

THEY MAKE A DESERT AND CALL IT PEACE

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I INTRODUCTION

When the Roman historian Tacitus surveyed the impact of the colonisation of Britain and its repressive effect on the native population he summed up his sense of despair with the searing phrase, ‘They make a desert and call it peace.’¹ Imperial overstretch had, according to Tacitus, reduced Rome to a broken society. Rome had achieved only a pyrrhic victory. Britain was prostrate before the power of Rome — but at what cost to the ideal of a civilisation that idolised the arts and culture but in practice created client states at the point of a sword?

Today the modern university shares many of the characteristics of an overstretched imperial power. In theory it is a bastion of humane disciplines and a focal point for the transmission of values and principles aimed at increasing the public good. In practice this institution, forged in the age of feudalism and one of the crowning glories of Western civilisation, has suffered a steep decline. In classic empire fashion universities exhibit a relentless desire for expansion but at the cost of eschewing many of their core values. When operating at their optimum level, universities are self-governing citadels dedicated to promoting tolerance, diversity, autonomy, reason, informed rationality and the creation of ethical citizens driven by the ideals of a liberal education. In contemporary Australia the modern university has become a travesty of its ideal image. It has been reduced to an appendage of the state and an adjunct of a corporate market society. Like an empire slowly declining, the modern university appears in working order from the outside, but on closer inspection a state of decay is evident.

This article argues that within Australia the discipline of law has fallen victim to a corporatist approach and in that sense is representative of the forces that have colonised the academy and threaten its aesthetic lifeblood. Instead of strengthening the

* Law School, Macquarie University.

¹ R M Ogilvie and I Richmond (eds), *Cornelius Tacitus ‘De Vita Agricolae’* (Clarendon Press, 1967) 112.

humanities, law schools in Australia have focused on developing mechanistic skills that favour profitable specialisation, at the expense of equipping students with the capacity to think critically about the status quo. Without humane enquiries as the guiding principle of higher education, universities in the classical sense of the term disappear and trade school disciplines flourish. Universities have resiled from their role as centres of critique, and the study of law is emblematic of the shift towards higher education servicing the status quo. Instead of civilising a market society, universities pander to corporate values — and Australian law schools epitomise that phenomenon.

Part II of this article surveys the historical landscape of legal education, which has been dominated by the struggle between competing pedagogical visions. It charts the way these competing models of learning played out in the early part of the twentieth century and maps the historical contest between a rules-based, vocation-oriented education that encourages corporate values and a teaching methodology that supports a critical legal education based on promotion of the positive pedagogical values of liberalism.

Part III sketches a tragedy. By focusing on what happened at a number of Australian law schools over a period of two decades, a picture is drawn of the rise and fall of innovative law schools that strove to implement a program that paid more than lip service to socio-legal values. The strange death of a humanities-based legal pedagogy will be examined.

Part IV interrogates the complex interplay of forces that led to the demise of these trailblazing experiments. Pioneering legal programs were extinguished not only by external factors but also by internal forces. Different psychological types played as big a role as economic issues and competing ideologies or legal philosophies in determining the fate of these law schools. It will be argued that what happened at these law schools parallels the destruction of the civilising mission of universities, and the same factors can be seen at work.

Light is a strong disinfectant, and the article tries to shine light on important social phenomena. In doing so, it relies upon selection of a sum of facts and interpretation of the materials presented. It is axiomatic that every analytical framework involves its own theoretical and political judgments. The goal of impartiality is a fallacy even if one is not an actor in the events that unfold in a narrative. Facts are never neutral, but part of a social world, and what is required if objective truth is to be approached is that there must be a march towards facts — one that utilises a conceptual structure capable of comprehending empirical data. Facts have to be viewed through a dialogue with a theory that illuminates a train of events.² What do

² E P Thompson, *The Poverty of Theory* (Merlin Press, 1979) 231.

facts stand for in the context of the social forces that stymied groundbreaking attempts in Australia to dilute the role of rule fetishism and instead make legal education brim with enriching ideas? That social meaning is the keystone in the search for truth. In order to render actions intelligible as part of a pattern, this article seeks to draw out the inner reality of social relations and psychological traits that led to the collapse of will which caused progressive law schools to turn back to a trade school mentality. A stubborn fact at this stage of history is that those whom Gramsci termed organic intellectuals of the political and corporate elite have proved to be powerful enough to defeat maverick intellectuals who possessed a competing vision of legal pedagogy.³ Just what killed progressive attitudes in law schools in the twentieth century in Australia will be of prime importance to those contrarian legal scholars who will in the future tilt once more at ossified teaching and governance models.

II THE CHANGING HISTORICAL LANDSCAPE OF LEGAL EDUCATION

Ever since medieval universities began teaching law there has been a contest of ideas about whether a scholarly or skills-based methodology was appropriate. At the outset the trade school approach was rejected in favour of the scholarly values associated with a traditional conception of a university. Starting in the twelfth century in Bologna and then at Oxford and Cambridge, law was taught as a component part of the liberal arts.⁴ Roman law, canon law, legal history and jurisprudence were the core subjects taught in the great universities.⁵ As a market economy expanded, a separate pedagogical stream was developed for those who wanted a vocational and craft-based education. At the Inns of Court in London a practice-orientated syllabus that focused on vocational skills prevailed.⁶ It was a teaching model that suited the rise of capitalism. A utilitarian model that treated law as a system of rules underpinning property rights thrived, while a pedagogy that aimed at producing citizen lawyers capable of excavating legal principles in order to promote human welfare became marginalised.

By the latter part of the nineteenth century and the inception of law faculties in Australia, an empirical legal monoculture imported from Britain was dominant. At the lectern practitioners steeped in the craft tradition, who espoused the view that law is a system of autonomous

³ Antonio Gramsci, *Selections from the Prison Notebooks* (International Publishers, 1978) 5–6

⁴ Margaret Thornton, 'Portia lost in the groves of academe wondering what to do about legal education' (1991) *The Australian Universities' Review* 26

⁵ *Ibid.*

⁶ *Ibid.*

rules separate from political, social and economic factors, spent evenings conveying their positivistic tradition to budding Australian lawyers.⁷ The political power of the legal profession even at this stage of colonial evolution sufficed to control the curriculum.⁸ At this point in Australia's development, legal education was 'little more than the imparting of information in the form of legal principles, rules and propositions ... to be committed to memory for examination purposes.'⁹ The study of law was reduced to a trade school discipline that moved in tune with the commercial requirements of a colonial trading society.

The first law faculties in Australia were effectively apprenticeship institutes. They had nothing in common with the classical humanistic concept of universities. A doctrinal and vocational form of legal education ruled supreme. In the US the Legal Realist movement of the 1920s and 1930s at Columbia and Yale emerged to challenge legal positivism, but it was an initiative that failed to register in Australia. This was partly attributable to a cultural logic dominated by Britain. American investment and its cultural products were just beginning to have an impact on the Australian landscape after the First World War.¹⁰ But there was more than just Britain's influence acting as a brake on legal innovation. The inherited system of legal positivism had become part of Australia's corporate institutional matrix supporting the rights attached to private property and by extension the rule of the economic elite. The craft based model of legal thinking became an intrinsic part of the organisation of the circulation of commodities through contractual and commercial law. This turn of events was of lasting importance and it was to survive the sun setting on the British Empire in Australia.

The Legal Realists at Columbia and Yale pioneered a curriculum that 'sought to integrate law and the social sciences'.¹¹ The realists were an eclectic group but they were united in affirming the sterility of legal positivism. The Realists argued that 'legal rules were not objective and value free'.¹² They set about generating a legal education that propagated the view that legal reasoning was suffused with politics. Moreover, policy choices rather than logic or rules underpinned judicial decisions.¹³ This paradigm was bound to trigger a negative response from vested interests. Unsurprisingly,

⁷ Ibid.

⁸ Nick James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 967

⁹ Ibid 967. James quotes from a 1964 Australian Universities Commission Report into Tertiary Education.

¹⁰ Michael Dunn, *Australia and the Empire: From 1788 to the Present* (Fontana Books, 1984) 108.

¹¹ Margaret Thornton, 'The Dissolution of the Social in the Academy' (2006) 25 *Australian Feminist Law Journal* 15

¹² James, above n 8, 968.

