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# "Community Without Propinquity" — Teaching Legal History Intercontinentally

*Douglas Harris,* John McLaren,** W Wesley Pue,*** Simon Bronitt† & Ian Holloway††*

## Introduction

Legal education has always responded to, perhaps even been driven by, available technologies of information dissemination. Before printing and then mechanical and eventually electronic copying were readily available and cost-effective, some mixture of manual form copying, apprenticeship, recitations, keeping of "commonplace books", and mooting dominated legal education. The emergence of textbooks and casebooks followed rapid, multiple transformations in publishing technology and administration in the 19th century. "Socratic" instruction supplanted lectures in many universities once the implications of readily available, relatively cheap textbooks and casebooks became apparent to law teachers and students alike.[1]

## The "Virtual Classroom": Dream and Nightmare

At the cusp of the twenty-first century, law teachers find themselves in another unprecedented period of technological

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1 For some suggestive writings addressing these topics see: D Lemmings, Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth-Century England (1998) 16 *Law and History Rev* 211; W P LaPiana, *Logic & Experience: The Origin of Modern American Legal Education* (NY: Oxford University Press, 1994); D Sugarman, A Hatred of Disorder: Legal Science, Liberalism, and Imperialism, in Peter Fitzpatrick ed, *Dangerous Supplements* (London: Pluto, 1991), 34-67; R Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina

change: available means of presenting and distributing information are daily transforming. The "information age" seems, genuinely, to be upon us. The present is difficult to comprehend and the future is beyond our imagination. What is clear, however, is that computer technologies and telecommunications have changed our world forever. Future transformations, whatever they may be, will be immense. Legal scholarship and legal publishing will change,[2] and the implications for the development of different modes of legal education are potentially profound.[3] Just as printed books made the practices of "commonplacing" less useful, and just as reduced printing costs made lecturing redundant,[4] so too the current explosion of new communication technologies threatens to destabilize the "Socratic" or discussional classroom in a number of positive or negative ways.

Newly developing communication technology (hereafter "DCT")[5] collapses both time and space.[6] It holds forth the

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Press, 1983); D Howes, The Origin and Demise of Legal Education in Quebec (1989) 38 *University of New Brunswick LJ* 127-156; D Daintree, The Legal Periodical: A Study in the Communication of Information (Unpublished, MA Thesis in Librarianship, University of Sheffield 1975).

2 The insights of Bernard Hibbits are particularly noteworthy. See B Hibbits, Yesterday Once More: Sceptics, Scribes and the Demise of Law Reviews (1996) 30 *Akron L Rev* 277-320; Last Writes? Re-assessing the Law Review in the Age of Cyberspace (1996) 71 *NYU L Rev* 615-688; Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse (1994) 16 *Cardozo L Rev* 229-356; E-Journals, Archives and Knowledge Networks: A Reply to Archie Zariski's Defense of Electronic Law Journals, *First Monday: Peer-Reviewed Journal on the Internet* (July 1997); Now Hear This! Thoughts on Law and the New Digital Orality, *Intellectual Property: The Magazine of Law and Policy for High Technology* (December 1996, at 7); and B Hibbits & Dr R LaPorte, Rights, Wrongs and Journals in the Age of Cyberspace (1996) 313 *British Medical J* 1609. For further references and discussions of law in cyberspace, see Bernard Hibbits at URL: http://jurist.law.pitt.edu/index.html.

3 MA Geist, Where Can You Go Today?: The Computerization of Legal Education from Workbooks to the Web (1997) 11 *Harv JL & Tech* 141; J Goldring, Coping with the Virtual Campus: Some Hints and Opportunities for Legal Education (1995) 6(1) *LER* 91.

4 The traditional law lecture has long been criticised as an ineffective mode of legal education. CR Smith noted in 1935 that lectures tended "to degenerate into dictation of notes by the lecturer, written down at breakneck speed by the students..." and concluded, that even at its best, "the formal lecture ... does very little to develop the power of analysis and gives little practice in expression and argument": CR Smith, Legal Education: A Manitoba View (1935) *Can Bar Rev* 404, 408.

5 The term is used to include both new existing and yet-to-be-developed means of publishing, discussing, displaying and communicating.

