roger Cramton, 'Beyond the Ordinary Religion' (1987) 37 *Journal of Legal Education* 509, 510.

school becomes merely another training school. As law, medicine, and other professions become commercialised, we experience what can only be called the deprofessionalisation of the professions.<sup>73</sup>

The social sciences, and especially sociology, have addressed the professionalisation of occupations including legal and criminal justice occupations, and are thereby leading sources of insight on the political, economic, cultural and other forces at play in occupational and professional domains, including those that undermine professional ideals.

The reflections of Goldsmith on his own professional education and acculturation in the Australian system are very illustrative of the gap in legal education which could be filled by greater attention to social scientific scholarship on the law. Goldsmith recalls of his legal education that, ‘for the most part, the connections between “thinking like a lawyer” and the rest of human experience were left hanging or left out completely’.<sup>74</sup> He found that his legal education lacked the exposure to the sociology of the legal profession which would have prepared him better for the process of finding employment. Further, once he found employment, he ran afoul of pressure to persuade his criminal clients to plead guilty more often, which lesson he admits he might have learned much more quickly had he been exposed to relevant literature including Blumberg’s famous article on the practice of law as a confidence game, which introduces students to the importance of the courtroom work-group.<sup>75</sup> Drawing on these and other experiences, Goldsmith observes that:

the relationship between traditional legal education and legal knowledge has been, and continues to be in many quarters, strangely perverse. While lawyers in practice operate largely according to a body of shared, informal legal knowledge, there has been little or no pressure from either the student consumers or the prospective employers of law graduates, in particular the profession, to acknowledge the value of it in law school.<sup>76</sup>

## VII SPECIALISATION AND MULTI-DISCIPLINARY PRACTICE

In their report to the Carnegie Commission on Higher Education, Packer and Ehrlich argue that:

up to the present, legal education and admissions to the bar and bar organization have combined to force the profession, at least on the surface, into a common mold, based largely on obsolescent patterns of practice. This has greatly inhibited the formal recognition ... that lawyers, after all, are not members of a homogenous profession ... We believe that the supposed homogeneity is spurious and that the profession, including

<sup>73</sup> Ibid 511.

<sup>74</sup> Goldsmith, above n 12, 145.

<sup>75</sup> Ibid 147–8.

<sup>76</sup> Ibid 149.

education for it, must respond to existing diversity and to the pressure for more and must acknowledge the need for specialization and the development of paraprofessional careers. These themes will recur.<sup>77</sup>

These themes recur not only in Packer and Ehrlich's report, but also in discussions of legal education in the US and abroad, despite some progress such as increasing opportunities for joint degrees and paralegal degrees.

Allen observes that traditional legal research is relevant but itself insufficient for understanding law as a part of public policy, and concludes that 'the ideal of law as public policy may steer us, however slowly, to those departments of the university in which methodologies for the study and evaluation of public policy have long been developing.'<sup>78</sup> He also states that 'the demands on legal education will become increasingly numerous and diverse'.<sup>79</sup> Allen calls for law schools to become more pluralistic communities, while acknowledging that such a prospect would meet with resistance.<sup>80</sup> The relevance or need for more diverse, interdisciplinary legal education has been noted by a variety of others, in a variety of contexts.<sup>81</sup>

Wilkins, for example, argues that recent curricular innovations in legal education are still insufficient to close the gap between legal education and legal practice.<sup>82</sup> Wilkins calls for:

systematic and rigorous quantitative and qualitative research about the profession's institutions, organizations, norms, and practices, and how each of these 'arenas of professionalism' is evolving — and should evolve — to confront the demands of an increasingly globalized market for legal services. This research, in turn, should form the basis for a whole new kind of pedagogy. At its core, this pedagogy should emphasize how organizational structures, norms, and practices shape individual careers and influence the practical meaning of substantive legal rules and professional commitments.<sup>83</sup>

Wilkins implies that law schools do relatively little to prepare their students for legal careers, but even less do they help law students understand 'the large-scale economic, social and cultural forces that are reshaping the profession their students are about to enter'.<sup>84</sup>

More recently, Daly has commented on the rise of multi-disciplinary practice, which has occurred largely outside the context

<sup>77</sup> Packer and Ehrlich, above n 23, 2.