¹³ Ibid.

within a few years the experiment at Columbia was throttled by forces intent on restoring the supremacy of legal positivism. The counterrevolutionaries claimed the production of proficient practitioners was being impeded by incorporating the social sciences into the curriculum.¹⁴ The Yale enterprise also collapsed under the pressure exerted by the advocates of mechanical jurisprudence who claimed that the Realists were ‘not teaching law’.¹⁵ As Margaret Thornton pungently expresses it: ‘Doesn’t it sound depressingly familiar?’¹⁶ The view that law exists in a historical vacuum separate from socio-economic forces is an ideology, but it is one that supports concrete interests. The restoration of legal positivism at Columbia and Yale is symbolic of the capacity of the ruling elite to instil their pedagogical values into a discipline and turn these beliefs into the common sense of the epoch.

III THE POST-WAR CHALLENGE TO THE LEGAL STATUS QUO

In the period following the Second World War US academics disenchanted with the precepts of legal positivism launched a second wave of dissent.¹⁷ The Critical Legal Studies (CLS) movement inherited the mantle of the Legal Realists. A major theme of CLS was hostility to legal positivism.¹⁸ The thesis that law was a system of autonomous rules that existed in a sealed vacuum was confronted with a methodological approach that was prepared to examine the contradictions within the rule-based model.¹⁹ The advocates of CLS also declared that ‘law is a political product that results from the struggle of conflicting social groups.’²⁰ CLS began its life as an ideological antidote to mechanical jurisprudence but a challenge to the positivistic US law school curriculum was a natural corollary of its attack on mainstream legal thought. This was a wind of change that spread beyond the borders of the United States, and this time Australia was ripe for importation of the critical legal education model it brought. Practitioners teaching at night had been supplanted by career academics, and a welter of law schools sprang up to provide a laboratory for new ways of seeing law.²¹ In the vanguard were the University of New South Wales (UNSW) Law School, founded in 1971; the Department of Legal Studies established at

¹⁴ Thornton, above n 4, 28.

¹⁵ Thornton, above n 11, 15.

¹⁶ *Ibid.*

¹⁷ Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987) 1

¹⁸ Stuart Russell, ‘The Critical Legal Studies Challenge To Contemporary Mainstream Legal Philosophy’ (1986) 18 *Ottawa Law Review* 12

¹⁹ *Ibid.* 5.

²⁰ *Ibid.* 9.

²¹ James, above n 8, 967.

La Trobe in 1972; and Macquarie Law School, which followed in 1974.²² The long boom following the Second World War was at its height, and on the policy front Keynesian social welfarism fostered different paradigms of learning, different ways of conceptualising reality.²³ A class compromise between capital and labour opened up space for liberal democracy to encourage innovation on a number of fronts, and this rejuvenating spirit was cushioned by high profits.²⁴ It looked as if the ascent of liberal legal education, based on the humane disciplines and guided by a perspective that encompassed scrutinising the inextricable relationship between politics and law, was assured of a fortuitous climate in which to prosper. Quite apart from the CLS framework of analysis, a pathway in Australia was opened to exploring law from a wealth of methodological approaches. For example, feminism and Marxism were given a shot in the arm in an era dominated by social liberalism. The horizon seemed limitless for the proponents of a critical legal education. It was a brief golden age. When the backlash came it was dressed in a familiar guise.

A *UNSW Law School*

In the wake of the Second World War Australia became a client state of the United States, and prospects of a backlash in any social sphere appeared distant as the long boom and social liberalism sparked by Keynesianism promised unbroken progress on many fronts.²⁵ The age of Pax Britannica gave way to Pax Americana, and supervision of the Australian state by a new and dynamic global empire provided scope for fresh ways of seeing. The US political economy spearheaded an economic transformation in Australia. Its dominance was expressed by the development of large-scale firms that came to occupy the commanding heights of the economy. The economic transformation supported by social liberalism allowed US cultural and legal influences to expand their reach, and liberal legal education was provided with the oxygen it needed to flourish in Australia. A by-product of the economic boost to the legal market was the expansion of the ranks of full-time legal academics in Australia. Among these career academics some were inspired by the radicalism of the 1960s and a countercultural movement that had its genesis in the United States. The favourable cultural milieu soon found an institutional home for contrarian legal thinkers to canvass their ideas. When the UNSW Law School was formed it was given the leeway to forge a critical legal education. A number

²² Ibid 969.

²³ Kelvin Rowley, 'The Political Economy of Australia Since the War' in John Playford and Douglas Kirsner (eds), *Australian Capitalism* (Penguin, 1973) 317.

²⁴ David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 10.

²⁵ Greg Crough and Ted Wheelwright, *Australia: A Client State* (Penguin, 1982) 3.

of legal academics disenchanted with positivism and a trade school approach to law became founding staff members at UNSW. Gill Boehringer notes that a number of maverick academics ‘gladly left the deadening environment of the Sydney Law School’, where a rule-based jurisprudence prevailed, to foster a new form of legal pedagogy at UNSW.²⁶ The opportunity to challenge the premises of legal positivism promised a stimulating intellectual climate.

Brian Kelsey was one of the academics recruited to usher in a new epoch of legal training in Australia. He noted that the UNSW project began with a commitment to providing students with a ‘wide-ranging inquiry into the law as a social and political process’.²⁷ He stressed that, at the outset, the appointment of a Professor who was well known for his commitment to a CLS standpoint augured well for the future.²⁸ Professor Curt Garbesi left the United States to join UNSW Law School, and he exhibited intellectual leadership by developing a remarkable common law course — a combined unit embracing tort, contract and crime.²⁹ With Garbesi in intellectual command it must have been tempting to view the UNSW Law School as a sign of a fundamental epistemological break with the past. But events quickly dispersed any such romantic notion.

The modern law school is a reflection of the surrounding society, and the composition of its staff mirrors the contradictions of capitalism. In brief, not all the staff at UNSW were committed to CLS or other counterhegemonic legal models. This is unsurprising, given the cardinal role legal positivism plays as a legal ideology bolstering a commercial society. The allure of legal positivism is that being a component part of bourgeois ideology and a handmaiden of commodity production, it fits smoothly into a society based on promoting market values. Students who fall under the spell of legal positivism and either consciously or unconsciously absorb its capitalist spirit then move on to become academics who exhibit no qualms about instilling its central tenets in those same terms. As long as capitalist relations of production are in command, legal positivism will be a major force in law schools and unorthodox thinkers in a minority. This state of affairs applies equally to the old and the new law schools that proclaim a departure from the traditional path.

A number of academics at UNSW were traditional supporters of legal positivism or were committed to a vocational orientation to legal studies. Garbesi became a lightning rod for the expression of their ire, and his critics let their dissatisfaction be known.³⁰

²⁶ Gill Boehringer, ‘Historical Documents’ (1988–89) 5 *Australian Journal of Law and Society* 55.

²⁷ Brian Kelsey, ‘What’s Wrong with the Law School?’ in The Law Editorial Collective (eds), *Critique of Law* (UNSW Critique of Law Society, 1978) 124.

²⁸ *Ibid.* 125.

²⁹ Boehringer, above n 26, 55.

³⁰ Kelsey, above n 27, 125.

They encouraged students not to enrol in socio-legal courses and channelled them towards ‘commercial and business subjects’.³¹ In passing, it should be noted that this obviously ‘corporatist’ ploy occurred long before neoliberal politics, or a so-called ‘new knowledge economy’, became part of public discourse in Australia. The events at UNSW highlight the activist nature of some of the defenders of legal positivism. Direct action is not a monopoly of the left. Conservative conceptual ideologists went on the offensive at UNSW and aggressively defended their methodological framework. To expect gentility to prevail in academic disputes when in effect the pedagogical destiny of a department is on the line is naïve. An imbroglio of competing pedagogical philosophies is never going to generate a gentle and polite discourse. As ideological lines are drawn, the organic intellectuals of the power elite may publicly abhor conflict, bemoan the alleged dysfunctionality of the department, and preach respect for pluralism — while in practice mobilising to restore a monolithic legal conservatism.

An ideological war between the advocates of the establishment model represented by positivism and contending paradigms engulfed UNSW Law School. The CLS framework of analysis and other maverick models were able to draw succour from the existence of the social democratic political structure promoted by Keynesianism. Counterhegemonic legal models are given more oxygen when social liberalism is flourishing. But the overarching principle is that alternative teaching models wax and wane in accordance with the balance of power between those seeking to retain the status quo and those calling for change. The upshot of the contest of ideas in law is preordained. In the absence of large-scale changes in the wider polity the progressive forces will eventually experience a rollback. The forces supporting the status quo have the state, university chieftains and corporations on their team, and they are too powerful — given the dynamics of Australian society and the material interests at stake — to allow what is perceived as a radical teaching paradigm to flourish in a key ideological sphere such as law.