6 Writing served a similar function. See DF McKenzie, The Sociology of a Text: Oral Culture, Literacy & Print in Early New Zealand in P Burke & R Porter eds, *The Social History of Language* (Cambridge University Press, 1987).

promise of liberating researchers, teachers and students from the normal constraints of our materiality. DCT offers the hope of developing both inter-institutional and intercontinental teaching exchanges, and of fostering student community across huge spaces, cultural differences, and, perhaps eventually, languages. Huge resources of pent-up pedagogical creativity might be unleashed when we transcend the constraints of the printed page and the bricks and mortar of the our classrooms.

The advent of the "Virtual Classroom" and "Virtual Campus" may also produce a significant education-equity benefit. If higher education can be delivered without the physical presence of students being required on university campuses, the costs of that education to both students and institutions ought to diminish.[7] Imaginative use of DCT might make legal education possible for those who otherwise could not afford it. Students would no longer need to uproot themselves from Coober Pedy or Iqaluit or Timaru to be educated in Canberra, Ottawa or Wellington.[8] Furthermore, the anonymity of the virtual community offers protection for those whose shyness or physical markers as "Other" — whether because of gender, sexual orientation, disability, ethnicity or cultural background — may make higher education otherwise unthinkable.[9] The opportunity to create an

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7 This is a standard argument in favour of traditional distance education programs such as Athabasca University in Alberta, and the Open University in Britain. See, for example, W Perry, *Open University* (Milton Keynes, Open University, 1976). DCT however dramatically extends the opportunity for improving the *quality* of distance education and creatively destabilizes the environment in which teaching to in-residence students takes place.

8 Costs of dislocation in legal education was a theme addressed in a series of papers presented at the Canadian Law and Society Association's meetings in 1998 on Canada's First Inuit Legal Studies Programme. Chaired by Professor Constance Backhouse, the papers presented at this session were: S Inutiq, Participating as a Student in the First Inuit Legal Studies Program; B Dawson, The Carleton Connection: Accommodating Inuit Studies in a Southern Canadian University; K Gallagher-Mackay, Nunavut — Affirmative Action and Self-Government: The Case of Legal Education, and C Backhouse, Teaching in the First Inuit Legal Studies Program, and What the Future Holds — a Circumpolar Law School? URL: www.juris.uqam.ca/rcds/prog.html.

9 See, for example, D Tong, Gatekeeping in Canadian Law Schools: A History of Exclusion, the Rule of "Merit", and a Challenge to Contemporary Practices, (UBC LLM thesis, 1996, URL: http://www.law.ubc.ca/handbook/gradstudies/list3.html); J Brockman, Identifying the Issues: A Survey of the Active Members of the Law Society of Alberta (A Report Prepared for the Joint Committee on Women and the Legal Profession: March 1992); and Leaving the Practice of Law: The Wherefores and the Whys (1994) 32 *Alberta L Rev* 116-180; M Thornton, Hegemonic Masculinity and

educational community for those for whom it previously was impossible is no less attractive than the substantive pedagogical benefits of employing DCT in legal education. Genuine equality of opportunity (or something closer to it than we have seen before) might become possible.

All dreams cast a dark shadow. There is a danger that DCT may not merely fail to attain its potential but might actually be subversive of both the scholarly community and of quality, imaginative education. As Jack Goldring has perceptively warned, "Technology is an aid to or instrument of education. It is not education itself. Law teachers should not be mesmerised by it".[10] The outlines of this corrupted dream can be dimly perceived: the high (even prohibitive) cost of using technology creatively; the spectre of corporate control of the internet (and hence the means of producing and disseminating scholarly knowledge); the danger that teachers become caught-up in an intense downward spiral of ever more time-consuming tasks associated with DCT for ever-diminishing educational returns.

There is indeed something about DCT, at least as we experience it in 1999, which threatens to consume our lives with the relatively pointless work of adding "bells and whistles" to that which we already do through traditional, and arguably equally effective, educational methods.[11] Moreover, the possibility of reducing all higher education to neatly pre-packaged modules of information, presented and evaluated in uniform ways, foretells an undesirable bureaucratization or routinization of the educational process, as well as a "proletarianization" of the professoriat.[12] Not surprisingly then, legal educators, even those most committed to the

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the Academy (1989) 17 *IJSL* 115; S Ramshaw & W Pue, Feminism Unqualified: Margaret Thornton's Dissonance and Distrust: Women in the Legal Profession (1997) 15 *Law in Context*, 166–178.

10 J Goldring, supra n 3, at 99.

11 "Much new technology is expensive to develop and use, at least in the initial stages, and may not be as cost-effective as traditional educational methods which are equally educational effective", Goldring, ibid at 97.