<sup>78</sup> Francis Allen, 'Humanistic Legal Education: The Quiet Crisis' in Neil Gold (ed), *Essays on Legal Education* (1982) 9, 13.

<sup>79</sup> *Ibid* 21.

<sup>80</sup> *Ibid* 21. William Twining, 'Taking Facts Seriously' in Neil Gold (ed), *Essays on Legal Education* (1982) 51, 72; Goldsmith, above n 12, 150.

<sup>81</sup> Henderson, above n 15; Bell, above n 10; Banks, above n 12; Deborah Rhode, 'The Professional Responsibilities of Professional Schools' (1999) 49 *Journal of Legal Education* 24, 26–8; Connolly, above n 12.

<sup>82</sup> Wilkins, above n 66, 78.

<sup>83</sup> *Ibid* 79–80.

<sup>84</sup> *Ibid* 84.

of law firms, posing a challenge to law firms, the legal profession, and legal education.<sup>85</sup> Daly's overarching concern is that '[t]he complexity of modern society increasingly creates a superabundance of problems in which it is virtually impossible to separate the legal component from components more traditionally associated with other disciplines.'<sup>86</sup> In practical terms, she notes the blurring of boundaries between law and other disciplines, and increasing needs of clients for an integration of legal and non-legal advice.<sup>87</sup> She remarks that '[t]he professional service firms ... increasingly offer services that mimic those that law firms have traditionally offered corporate clients, such as merger and acquisition advice, human resources counseling, and litigation support.'<sup>88</sup> On another front, Daly observes that '[I]awyers who provide services to individuals and small businesses see their client base shrinking as financial planners, accountants, banks, and social workers offer services and products remarkably similar to those traditionally labeled "legal".'<sup>89</sup> She calls for a broadening of legal education to 'provide more emphasis on teaching and research about legal careers and the different segments of the legal profession', and more regular focus on interdisciplinary as well as theoretical training.<sup>90</sup>

Duxbury makes a complementary point, that the law and society movement has made impressive and important contributions in showing 'how the operation of law is very different from what one would expect were one only to study the law itself',<sup>91</sup> but he also expresses regret that the contributions of law and society scholarship have been undervalued in traditional legal scholarship.

### VIII SKILLS TRAINING AND ORIENTATION TO LEGAL PRACTICE

The blurring of boundaries between legal and other varieties of knowledge and skill, associated with increasing diversity and specialisation in legal careers, and the increasing importance of multi-disciplinary practice, has as a corollary that traditional legal education risks becoming further and further removed from relevant skills

<sup>85</sup> Daly, 'What the MDP Debate Can Teach Us about Law Practice in the New Millennium and the Need for Curricular Reform', above n 27; Mary Daly, 'The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization' (2002) 52 *Journal of Legal Education* 480, 485–7.

<sup>86</sup> Daly, 'What the MDP Debate Can Teach Us about Law Practice in the New Millennium and the Need for Curricular Reform', above n 27, 521–2.

<sup>87</sup> *Ibid* 529. See also Connolly, above n 12.

<sup>88</sup> Daly, 'The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization', above n 85, 485.

<sup>89</sup> *Ibid* 487–8.

<sup>90</sup> *Ibid* 489–90.

<sup>91</sup> Duxbury, above n 5, 959–60.

training and the realities of professional legal practice. This is true despite increasing emphasis on skills-training and clinical courses,<sup>92</sup> since changes in the legal profession can certainly outpace changes in legal curricula. A concern with a gap between legal education and legal practice is a longstanding concern which persists<sup>93</sup> despite the curricular innovations which have been introduced at various times in various national contexts.