Kelsey’s historical narrative depicts the doomed struggle at UNSW and the ruthless nature of the campaign to decapitate those seen as the leaders of the maverick forces. Garbesi was quietly forced to resign.³² Emboldened, the supporters of legal conservatism began to bait their opponents. Kelsey notes that their propaganda included ‘a scare campaign ... concentrated on the students to convince them their degrees and careers were on the verge of extinction.’³³ One teacher was even called out of class by a superior and informed that they were jeopardising the degree by offering a component

³¹ Ibid 124.

³² Ibid 125.

³³ Ibid.

of self-assessment in a course. The rhetoric deployed against this teaching strategy was along the predictable lines that 'if this got out to the judges it was the end of the Law School.'³⁴ The dream of a community of academics at UNSW pursuing a progressive legal program was terminated by the mid-1970s. The UNSW Law School retreated into being a positivistic carbon copy of Sydney University. A few maverick thinkers survived at UNSW, but lacking an institutional framework to promote their cause they were reduced to token rebels. The battle over legal pedagogy shifted elsewhere as the UNSW experiment collapsed.

B Department of Legal Studies at La Trobe University

Starting in 1972 at La Trobe University in Victoria, a Department of Legal Studies was formed. It was an adjunct of the Faculty of Social Sciences. It taught legal studies subjects, but these did not 'satisfy the educational prerequisites for admission to the practice of law'.³⁵ For twenty years it offered courses to Arts students and was free of the oversight of an admissions board charged with monitoring the curriculum.³⁶ It was a boutique body separate from the profession and thus a zone of unhampered self-regulation. Thus it met no resistance in integrating the social sciences into the study of law. When Margaret Thornton moved from Macquarie Law School to a chair in Legal Studies at La Trobe in 1989 she did so knowing a fully-fledged law school was on the cards.³⁷ She was optimistic about the vision of an innovative LLB program being implemented at La Trobe.³⁸ A stable of socio-legal scholars was already employed at La Trobe, so staffing the new law school was not an issue.³⁹ A seamless transition was mooted.

Thornton's confidence in the future was misplaced. She notes that roadblocks began to appear even before the offering of a law degree at La Trobe began in 1992. A plan to spend a year developing an innovative curriculum prior to the first intake of students was rejected by the university administration.⁴⁰ This led to the adoption of curricula from other law schools, and even at its birth La Trobe had the appearance of borrowing second-hand clothes rather than daring to be different.⁴¹

³⁴ Ibid.

³⁵ James, above n 8, 969.

³⁶ Thornton, above n 11, 6.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid 8.

⁴¹ Ibid 6.

By the time it took its first law students, the idealism that had spurred the opening of a law school at La Trobe was already being eviscerated. Thornton provides a list of woes. To placate the admitting authorities an assurance was given 'that the social was not going to overshadow doctrine; the core curriculum was devised along conventional lines.'⁴² When extra appointments were made, the La Trobe hierarchy employed legal positivists who would teach the commercially oriented core subjects in line with what the admitting authorities desired.⁴³ Yet again history repeated the refrain of the legal profession and its corporate allies calling the shots in crucial pedagogical areas. Then, in a move that was paralleled at Macquarie Law School, a restructuring exercise occurred. Thornton correctly terms the restructuring strategy a quintessential example of the corporatised university.⁴⁴ The fledgling School of Law was taken out of the Social Sciences fold and placed in a cluster that included Economics and Business.⁴⁵ A Faculty of Law and Management was established.⁴⁶ For Thornton, the new faculty was designed to ensure that 'law was expected to facilitate business rather than critique it. The general characterisation of law and legal studies as a social science was rejected altogether.'⁴⁷ Then the elective courses were whittled down by reducing the interdisciplinary offerings or replacing them completely with doctrinal units. The message coming from management was unambiguous. One academic summed up the pedagogical trend by noting: 'Law electives had to be generalist, dull and doctrinally orientated. The more black letter the better.'⁴⁸

In 1999 the coda to the long decline of La Trobe was played out. A report was commissioned by management under the pretext that the trajectory of the law school in the new century needed mapping out. Raoul Mortley, formerly a Vice-Chancellor from Bond University and academic at Macquarie University, was recruited to write the report.⁴⁹ Mortley's role as an ex-Vice Chancellor was paraded as the basis of the managerial skills required to conduct a review of the Faculty of Law and Management.⁵⁰ The background to the commissioning of the report was the liquidation of socio-legal scholarship at Macquarie in 1998. (That history is detailed below.) The winds of change were favouring legal conservatism. The La Trobe review, as it related to the law school, comprised just four pages. Its presuppositions were apparent from the types

⁴² Ibid 9.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid 10.

⁴⁶ Ibid 10.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid 11.

⁵⁰ Ibid.

of sources employed to support its findings. The report noted that the office holders in the student law society declared the La Trobe program 'needed to imitate its neighbours, rather than accentuate its distinctiveness'.⁵¹ This sort of comment was completely in keeping with the ethos expected from such an organisation, predicated as it is on building close links with large corporate law firms. The students who enrol in such a body are renowned for their ultra-conservative conception of law and their ambitious desire to join corporate firms when they graduate. Giving any credit to the viewpoint of a student body of this type regarding the destiny of an innovative law school is baffling. Putting an emphasis on their contribution is only explicable if there was a preconceived desire to utilise any evidence that favoured corporatising the law program. Unsurprisingly, the report recommended 'the rejection of the social in favour of applied commercial knowledge as the appropriate direction for the School of Law and Legal Studies.'⁵²

After eight years, the socio-legal framework at La Trobe law school was dismantled. The administration had no qualms about fully implementing the recommendation of the report. The socio-legal scholars at La Trobe were pressured to leave. Those who resisted were targeted as being incompatible with vocational methods of teaching and forced out by involuntary redundancies.⁵³ Those who survived bowed before management in order to keep their jobs. Thornton labels them as 'progressive colleagues' but describes her surprise as they went along with the sackings and the philosophical transformation of the La Trobe law school executed by management.⁵⁴

This phenomenon had occurred at Macquarie when the long delayed siege at that institution was waged. Liberal individualism and moral cowardice made the restructuring role of La Trobe and Macquarie management easier. Timorous academics fell in line with the corporate managers who wanted a curriculum based on professional practice. On a bizarre note, Thornton was herself ordered to relocate to the Spanish department at La Trobe.⁵⁵ Again the historical example of Macquarie was deployed by La Trobe management; at Macquarie the dissidents had been relocated to a different building. The upshot was that Thornton left La Trobe. Management was delighted: she was the best known liberal feminist there. The teaching staff at La Trobe was then replenished by recruitment of legal conservatives. One of those recruited noted that

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid 13.

⁵⁴ Ibid.

⁵⁵ Ibid 14.

‘the head of the law school had sought to hire him as he was keen to clean out the feminists’.⁵⁶

C *Macquarie Law School*

Macquarie Law School was founded in 1974. It took its first intake of students in 1975. Its two founding professors, Peter Nygh and John Peden, spent 1974 drafting the curriculum model that would be implemented at Macquarie.⁵⁷ Peden was in essence a traditional academic lawyer. In 1972 he had written a booklet spelling out his view of legal education. He noted that the primary aim of a law school was to instil the requisite skills and training to undertake legal practice.⁵⁸ He was only prepared to slightly modify his positivistic standpoint by accepting a role for policy considerations.⁵⁹ Stripped of its genuflection to the role of law in society, Peden viewed a law school as a vehicle for training students in the mechanics of legal practice. His was an epistemology firmly anchored in the axioms of legal positivism. Nygh was at first blush a more progressive spirit than Peden. He approached the curriculum task on the basis ‘that law could be best understood through an intellectual examination of it as a social phenomenon’.⁶⁰ In sum, Nygh and Peden exhibited an assorted mixture of views. Just what sort of law school would evolve from their ruminations was an open question. The calibre of staff enlisted at Macquarie would be of seminal importance in deciding its trajectory.

The early appointment of two CLS scholars who hailed from North America was a watershed event. Like Garbesi at UNSW, they opened up the prospect, at Macquarie, of a definitive break with vocational courses and the inception of a legal education in which the best values of liberalism would drive the curriculum. Would they suffer Garbesi’s ignominious fate? This worry was to cast an omnipresent shadow over Macquarie. From the outset of their appointment, Gill Boehringer and Drew Fraser were the driving force behind the attempt to create a critical legal education at Macquarie. For over two decades, in tandem with a handful of colleagues, they struggled to achieve their vision. They were not revolutionaries. They were pragmatists who understood that in the age of capital a truly liberal arts education was the highest peak of achievement attainable. This pedagogy was summed up by Boehringer and Fraser as constituting ‘such values as free enquiry, intellectual ... independence of thought and breadth of perspective ... and love of

⁵⁶ Ibid 13.

⁵⁷ Patrick Kavanagh, ‘Legal Education and the Functionalisation of the University’ (1988–89) 5 *Australian Journal of Law and Society* 22

⁵⁸ Ibid 21.

⁵⁹ Ibid.

⁶⁰ Ibid 23.

truth.⁶¹ In effect, at Macquarie, virtues associated with support for a citizen-based democracy were set as a guiding principle. In the wider society during the heyday of Macquarie, economic doctrines came and went while the Boehringer and Fraser group ploughed on regardless, inculcating a spirit that ensured teachers and students engaged in a 'joint adventure of ideas'.⁶² It would be wrong to cast Boehringer and Fraser in a hagiographic light, but the empirical evidence supports the view that they spearheaded the drive to integrate law and the humanities at Macquarie while narrowing the province of legal positivism.

Boehringer and Fraser were blessed with some success, but in 1998 they were comprehensively routed. Within a short space of time everything they built had been extinguished. Macquarie was transformed into a vocation-oriented law school, and this became its trademark with the ideological content of the curriculum experiencing a sharp shift to legal conservatism. The classroom became a location for focusing on instrumental skills. Time was soaked up by solving legal problems that treated facts as discrete entities sapped of their social component. An ambience was created that ensured decontextualised issues became the centrepiece of study. With the spotlight on practical problems, theoretical ambition nosedived. Macquarie lost its pedagogical edge and reforming zeal. It eschewed the vision that law was a component part of the humanities. It sidelined the idea that mastery of doctrinal structure had to be balanced by an interrogation of the economic, political and historical context of judicial decisions. The corporate managerial elite led by Di Yerbury, the long running Vice-Chancellor, was happy about the sequence of events. Yerbury and her clique were now free to inform the legal establishment that Macquarie was concentrating on inculcating the applied skills and commercial knowledge necessary for its students to undertake legal practice. Legal positivism ruled supreme. As the critical legal education model was quashed, a tranquil mood descended on Macquarie Law School. In a short space of time it became a pale copy of its mechanistic peers. A peaceful desert underpinned by a trade school mentality was created. A number of key administrative figures were appointed by management to leadership roles in the law school. They exhibited no reluctance in doing management's bidding.

The defeat of the Boehringer and Fraser group was much more than a personal tragedy. It symbolised the death of the ancient ideal of universities. The image of a university endowed with a decentralised form of governance comprising a community of equal

⁶¹ Gill Boehringer, Drew Fraser, Richard Thomas and Yvonne De Michiel, 'An Argument for a Contemporary Legal Education' (1988-89) 5 *Australian Journal of Law and Society* 116

⁶² *Ibid* 102.

scholars perished at Macquarie Law School. The range of forces that pulled Boehringer, Fraser and their supporters down were not purely economic. The tragedy is that from the inception of the Macquarie Law School, Boehringer and Fraser foresaw the social forces that would destroy their educational and governance project. In 1977 Fraser was warning that if an oligarchical power structure which had Nygh and Peden as its figureheads remained immune to change there would be a 'crushing of the hope that the School of Law might play a significant role in the development of an autonomous tradition of critical legal scholarship and teaching.'⁶³ Fraser began to experience scepticism that a 'dialogue among equals' was in operation,⁶⁴ and insisted that without a spirit of egalitarianism there was no hope of achieving a scholarly syllabus at Macquarie, given the growing anti-democratic proclivities of Nygh and Peden.⁶⁵ Fraser pointed out the dire events at UNSW and the implications for the mode of legal education at Macquarie, given its democratic deficit.⁶⁶ Without what Fraser termed 'collective resistance', the future would be one where 'the ideal of a progressive law school at Macquarie can never hope to become more than a well-intentioned cliché.'⁶⁷

Neither Boehringer nor Fraser was imbued with prophetic powers. What they did understand was that based on historical precedent, there was only a slim chance of pulling off a victory over the dominant teaching model that favoured professional legal training. And to secure lasting educational success, the ethos within the law school would need to be transformed by a flowering of internal democracy. A strong united front drawing together those who wanted to teach in a different way and those unwilling to follow a path charted by corporate managers would need to be built. That objective was to prove an elusive one.

In retrospect, 1977 was a crucial year at Macquarie Law School. In the previous two years there had been some positive steps taken towards the creation of a challenging legal education. Of prime importance was the early delegation of course design to groups of teachers. Drafts would then be 'submitted to the entire academic staff for discussion and general agreement'.⁶⁸ This was self-government of a community of equal scholars in practice. But such steps proved unpalatable to orthodox minds bent on closing down open and democratic forms of governance. Rifts started to widen, and two schools of pedagogy and governance began to collide. One group was led by Nygh and Peden, the other by Boehringer and Fraser. It

⁶³ Drew Fraser, 'Turbulence in The Law School: Republican Civility vs Patrician Deference' (1988-89) 5 *Australian Journal of Law and Society* 49

⁶⁴ *Ibid* 47.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* 63.

⁶⁷ *Ibid*.

⁶⁸ *Ibid* 47.

was a dispute that was not resolved until the events of 1998 put the issue beyond doubt.

In 1977 the law school was in the grip of a battle between two competing ideals. The Boehringer and Fraser camp were calling for a decentralised and collegial form of governance that emphasised political equality.⁶⁹ They wanted open forums for discussing matters such as the role staff should play in selecting new recruits.⁷⁰ Boehringer and Fraser were not interested in bringing on board those who simply aped their views. They wanted appointments to reflect 'readily discernible or coherent standards of academic excellence and scholarly achievement'.⁷¹ Obviously the hope was that whatever the philosophical persuasion of future recruits, the overarching factor was that new blood, whether of the right or left, would have the intellectual horsepower to engage with big ideas and facilitate an uplifting classroom experience. In recruitment, as in every other sphere of governance, what mattered to Boehringer and Fraser was crystal clear. They steadfastly promoted the view that without a community of scholars busily engaged on discussing a medley of methodologies that promoted spirited intellectual enquiry, there could be no coherent academic program.⁷²

While Boehringer and Fraser were promulgating the adoption of a classic view of a liberal arts law degree, the Nygh and Peden group were inextricably linking the issue of authority with the primacy of legal positivism.⁷³ In a memorandum to the law school in July 1977, Nygh noted the mandate he had from the University Council and the Supreme Court of New South Wales to 'create a course of professional training'.⁷⁴ Fraser picked up on Nygh's intellectual blind spot.⁷⁵ He accused him of backtracking from his earlier idealistic protestations issued at the time of the founding of the law school. At that juncture, Nygh had noted that Macquarie should follow 'a socially aware alternative approach to legal education'.⁷⁶ Fraser accused Nygh of ditching his proclaimed progressive credentials. According to Fraser, what was occurring was the bypassing of collegial decision-making processes and acceptance, as an article of faith, of the nostrums of legal positivism. Authoritarian rule had supplanted the self-governing aspirations of a community of scholars bound together by an egalitarian code. Nygh had broken ranks and was seeking to further the aims of a 'patrician elite composed of

⁶⁹ Ibid 45.

⁷⁰ Ibid 49.

⁷¹ Ibid.

⁷² Boehringer, above n 26, 54.

⁷³ Ibid 54.

⁷⁴ Peter Nygh, 'Memorandum To Law School Staff From P E Nygh 5 July 1977' (1988-89) 5 *Australian Journal of Law and Society* 57

⁷⁵ Fraser, above n 63, 48.