The *MacCrate Report on Legal Education and Professional Development*, compiled by the American Bar Association section of Legal Education and Admissions to the Bar, mentions many skills which could arguably be cultivated more effectively by interdisciplinary training.<sup>94</sup> The report discusses 10 sets of skills under the rubric of fundamental lawyering skills, only two of which seem to be unique to traditional legal education (being skills involving the identification of legal issues and case litigation). Other skills which are deemed fundamental lawyering skills include the ability to identify and respond to problems, ‘knowledge of the nature of legal rules and institutions’, knowledge of ethics, and skills relevant to factual investigation, effective communication, negotiation, and efficient management. The more recent Carnegie Foundation report, *Educating Lawyers*, referring primarily but not exclusively to US legal education, notes ‘the increasingly urgent need to bridge the gap between analytical and practical knowledge.’<sup>95</sup> Another recent report from the US states simply that ‘most law schools are not committed to preparing students for practice.’<sup>96</sup>

With respect to the handling of factual questions and issues in particular, traditional legal education and legal practice have both been criticised as deficient. Twining refers to a widely acknowledged imbalance ‘between the amount of attention that is devoted to disputed questions of law in upper courts and the amount that is devoted to disputed questions of fact in trials at first instance, in other tribunals, and in legal processes generally.’<sup>97</sup> He later remarks on the orthodox tradition in evidence scholarship that it has ‘devoted far more attention to the rules of admissibility than to questions about the collection, processing, presentation, and weighting of information that reaches the decision makers.’<sup>98</sup> Ten years later Twining welcomed

<sup>92</sup> The MacCrate Report, above n 25, 7.

<sup>93</sup> Edwards, above n 69; Daly, ‘What the MDP Debate Can Teach Us about Law Practice in the New Millennium and the Need for Curricular Reform’, above n 27; Litowitz, above n 28, 38.

<sup>94</sup> The MacCrate Report, above n 25, 20–3; see also Henderson, above n 15, 57–63; Bell, above n 10, 916.

<sup>95</sup> Sullivan et al, above n 10, 12.

<sup>96</sup> Clinical Legal Education Association, above n 58, 7. This report also declares, ‘no effort is made to help students progressively acquire the knowledge, skills, and values needed for law practice’ at 24.

<sup>97</sup> Twining, ‘Taking Facts Seriously’, above n 80, 53.

<sup>98</sup> *Ibid* 73.

a ‘new evidence scholarship’, including increasing use of statistical arguments in court, but he was unfortunately optimistic when he predicted that standard conceptions of lawyerly competence would include mastery of economics and statistics by the year 2000.<sup>99</sup>

Addressing overlapping concerns about the gaps in legal education, Wilkins suggests that legal education would benefit from the adoption of the case study method as used in business school and public policy schools. He notes that such case studies ‘would go a long way toward helping law students learn to identify and resolve the ethical, strategic, career, and policy issues that they will face as practitioners.’<sup>100</sup> Such case studies would address the need for greater skills training, in coordination with a more meaningful introduction to the variety of legal practice.

At the same time as legal practice has become more diverse and arguably less distinctive vis-à-vis other professional services, the study of the legal profession and legal institutions by social scientists and others outside the law school setting has expanded considerably. These interdisciplinary studies have generally not dealt with skills training<sup>101</sup> so much as a variety of other topics which, while typically not vocational in interest, very often offer valuable lessons about the law which would be useful in a legal education. Teitelbaum corrects the tendency to think of relevant social science as involving only evaluations of the social impacts of law, although that continues to be an important tradition of social science research. He observes that:

studies of municipal courts, juvenile courts, police departments, and administrative agencies ... tell us something about official actors, about the context in which they operate, about the cases and clients they treat, about the formal and informal strategies they employ to manage their responsibilities, about the power relationships that characterize agency function, and about the costs to the agency, parties, and professional personnel of resort to that agency. From such research we have learned something, but not enough, about the costs of litigation and its relative unavailability to various communities, the independent interests of law-dispensing agencies which are extrinsic to formal assumptions about the administration of law, the ways in which discretion mediates between formal requirements and institutional interests, and the power systematically wielded in litigative settings by institutional, as opposed to individual, participants.<sup>102</sup>

<sup>99</sup> William Twining, ‘Preparing Lawyers for the 21<sup>st</sup> Century’ (1992) 3 *Legal Education Review* 1, 13–14.