⁷⁶ Ibid.

senior members of the Professoriate, the legal profession and the judiciary'.⁷⁷ Nygh was acting as the spokesman for the power elite that believed it 'possessed the authority to prescribe the intellectual parameters of a professional legal education'.⁷⁸

It was in 1977 that the need for an infusion of new staff to teach the final two years of the law degree program was recognised.⁷⁹ For Nygh and Peden this represented a fortuitous opportunity to dilute the legitimacy of the CLS position Boehringer and Fraser held while delivering a blow to their calls for collegial decision-making.⁸⁰ For Nygh and Peden, the recruitment drive at Macquarie was part of an 'extended campaign to transform the character of legal education'.⁸¹ At the same time as watering down the influence of Boehringer and Fraser, the space for other theoretical frameworks apart from CLS to emerge at Macquarie would be crushed. For Nygh and Peden the way forward for a law school was to recruit 'more black letter law teachers to provide students with the appropriate professional orientation in their law studies.'⁸²

As those staff members barracking for students to be drilled in the positivist rules and concepts that they took to be the skeletal structure of law mobilised, Fraser issued a withering critique of the epistemological flaws in their argument.⁸³ In a discussion paper he noted the debasement of practice implicit in the positivists' case. This struck at the heart of the intellectual rationale for positivism. After all, the case for instilling in students a rule-based education was founded on the belief that it provided the practical tools necessary for legal practice. It provided a system of rules that had practical significance in the real world. If this craft rationale was based on unexamined assumptions that were false, it struck a blow at the pedagogical foundations of positivism. It reduced the study of law to an ideological enterprise that perpetuated misguided premises and inequalities. Fraser expressed the view that *a priori* knowledge in the shape of mechanically applied rules was guaranteed to produce unsatisfactory results.⁸⁴ By manipulating rules bereft of a reasoning process that took account of a complex social universe imbued with contending values and interests, jurists could only achieve irrational and impractical outcomes.⁸⁵ In other words, judicial decision making

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Boehringer, above n 26, 54.

⁸⁰ Fraser, above n 63, 52.

⁸¹ Drew Fraser, 'When Are Problems Really Problems? A Memo to the Law School Staff from: Drew Fraser, 2 August 1978' (1988-89) 5 *Australian Journal of Law and Society* 72

⁸² Boehringer, above n 26, 54.

⁸³ Drew Fraser, 'Knowing the Law: a Discussion Paper. Drew Fraser, 19 October 1977' (1988-89) 5 *Australian Journal of Law and Society* 66

⁸⁴ Ibid 67.

⁸⁵ Ibid 68.

of a positivist persuasion was premised on operating in a social vacuum, and the upshot was an instrumental view of law that failed to serve justice. Only by imbuing the judicial process with a holistic understanding of the social nature of the facts in dispute could a prudent and empirically supported practical decision be achieved.⁸⁶ Implicit in Fraser's critique of the dogmatic nature of positivism was the view that a legal education guided by the humanities would result in a qualitative rise in the calibre of legal reasoning that would translate into superior judicial judgments.

Fraser's opponents were not interested in countering him on an intellectual plane. Their utilitarian training had not equipped them to engage in socio-legal analysis. They spurned a contest based on contending concepts and philosophies. They were craftspeople who had never attuned their minds to thinking of law as a political product that reproduced hierarchies and domination. They also turned a deaf ear to Fraser's critique because they realised that raw power was on their side and that the respective calibre of arguments would not be the cardinal factor in determining the fate of Macquarie Law School. Their mantra that a model of rules was the functional imperative for professional legal practice was relentless and immune to logic. It was a campaign that was given fresh impetus by Nygh and Peden successfully hiring a batch of legal positivists in 1977.

By 1979, Peden was confidently repeating the refrain that the courses at Macquarie were established to satisfy the admission requirements that were supervised by the Supreme Court.⁸⁷ He stated that the approval of the Court for courses that satisfied admission purposes was what drove many students to enrol at Macquarie and that 'we owe a duty to present and future generations of students to ensure that our degrees are accepted by employers as meeting their standards.'⁸⁸ This pragmatic approach, with its emphasis on serving the practical considerations of a corporate hierarchy, was reinforced by one of Nygh and Peden's new legal conservative recruits: in 1979 Andrew Lang stressed that the aim of a legal education was to ensure students acquired a 'firm grasp of basic legal principles'.⁸⁹

By 1985 a balance of power had been struck between the warring sides at Macquarie. It was, like all truces, an unstable arrangement, and it was destined not to endure. In 1985 a report into the state of Australian legal education was commissioned.⁹⁰ The Pearce Report

⁸⁶ Ibid.

⁸⁷ John Peden, 'Philosophy of Macquarie Law School: John R Peden Professor of Law and Acting Head of School, August 1979' (1988-89) 5 *Australian Journal of Law and Society* 80

⁸⁸ Ibid 81.

⁸⁹ Andrew Lang, 'Should the School of Law Have a Philosophy? Andrew Lang, August 1979' (1988-89) 5 *Australian Journal of Law and Society* 79

⁹⁰ James, above n 8, 973.

was released in 1987 and it had an ambivalent message.⁹¹ It spoke of the need to promote a law degree that contained a sociological and liberal component.⁹² However, the Report also recommended the closure of Macquarie's law program.⁹³ The Report accepted the persistent allegations from the legal establishment that focused on the supposed lack of 'solid legal substance' in the teaching program at Macquarie.⁹⁴ Supporters of the CLS movement at Macquarie were regarded as scarecrow figures and impugned for impeding the training of legal practitioners.⁹⁵ Ironically the Report, with its nod towards the benefits of an interdisciplinary and contextualist legal education, bore witness to the fact that a return to unbridled legal positivism was not feasible. The historical endeavours of the pioneering figures at Australian law schools had been partially exonerated. Thornton neatly sums up the underlying dynamic of the Pearce Report when she wryly observes that 'doctrine, it seemed, must remain at the centre regardless of what else was going on.'⁹⁶ Any move towards a genuine critical legal approach or steps beyond the merely tokenistic would be met by stiff resistance from the legal establishment.

Macquarie survived the closure fears sparked by the Pearce Report. In 1988 Boehringer admitted rather ruefully that the debate over the destiny of Macquarie Law School had been going on for more than a decade.⁹⁷ It was to go on for a further decade before the finale was played out. In 1989 Lang was still continuing with the theme that he and his confreres helped sow with the members of the Pearce Committee. Lang asserted that a law school containing CLS proponents would make students unemployable because they had prioritised the sociological at the expense of the coverage of rules necessary for professional legal practice.⁹⁸ Evolution then took its course, and by the early 1990s Nygh, Peden and Lang had departed from Macquarie. Boehringer became Head of the Law School, but his elevation was set against a backdrop of a traditionalist majority that continued with their doctrinal teaching practices at Macquarie. Fresh appointments were made including some who enthusiastically supported the ancient ideal of a community of scholars. These new staff members understood the need for students to possess technical competency but also relished the prospect of aiding a flourishing critical legal scholarship guided by the need to create within every course a rigorous strand of conceptual thinking. These new recruits

⁹¹ Margaret Thornton, *Privatizing the Public University: The Case of Law* (Routledge, 2011) 62.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ James, above n 8, 974.

⁹⁶ Thornton, above n 91, 62.

⁹⁷ Boehringer, above n 26, 53.

⁹⁸ James, above n 8, 972.

understood that it was possible for law to be taught in a way that made it a progressive force.

I was one of the new recruits who sought to entrench a different way of viewing governance and the legal syllabus at Macquarie. I joined those who were catholic in the range of epistemologies they acknowledged but were united in a passionate commitment to socio-legal scholarship as part of every course. This entailed teaching the rules, but putting them in historical and social context. I quickly realised that implementing a holistic legal program faced stiff resistance. The upper echelons of the university administration regarded Boehringer and Fraser as a thorn in their side. They had always supported the kinds of views expressed by Nygh and Peden and were bent on realising the aims of a style of legal education based on applied knowledge. The overwhelming majority of staff, old and new, had a vision that only stretched as far as their own courses required. As liberal individualists they wanted to be left alone to pursue their own predilections, and any talk of a collective mission was met with claims about 'totalising theories', while increasingly the old chestnut about a dysfunctional law school began to recirculate. Pejorative language of this type was a boon for management and it signified that a day of reckoning was looming. In fact it was a singular theory that had operated from the inception of the law degree at Macquarie. The theory that bound the mavericks together was one of providing scope for refreshing ideas, free enquiry and the creation of a coherent legal program that provided a curriculum that was not simply ideological training for entering the service of the power elite. As the always fragile unity in a common cause frayed, a fragmented and loose coalition of forces lacking a unified purpose emerged. This presented a ripening opportunity for managerial prerogatives to play a decisive role. Instead of acting as an honest broker and striving to ameliorate differences, the administration played a partisan role. It threw its support behind the forces that railed at any notion of a community of scholars bound together by allegiance to a curriculum that challenged a market based model. Management encouraged schisms and created a climate conducive to a showdown that would produce a revamp of the law school.

When in 1998 a restructuring proposal was engineered by Di Yerbury and her circle of advisers — one that entailed shifting a group of Business Law academics into the Law School — the hierarchy quickly grasped the splintered nature of the forces that confronted them. Only one group in the Law School was vociferous about the reactionary nature of the proposed amalgamation. Management were confronted by the Boehringer and Fraser group declaiming against the strategy, which they claimed was a corporatist plan to reclaim territory lost by legal positivism, and a scheme designed to appeal to the ultra-conservatives in the legal establishment which had always

excoriated the Macquarie experiment. Management were not coy about stating that its restructuring plans were supported by judges and legal firms they had consulted. The Boehringer and Fraser group were alone in asking what justifiable synergies existed between business aims and the study of law. This group also sought an academic rationale for merging a group of business academics intent on teaching the law as a system of rules with a school that was at least nominally committed to a liberal arts orientation in legal education. Business Law had been based in the Economic and Financial Studies department and its students were made up of finance students seeking to top up their studies with corporate law subjects that prepared them for entry into the accountancy profession. None of the Business Law academics questioned their adherence to the ethos of legal positivism. The Business Law academics had not initiated the merger. They were content to stay under the umbrella of the Economics department. It was a management strategy led by Yerbury and her disciples. The underlying aim was to further dilute the role within the Law School of those responsible for the development of a critical legal education at Macquarie. It was payback for years of being confronted by those who battled for an autonomous law degree free of deference to the power elite. It was a ploy to appease those who wanted a legal system and functionaries obedient to a corporatist agenda. And it was a strategy that worked. The Boehringer and Fraser group was isolated, and cognisance was quickly taken of the fact that it was just one of a number of competing groups in the law school. There was no impetus for collective action to block the restructuring plan, and the bulk of law staff either acquiesced or joined forces with management.

Management acted swiftly to settle accounts with the sole dissident group in the Law School. They provided an object lesson in the machinations of the corporate managerial elite that wields power in the modern Australian university. Working in tandem with a cohort of malleable academics within the Law School, a plan was devised that involved not only physically relocating the mavericks but setting up a special department designed to house them.⁹⁹ The collaborators included those who identified as postmodernists. They may have regarded themselves as progressives, but by their actions they revealed that they were prepared to execute managerial policies. They comprised a component part of the liberal individualists who had never displayed any interest in creating a critical legal scholarship program that embraced the whole of the Law School. Likewise they had never challenged the legitimacy of management to set the parameters of governance. Guided by a linguistic based philosophy and a doctrine of political individualism these academics

⁹⁹ Gill Boehringer, 'Infamy at Macquarie: Economic Rationalism and the New McCarthyism' (1999) 24(1) *Alternative Law Journal* 31

were well suited to entrenching managerial prerogatives. Acting in concert with management, the collaborators formulated a plan that linked exile with a scheme to take courses away from the Boehringer and Fraser group and hand them over to orthodox academics already on the staff, or to pliant recruits ready to fill the shoes of those being involuntarily hived off from the Law School.

The dissidents were left with a meagre number of elective courses to teach. The word soon spread that undertaking courses with those housed outside the law building was a risky venture. The implicit message was that any such courses would not satisfy admission authorities. A voluntary redundancy program was launched with the aim of winnowing the Boehringer and Fraser group. It worked, and the ranks of the exiles shrank. The rump that was left had to confront the sober fact that no matter how long they clung on to their employment, any prospect of career progression vanished. The viciousness exhibited by the administration and their academic acolytes elicited a backlash from two academics. These two had stood aloof from the struggle against the amalgamation with Business Law, but they refused to partake in the ostracism of colleagues that followed the partition of the Law School. They were disenchanted with the new order and were sufficiently outraged to write an article about the dying of the Law School. Shortly after leaving Macquarie, John Touchie and Scott Veitch wrote their article against the backdrop of the expulsion of the Boehringer and Fraser group. The article is a scathing critique of the administrators and the personality traits of their academic collaborators within the Law School. With polemical passion they note the conceptual poverty that underpinned the setting up of discrete departments within the shell of a refashioned Law School.¹⁰⁰ They grasped that this was a move to camouflage the moral infamy of locating the exiles in a sham department. In brief, the creation of multiple departments was designed to sanitise the fact that one department was treated as an outcast. They illuminated the simple fact that the restructure had no pedagogical basis. It was driven by malice towards the dissidents, and apart from reinforcing their isolation it was simply a mechanism to put people together who felt comfortable and secure in each other's company.¹⁰¹ Touchie and Veitch were clear in expressing the view that none of the rationale for basing departments on proper and justifiable academic divisions occurred.¹⁰² The exercise was aimed purely at achieving personal preference for the insiders who had given unbridled support to management, and discriminated against the Boehringer and Fraser group by engineering a pretext to

¹⁰⁰ John Touchie and Scott Veitch, 'The Decline of Academic Reason' (1999) 24(1) *Alternative Law Journal* 26

¹⁰¹ *Ibid* 28.

¹⁰² *Ibid* 26.

institutionally isolate them and take courses away from them, thus confirming their pariah status.¹⁰³ Touchie and Veitch accused their former colleagues in the Law School of acting in bad faith and being a tool of Yerbury and her supporters. They alleged that all of those who lined up on the side of management were guilty of intellectual and moral cowardice.¹⁰⁴

Looking back, Thornton derives an important point from her travails at La Trobe. She notes that any ‘attempt to do more than make a tokenistic gesture in the direction of law and society meets with resistance.’¹⁰⁵ In other words, a robust counteroffensive will be launched by a powerful constellation of forces against those who set out to confront the axioms of the dominant legal pedagogy. The decapitation of the La Trobe, UNSW and Macquarie experiments provides cogent evidence that the university guardians of the power elite will not remain neutral and passive when the ideological content of a law school curriculum is being challenged by ardent reformists.

IV THE TURNING BACK OF THE CLOCK

Psychological traits played a role in the demise of the attempt to forge new pathways of legal education in Australia. Those who cooperated with management to discard academics promoting a critical legal education model were complicit in securing the rule of the power elite and positivism. They were not insignificant players in the drama that unfolded at UNSW, La Trobe and Macquarie. But deeper forces than human psychology were at work in ensuring the obliteration of any institutional structures that gave succour to those challenging the dominion of applied commercial knowledge at law schools. This part of the article illuminates the key factors that curbed the rise of ground-breaking law schools.

Thornton has enumerated the issues that ensured the demise of socio-legal forms of teaching law. She notes that the doctrine of neoliberalism and a new knowledge economy are responsible for the unbridled rule of mechanical jurisprudence.¹⁰⁶ According to Thornton, the critical legal studies movement that began to flourish in Australia in the 1970s was felled by the economic doctrines of Hayek and Friedman, which began to garner influential political support in Australia during the 1980s. Belief in unchallenged property rights and free markets combined with the technocratic requirements of a system that seeks facilitative legal rules shrugged off a challenge to the stranglehold of legal positivism.¹⁰⁷

¹⁰³ Ibid 27.

¹⁰⁴ Ibid 28.

¹⁰⁵ Thornton, above n 11, 15.

¹⁰⁶ Margaret Thornton, ‘Law as business in the corporatized university’ (2000) 25(6) *Alternative Law Journal* 269, 271.

¹⁰⁷ Thornton, above n 91, 5, 8.

Thornton's is an incomplete insight. It omits the historical pattern at work both in Australia and overseas that resulted in the dethroning of a number of ventures aimed at transforming legal education. Over the years, several projects foundered due to vested interests killing off methodological frameworks that challenged the supremacy of legal positivism. The eclipse of the Columbia and Yale legal education model in the interwar years pinpoints the misguided perspective of Thornton. Long before the advent of the ideology of neoliberalism, an attempt at revamping legal education had come to grief. Moreover, the way the UNSW project was crushed at the highpoint of Keynesianism is another empirical retort to Thornton's assumption that the rise of neoliberalism and a new knowledge economy spearheaded the eclipse of critical legal education. Another challenge to Thornton's framework of analysis is that no radical shift in economic doctrine or ideology provided the catalyst for the victory of legal conservatism at Macquarie. Thornton even undercuts her own thesis by noting that in 1970, well before the arrival of neoliberal politics, the great English historian E P Thompson was inveighing against the combined power of local industrialists and university administrators at Warwick University who were busy imbuing its academic program and operations with corporate capitalist values.¹⁰⁸

What occurred on the legal educational front is more plausibly explained by seeing it through the prism of the long-term growth of corporate power. Legal positivism went on the retreat for short bursts of time, then an inevitable blowback was experienced as mechanical jurisprudence reasserted its dominance. Its victory was aided and abetted by the evolution of corporate firms and their allies in the legal profession and the administrative hierarchy within universities. Political power in the age of corporate capitalism snuffed out Legal Realism, and since then every reforming mission has fallen victim to the same combination of elite forces. Put simply, those who championed legal positivism had power on their side.