<sup>100</sup> Wilkins, above n 66, 94.

<sup>101</sup> Cf John Monahan and Laurens Walker, ‘Teaching Social Science in Law: An Alternative to “Law and Society”’ (1985) 35 *Journal of Legal Education* 478, for a focus on applied social science.

<sup>102</sup> Lee Teitelbaum, ‘An Overview of Law and Social Research’ (1985) 35 *Journal of Legal Education* 465, 467–8.

As Trubek and Plager remark about the narrow nature of legal education, ‘[p]art of the reason law schools have been the problem has been the definition of the curriculum as the teaching of rules, not their social meaning.’<sup>103</sup> They argue that ‘[i]f we thought of legal education as teaching lawyers about what happens, how things work, what works and does not work, then the legal studies approach would fit more easily into the curriculum.’<sup>104</sup> This observation dovetails nicely with Johnstone’s remark that ‘[t]raditional legal education has required students to apply legal principles to facts but has ignored the more socio-legal issues relating to the way that the law is implemented or enforced in practice.’<sup>105</sup> Social science scholarship thus stands to contribute to legal education in a variety of manners, from technical and applied skills such as how to use empirical research methods in gathering evidence or assessing claims, to illuminating such questions as the impacts of law on clients and society, the lived realities of legal practice, the social organisation of the legal profession, the role of the lawyer and the legal profession in society, and the ideological dimensions of legal education, even predicting the contours of future legal developments,<sup>106</sup> among many others.

## IX HAS THERE BEEN NO PROGRESS?

The persistent and significant criticism of legal education, observable for example with respect to the US, the UK, Australia and Canada, does not mean that no progress has been made or that no prospects exist. Overall, however, the positive developments seem to be either marginal features of legal education or vulnerable to backsliding, or both. For example, socio-legal scholarship seems to have been institutionalised in UK law schools more so than in other national contexts, but Collier observes that ‘there is, at best, a patchy and minimal training program in socio-legal methods’ and the institutionalisation of socio-legal scholarship, especially of a more critical or theoretical variety, is by no means secure in the face of new economic and administrative pressures on higher education.<sup>107</sup> Cownie also documents the institutionalisation of socio-legal scholars in British law schools, but then notes that a significant number of respondents in her study of a law faculty were concerned that law students were not being introduced to other disciplines relevant for studying law.<sup>108</sup>

<sup>103</sup> Trubek and Plager, above n 17, 485.

<sup>104</sup> *Ibid.*

<sup>105</sup> Johnstone, above n 19, 24.

<sup>106</sup> *Ibid.* 23.

<sup>107</sup> 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, 534–6.

<sup>108</sup> Cownie, above n 11, 66.

Writing from the US, Connolly notes that ‘many law schools have increased the number of interdisciplinary classes in the last two decades’ but also notes that ‘interdisciplinary work can make instructors feel marginalised’ and notes that dual degree and specialised programs offering interdisciplinary training ‘reach a limited number of students’.<sup>109</sup> Referring to the impact of the MacCrate report and other bar association efforts on American legal education, Pearce argues that ‘[a]side from generating a professionalism industry, the professionalism campaign has had little or no effect on how lawyers understand their role or how the public perceives lawyers.’<sup>110</sup>