Legal positivism legitimates the sovereignty of capital. Neoliberalism, with its elixir of deregulated markets and unfettered corporate power, is simply the latest stage in an accumulation of capital process that has reached a tipping point where monopolisation has created giant firms.¹⁰⁹ The rise of oligopolistic corporations preceded neoliberalism. An ostensibly depoliticised legal framework that underpins a commodity economy is just as necessary in contemporary oligopolistic market conditions as it was in the era of nineteenth-century free market economics. The vaunted apolitical nature of legal positivism assists its ideological role of reinforcing the property rights owned by the economic elite. Its ideological

¹⁰⁸ Ibid 8. Also see E P Thompson, *Writing by candlelight* (Merlin Press, 1983) 13.

¹⁰⁹ Paul Baran and Paul Sweezy, *Monopoly Capital* (Penguin, 1973) 19.

function is the keystone for the longevity of legal positivism. This conservative legal philosophy has shored up the economic foundations of private property and a commodity-based economy through all the phases of capitalism. As a legal model it has been durable because it provides a powerful ideology that supports the buying and selling of commodities, and it operates as a bulwark for commercial society. In effect, legal positivism is concentrated economics. Economic power is the foundation upon which legal positivism rests. In a true sense those who have an alternative understanding of law and legal education are at the same time implicitly or explicitly critics of the extant property relationships, and must expect to draw fire from legal academics who owe their allegiance to positivism and the power elite that underwrite its hegemony.

Corporate capitalism expanded its reach throughout the twentieth century and its monopolising tendencies narrowed the scope of democracy in every field.¹¹⁰ Universities are too important to the corporate capitalist system to be left as islands of self-governance. Thus it is not surprising that in the course of the twentieth century there was a growing trend of interventionism in the internal operation of places of higher learning. As corporate capitalism expanded its reach into every sphere of life, there was a struggle between those who viewed universities as a domain of freedom of thought and corporatist interests which desired a learning institute that instilled mechanistic skills in trade school disciplines. Neoliberalism accentuated the move to a corporate model in universities. But the roots of the drive to make universities a form of business enterprise stretch back into the history of the system and the logic of a social formation that has undergone waves of development.

If neoliberalism was not the catalyst that Thornton posits, then it can be cogently argued that the so-called new knowledge economy was also not instrumental in executing a reconfiguration of the legal syllabus. To begin with, the economic structure underwent no fundamental transformation that sparked the need for a boost in the mechanistic skills of trainee lawyers. Under modern capitalism, legal positivism has been an effective instrument of the economic status quo. It is a protected species, and whenever its authority has been put to the test there has been a putsch to restore the status quo.

Deep structural corporate forces operating after the Second World War provided an impetus to legal positivism. While the post-war years provided the Keynesian trigger for socio-legal studies to be given a new lease of life, it also ironically provided the material circumstances that would eventually restore legal positivism to its commanding role. Weisbrot has illustrated how large corporate law firms began to emerge in Australia in the post-war period in

¹¹⁰ R. Hilferding, *Finance Capital* (Routledge & Kegan Paul, 1985) 370.

response to the rapid expansion of multinational companies.¹¹¹ From the outset the corporate law firms focused on the commercial work that facilitates the needs of capital and the takeover of the Australian economy by foreign multinationals.¹¹² These legal firms are adjuncts of capital and they run lean businesses, for they are well aware that their rich clients talk among themselves about where to get the best deal, and they will move their account if over-servicing occurs and bills are too high.¹¹³ Viewed within this historical context, it was post-war multinational capital, not neoliberal orthodoxy, that turned lawyers into knowledge workers. The big corporate law firms spurred the movement to make lawyers knowledge workers who spent their days facilitating market exchanges by ‘preparing contracts for billion-dollar takeovers, mergers and acquisitions, as well as negotiating cross-border conflicts and protecting intellectual property.’¹¹⁴ Given that legal positivism provided the bedrock knowledge that was applied in the corporate law firms, the captains of these enterprises had a vested interest in not promoting a form of teaching that proffered a challenge to the commercial forces that the legal system is devoted to serving.

It is a mistaken assumption on Thornton’s part to believe that a nebulous concept such as a new knowledge economy stifled the prospect of long-term success for the critical legal education movement. Both in the UK and in Australia studies have shown that new technology is not creating a knowledge-driven economy that is transforming jobs in the service industry. The delivery of legal services is not being revolutionised by communications technology. In fact the *bottom* end of the market is responding to technological forces. Job growth in the UK is focused on the ‘low-skilled end of the service sector-in shops, bars, hotels domestic service and in nursing and care homes’.¹¹⁵ In the Australian context a similar picture emerges. Using data from the Australian Bureau of Statistics, a team of researchers demonstrated that in the contemporary era there was a decline in high-skilled jobs and a rise in low-skilled employment.¹¹⁶ The major source of this deskilling was information technology. It was creating low-grade jobs with minimal autonomy and job discretion.¹¹⁷ Even in professional occupational groups there was a trend towards a lowering of the skills required to execute

¹¹¹ David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) 258.

¹¹² *Ibid.*

¹¹³ *Ibid* 259.

¹¹⁴ Thornton, above n 91, 27.

¹¹⁵ Larry Elliott and Dan Atkinson, *Fantasy Island: Waking Up to the Incredible Political and Social Illusions of the Blair Legacy* (Constable, 2007) 79.

¹¹⁶ Peter Fleming, Bill Harley and Graham Sewell, ‘A Little Knowledge Is a Dangerous Thing: Getting Below the Surface of the Growth of “Knowledge Work” in Australia’ (2004) 18(4) *Work Employment and Society* 737–8

¹¹⁷ *Ibid.*

tasks.¹¹⁸ In large law firms there is an advanced division of labour; individual lawyers are responsible for only a component part of a brief. This compartmentalisation of the work is designed to maximise productivity, but it reduces the range of skills required by lawyers.

The contradictions of liberalism have also played a role in unravelling projects aimed at revamping the foundations of legal education. The philosophy of liberalism is shot through with contradictions. While praising human rights, democracy, reason, tolerance, diversity and scepticism, the emergence of concentrated economic power undercut the liberal goal of maximising the free play of the mind. The attempt to make liberalism live up to the better angels of its tradition has been undermined by the rise of giant corporations. Within the legal academy, encouraging the intellectual qualities necessary to challenge the status quo in the name of human welfare and autonomous thought is made more difficult by the hegemony of towering corporations that rule in the private sphere and seek to set the agenda of public policy. Corporate managerialism has facilitated the submission of individuals to market forces and put pressure on the Enlightenment values of justice, equality and informed rationality. The elements that constitute a liberal legal education are put under enormous strain by the authoritarianism of corporate Australia along with a legal profession, and a bureaucratic elite within universities, that serve commercial imperatives. The pervasive individualism of liberalism also undercuts its positive traits. The academics aligning themselves with management for careerist and opportunistic reasons vividly illustrate the downside of liberalism and magnify the forces opposed to its finer humanistic tradition.

V CONCLUSION

In a sense this article has traced a tragedy. It has spelt out the collapse of numerous attempts to create new and modern law schools. It has tracked the shattering of optimism that occurs when an ancient institution begins to die. Universities are part of the civilising chain of Western civilisation. They emerged to give voice to the humane arts and act as a focal point for a critique of society. They were not established to be trade school institutions that instilled mechanistic skills and were governed by an oligarchy. If universities are to be reduced to appendages of corporations and the state, then it would be better to let them die and be replaced with apprenticeship institutes governed by the business elite. Once the humanities are divorced from a discipline and a university betrays its classical mission to instil intellectual values, it is on the path to becoming an instrument of a corporate managerial elite.

¹¹⁸ Ibid.

In the case of the study of law, the transition to corporatisation is complete. As this article has highlighted, during the twentieth century the drift towards law schools becoming an instrument of a corporate elite and state was challenged a number of times. The possibility of a competing ideology and revamped law school curricula surfaced. These contrarian models were based on the ancient concept of universities. Law was to be taught as a component part of the liberal arts. This humanities-based pedagogy was to be underpinned by a collegial form of governance based on the equality of a community of scholars. In Australia this methodological framework was defeated by the selfish aims of those who were blind to the ethos of the ancient university and instead worked hand in glove with the power elite to corporatise higher education. This article has pinpointed the array of factors that strangled the flourishing of an alternative legal education. The causal chain responsible for stifling the emergence of a new model for teaching law is not straightforward.

It is one of the bitter ironies of history that the class that held aloft the banner of individual freedom while emancipating humanity from serfdom has retreated from implementing a legal education based on liberal humanism. Concentrated economic power is regarded with suspicion by liberals, for it undermines the liberty of the individual. Yet modern capitalism is based on oligopolies or monopolies, and reconciling that reality with classical liberalism has proved impossible. Contemporary powerbrokers feel threatened by a liberal credo that prioritises equality, free enquiry, love of truth and independent thought. Of greater utility has been a framework of analysis that uncritically accepts the status quo and makes only hollow gestures towards liberal values. Legal positivism is a deeply conservative form of jurisprudence, and it exerts a seductive allure over the power elite. Under the guise of the dominance of rules it provides the depoliticised legal scaffolding that allows continuity for the sovereign rights of private property. It is a zero-sum game for big business to entertain universities as centres of independent thought, for the resultant critique of society may entail a close investigation of the prerogatives of capital and the systemic inequalities that are the hallmark of a market society. The upshot of this culture of fear on the part of the economic elite and their allies is that corporate power throughout the twentieth century was opposed to the socio-legal doctrines that flourished in a university context. As history shows, as soon as the balance of forces was favourable, reformist models that challenged the trade school mentality were toppled.

Within the academy, a medley of circumstances broke the linkage with the old idea of a university. As the twentieth century unfolded, universities came under commercial pressure to turn into business enterprises, with syllabi to match, and the corollary was that strange alliances were struck. Instead of top administrators waging

a fierce struggle against the corporatisation of universities, they fell into line with their private-sector peers. This was not the product of neoliberalism. The period immediately after the Second World War saw the rapid growth of large firms, and as business culture penetrated every sphere of society, university chiefs lost interest in creating islands of self-governance and collegial equality and instead replicated the aims and organisational structure of big business. A pyramid of power became a cardinal feature of universities and they began to operate as if they were empires of capital. Universities became top-heavy with administrators, and they spoke a business-oriented language of profit centres and the pricing mechanism. Humanities were regarded as loss makers and were subsequently irretrievably weakened. Only courses that had synergies with big business prospered. In law, instrumental skills accentuating professional legal practice and mechanical jurisprudence were uncritically accepted as the focus of a law degree. Those who espoused a critical legal education that implicitly contained a critique of the corporate state were hounded, and their ideas snuffed out. Most legal academics, even those of a self-proclaimed progressive hue, were unable to rouse themselves and fight for the ideal of the ancient university. Calls to fight for counterhegemonic ideas and give practical support to the quest for a community of scholars dedicated to self-governance fell prey to personal foibles and a brand of competitive individualism that fuelled the move to the marketisation of universities. These personality types cooperated with the political and economic elite of corporate capitalism in speeding the death of the innovative models employed at places like UNSW, La Trobe and Macquarie.

The aspiration of reconfiguring law departments to fit within the matrix of an ancient concept of universities and guiding them towards a genuine liberal legal education now appears utopian. Today it is simply inconceivable to realise the dream of a dialogue of equals determining the pedagogy and governance of law schools. The burst of open democracy at places like Macquarie in its heyday appears a distant memory. The epoch that opened up pathways for critical legal education to emerge has ended as managerial capitalism has tightened its autocratic grip on law schools. Decisions on fundamental issues of vital importance to the lifeblood of law schools are now made without any reference to those affected by them. Democracy has no reach within law schools. Corporate power, which now stretches up into the highest realm of the state apparatus, makes major decisions with only a token nod to input from academics. The bulk of professors are as powerless as the lower ranks. Only the Dean in each law school is strategically placed to be part of the conversation that sets academic and governance parameters. Power has been centralised and made even more unaccountable since the demise of the progressive experiments at UNSW, La Trobe and Macquarie. The

Deans of Australian law schools have their own peak organisation and behind its protective wall they engage in policymaking along with other more important bodies. The Council of Australian Law Deans (CALD) is an activist organisation that operates beyond the purview of the Deans' fellow academics, and they have made use of their freedom from accountability and close interrogation to formulate the standards they deem applicable to legal training.¹¹⁹ Above this bureaucratic body, the Australian ALP government has taken direct control of the syllabus by creating organs charged with prescribing 'what an LLB graduate is expected to know, understand and be able to do as a result of learning.'¹²⁰ The government-inspired organs fashioned pedagogical outcomes in league with standards promoted by CALD.¹²¹

In effect, the outline of a national curriculum has been mandated. And it was achieved with a controlling input from the usual suspects who have operated behind the scenes over the decades to set the agenda for legal education. The judiciary, the admitting authorities and the legal profession were at the forefront in drawing up a prescriptive list of objectives that were implemented by CALD and government bodies.¹²² Needless to say, the anodyne generic skills listed in these objectives cannot grapple with all the crucial issues that underpinned the moves to transform legal education. There is no discussion of the need to develop an underlying philosophy allied with democratic governance structures to coordinate the actions of a community of scholars intent on sustaining a critical legal education. Instead of confronting the issue of the underlying dynamic of legal positivism there are homilies about identifying and articulating issues and applying legal reasoning to solve problem situations.¹²³ Buzz words abound, but stripped of a concrete context where they would operate, everything is reduced to clichés. The concrete context is a corporate capitalist world where legal positivism rules. To give the project a veneer of pluralism, consultation with academics is predictably paraded as one of the legitimating factors for a legal education template produced by an inner circle.¹²⁴ Beyond the phony consultation claims, it is clear that the objectives of learning that emerge are a technocratic exercise formulated under the aegis of the state apparatus and essentially driven by the elite interests which have traditionally stymied any innovative and liberating steps in legal education. The outcome of the project is study guides littered with vapid phrases about learning outcomes and graduate attributes

¹¹⁹ Sally Kift, Michelle Sanson, Jill Cowley and Penelope Watson (eds), 'Preface', in *Excellence and Innovation in Legal Education* (Lexis Nexis, 2011) xxxix.

¹²⁰ *Ibid.*

¹²¹ *Ibid.* 12.

¹²² *Ibid.* xxxix.

¹²³ *Ibid.* 13.

¹²⁴ *Ibid.* xxxix.

while in practice conservative legalism rules. Law schools have been pressured into becoming a mirror image of corporations and their knowledge base has been systematically ring-fenced to reflect the ethos of a market economy.

In the classroom an arid orthodoxy that poses no challenge to the corporate status quo, undergirded by the axioms of legal positivism, continues to predominate. This desiccated teaching model inflicts a personal and national cost. Thornton has noted that only half of all Australian law graduates enter legal practice,¹²⁵ while in the UK less than half of all law graduates enter the legal profession.¹²⁶ Even allowing for some law graduates finding work where legal knowledge may be a part of the required duties, the oversupply factor is a burning issue. It produces a misallocation of human resources. A substantial number of Australian law schools should be closed. But the university hierarchy is full of empire builders, and taking account of the national interest and stepping in to avoid many young people wasting their tertiary education is not part of their remit. Expanding the production of law graduates far beyond the capacity of the labour market to soak them up produces a swathe of workers who have received a very narrow and technical form of education that quickly becomes superfluous. Devoid of the generalist skills that a liberal humanist education can instil, the surplus law graduates will have to struggle even harder to equip themselves with a range of skills necessary for employability in other professional work. Often this will entail expensive retraining done from a very limited knowledge base due to the years of rote learning of legal rules that proved a waste of labour. Furthermore, if only there was an emphasis on law students employing their intelligence analytically and studying the social sciences in more than a desultory manner, more of the excess graduates could be endowed with the capacity to expand their horizons and grasp the potential aesthetic and financial rewards of making and fixing things in conceptually challenging occupations where skill shortages persist in Australia at every stage of the economic cycle.¹²⁷ Ironically their working lives would be richer than the bulk of those who found a cubicle in a law office and spent their time sifting through streams of paper and experiencing Kafka-like drudgery.

The folly of slavishly focusing student learning on technical proficiency and professional practice requirements has ramifications that reach deep into the national fabric. Yet the law schools are deserts, and any dissenting voices are easily marginalised. The days of dissent at UNSW, La Trobe and Macquarie have receded

¹²⁵ Thornton, above n11, 8.

¹²⁶ Thornton, above n 91, 47.

¹²⁷ Matthew Crawford, *Shopcraft as Soulcraft: An Inquiry into the Value of Work* (Penguin, 2009).

into history and are fading from view. In sum, a peaceful desert prevails in place of the lively joint adventure between academics and students, based on contrarian ideas, which should be ricocheting through the halls of the academy. This is the sort of peace that power elites everywhere cherish. There will be another generation of radical dissenters prepared to tilt at reactionary pedagogical and governance models but that next wave is on the dim horizon. The closing of the mind in a dark age of orthodoxy is the present keynote of legal education in Australia.