Writing largely about the Australian context, Thornton notes that, despite the intellectual vibrancy of legal scholarship since the 1970s, ‘the new scholarship remained marginal to the primary purpose of the law school, that is, the training of legal professionals’.<sup>111</sup> She notes also the reversion of a number of law schools to a ‘straight’ law degree, at the expense of the broader education that had been emphasised for a period, and the negative influence of market pressures on critical legal scholars.<sup>112</sup>

So, despite increased prominence and availability of interdisciplinary scholarship, and despite the large number of legal scholars oriented to social scientific theories, themes or methods, there is an understanding, conveyed repeatedly in professional discourse and literature, that the social sciences are not well integrated into legal education. Where social scientific instruction has been made available, for example, through elective courses, selection of faculty mentors, or specialised degree programs, it is typically not required and thus has been exceptional.

## X WHERE TO FROM HERE?

What opportunities are there for infusing additional social scientific content and insight into legal education? The opportunities will naturally vary across national and institutional contexts, but it may be helpful to succinctly suggest a wide variety of opportunities, hopefully facilitating recognition that in most if not all institutional and national contexts, at least several opportunities may be feasible.

A first consideration is what can occur within law schools, and in many cases there could simply be further development of practices such as hiring faculty members with social science credentials,

<sup>109</sup> Connolly, above n 12, 23, 32, 34.

<sup>110</sup> Russell Pearce, ‘MacCrate’s Missed Opportunity: The MacCrate Report’s Failure to Advance Professional Values’ (2003) 1 *Fordham Law Faculty Colloquium Papers* 1, 22.

<sup>111</sup> Margaret Thornton, ‘The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy’ (2001) 8 *International Journal of the Legal Profession* 37, 42.

<sup>112</sup> *Ibid* 46, 51.

offering more electives with social science content within law school and/or facilitating coursework in social science departments, offering more joint degree or multi-disciplinary programs or putting more resources towards those already existing. Law libraries and librarians could potentially play a significant role in providing law professors and law students with relevant resources and guidance. Textbook or casebook authors and publishers could provide a great service by providing law faculties with more interdisciplinary resources in the form of pedagogical materials that offer social scientific contributions without presupposing prior social scientific training by students or faculty. The increasing integration of social scientific scholarship into law schools could also be supported by expanding the variety of initiatives related to faculty professional development and curricular development. Ultimately, the possibility of integrating social scientific contributions into first year and required courses suggests a vital opportunity to recognise social science as a relevant resource for accomplishing the basic pedagogical and professional objectives of law school; social science is much more than another flavour among the variety of elective courses, faculty advisors or specialised degree programs available to students.

Law schools certainly have an important role to play in the evolution of legal education, but as currently organised and staffed, their efforts would predictably be slow and incomplete relative to both the critiques of legal education and the benefits of an increasingly inter-disciplinary legal education. Part of the constraint is simply the limited time students spend in any one degree program and the limited number of courses they can take. Other contexts and opportunities of legal education need to be considered as complementary to the experiences and functions of law school. In the US, where law students take four years of undergraduate coursework prior to law school, the institutional timing and location of potential interdisciplinary legal education is a relatively easy question.<sup>113</sup> In other national contexts, as well as in the US, additional opportunities for exposure to social scientific scholarship could involve greater use and diversity of continuing legal education, and potentially on-the-job-training programs as well. Of course, the existence of paralegal professionals and paralegal training programs suggests another important venue and resource for integrating social science scholarship into legal education, broadly conceived.

When we think of opportunities for making legal education more interdisciplinary, then, we need to think of law school courses; law school faculty; law school libraries; law school textbooks; and also beyond the confines of law school, looking to pre-law education; joint-degree and multi-disciplinary programs; continuing legal

<sup>113</sup> Henderson, above n 15, 74–5.

education; on-the-job training; and paralegal training. Wherever people do legal work, whether as lawyers, paralegals, or judges, their work stands to benefit from interdisciplinary legal education and training, and this can be facilitated by many means in many types of educational and professional settings.

## XI CONCLUSION

Legal education is too often circumscribed by a narrow professional ideology about what type of education is relevant to the study of law and the practice of law. It is too rarely involved in the type of broad and critical self-examination of the law and the legal profession that might enable legal education and educational institutions to develop and demonstrate much-needed autonomy with respect to the most immediate pressures of the profession — the state and the market.<sup>114</sup> Such self-examination, Goldsmith observes, ‘is just as vital to a vibrant and healthy profession as it is to the values of the university or indeed to what might be considered the public interest.’<sup>115</sup> It is precisely because the law is in many important respects not independent and not autonomous with respect to social facts and social institutions, and is itself a social fact and social institution, that legal education cannot be independent and autonomous from relevant social scientific scholarship on legal institutions, legal personnel, legal processes, legal education, and other legal phenomena.

Legal scholarship and legal education have, to some degree, although very inconsistently, acknowledged and incorporated social scientific concerns or social scientific scholarship into legal scholarship and legal education. Different schools of legal thought have raised social scientific issues about the effectiveness of law, or the ideological nature of law, or the way law works in practice. These issues range from legal realism to critical legal studies and other critical approaches, to the new interest in ‘empirical legal studies’ (which have a much longer and richer history than this novel label). The degree of interdisciplinary social scientific and socio-legal scholarship and learning actually incorporated within legal education has, by comparison, been extremely modest. For example, Allen suggests that the social realist agenda has failed to significantly impact research and teaching in law schools.<sup>116</sup> Duxbury implies that the ‘outsider’ perspectives in legal scholarship, such as Gay-legal, Latino and critical race literatures are largely theoretical in nature and risk ‘losing their shine’ if they do not

<sup>114</sup> See Goldsmith, above n 12, 164.

<sup>115</sup> *Ibid.*

<sup>116</sup> Allen, above n 78, 13.

<sup>117</sup> Duxbury, above n 5, 965.

evolve into ambitious empirical projects.<sup>117</sup> Getman suggests that even the interests of legal scholars in economics, political science and critical legal studies do not generally or necessarily translate into empirical legal scholarship.<sup>118</sup> Of the law professors and legal scholars who do explore empirical issues, the exploration is not always sustained, and can amount to no more than what Rhode refers to as ‘armchair empiricism’ centred on anecdotal data.<sup>119</sup> Other relevant contributions from the social sciences, including theoretical and critical treatments of law as well as empirical scholarship, are also liable to be neglected. Legal scholars’ attention to social science is therefore not only too infrequent, but when it does happen it does not necessarily go beyond an interdisciplinary citation, in the manner of tipping the hat towards the boundaries of legal scholarship. The real-world complexity and importance of law requires that law be the subject of interdisciplinary scholarship, and a corollary of this is that legal education needs to become much more interdisciplinary.

The often-cited ‘gap’ between legal education and practice points not just to a professional concern with legal training in line with vocational interests and pressures, but also to an academic and humanistic concern that legal education fails to incorporate much available scholarly knowledge about legal institutions, legal professions, and legal work. While legal education has traditionally emphasised legal doctrine and ‘law on the books’, there are both professional and scholarly reasons to pay more respectful attention to the social context of law, and to law in action. The social sciences stand to teach law students much more about the practical realities of their profession, and illuminate these practical realities in a broader, more reflective and critical manner. The challenge will be to identify the opportunities to integrate social scientific contributions more extensively and consistently into legal education. This will likely involve taking a longer and more integrative view of when legal education might start, how long it can continue, and the diversity of faculty, degree programs and institutions which might be involved. There is clearly room for improvement in legal education, and much social scientific work that speaks to one or another challenge to legal education, so perhaps it is not unrealistic to hope that the future of legal education will see increasing integration and cooperation across disciplinary and institutional boundaries.

<sup>118</sup> Julius Getman, ‘Contributions of Empirical Data to Legal Research’ (1985) 35 *Journal of Legal Education* 489, 489.

<sup>119</sup> Rhode, above n 81, 24.