12 The Law Consortium Project, funded by the British Government, developed standardised "courseware" for compulsory LLB units. As Goldring observed (ibid), the Consortium's use of financial incentives amounted to a form of compulsion which forced some academics to make compromises so as to ensure a consistent product. On "proletarianization" in general, see: E Nakano Glenn & R L Feldberg, Degraded and Deskilled: the Proletarianization of Clerical Work (1977) 25 *Social Problems* 52; A Baron, Proletarianization of Legal Work: Directions and Implications of Recent Changes in Lawyering *American Sociological Association Paper*, 1984; J Smyth, A Policy Analysis of Higher Education Reforms in Australia in the Context of Globalisation (1994) *Melbourne Studies in Education* 39.

creative use of DCT, remain educational conservatives. It does seem that the most valuable education is self-learned; that time spent on the old-fashioned tasks of reading, thinking, and writing with care is more productive than time spent clicking mouse buttons or staring at flashing images on a screen. The intense, face-to-face, intellectual exchange possible in real as opposed to virtual communities has a quality about it which is impossible to replicate, even in endless hours spent pecking at a keyboard, firing meaning-packed electrons into the void. DCT is not human communication. Many of us have been "flamed", spammed, or subjected to other DCT indignities. What is more, there seems to be something about communicating in these ways which can bring out the worst, not the best, in us as human beings. The Australian National University "netiquette" guide on appropriate email conduct makes the point well:

> **Remember the human**
>
> …
>
> When you communicate electronically, all you see is a computer screen. You don't have the opportunity to use facial expressions, gestures, and tone of voice to communicate your meaning; words — lonely written words — are all you've got. And that goes for your correspondent as well.
>
> When you're holding a conversation online — whether it's an email exchange or a response to a discussion group posting — it's easy to misinterpret your correspondent's meaning. And it's frighteningly easy to forget that your correspondent is a person with feelings more or less like your own.
>
> It's ironic, really. Computer networks bring people together who'd otherwise never meet. But the impersonality of the medium changes that meeting to something less — well, less personal. Humans exchanging email often behave the way some people behind the wheel of a car do: They curse at other drivers, make obscene gestures, and generally behave like savages. Most of them would never act that way at work or at home. But the interposition of the machine seems to make it acceptable.
>
> The message of Netiquette is that it's not acceptable. Yes, use your network connections to express yourself freely, explore strange new worlds, and boldly go where you've never gone before. But remember the Prime Directive of Netiquette: Those are real people out there.[13]

13 See URL: http://www.in.on.ca/tutorial/netiquette2.html

Yet even taking full account of the possible dangers and leaving aside possible pedagogical advantages, there are compelling reasons to explore the use of DCT in law teaching. The first is simply that, in an era of "globalization", aspiring lawyers should have some exposure to the global legal community during the course of their university training. DCT can make this a basic part of legal education much more fully and routinely than even the best educational exchange programs, summer schools or comparative seminars. Secondly, in an era of shrinking faculty resources, DCT opens opportunities to draw on a vast, yet disperse, pool of expertise to provide outstanding instruction in an array of fields that no faculty could on its own provide.

Given these opportunities, it is surprising that few law teachers have taken advantage of the full potential DCT seems to offer. Though course web-sites are now relatively common,[14] it remains rare for law teachers to co-operate in the development of courses of instruction which use DCT to link students and teachers in more than one country — seemingly the area with most to gain.[15]

## OZCAN — An Introduction

This paper outlines the creation of an intercontinental course in legal history developed by Faculty members and student research/teaching assistants at The Australian National University in Canberra ("ANU") and British Columbia's University of Victoria in Victoria ("U Vic") and the University of British Columbia in Vancouver ("UBC") during 1997. Surprisingly, perhaps, the course was developed by legal historians at each of the three institutions, no one of whom had any particularly strong affection for computers, modern communication technologies, computer assisted legal education or "law and technology".[16] The impetus for the course was less the appeal of technology than the urge

14 As evidenced in *The Jurist* (URL: http://jurist.law.pitt.edu/), *The Jurist Canada* (URL: http://jurist.law.pitt.edu/jur-can.htm) and *The Jurist Australia* (URL: http://law.anu.edu.au/jurist/jur-aus.htm).

15 See AL Johnson, Distance Learning and Technology in Legal Education: A 21st Century Experiment (1997) 7 *Alberta LJ Sci & Tech* 213.

16 It is one of the ironies of developments in this area that legal historians, perhaps in reaction to too many years eating the dust of archives, seem to be particularly engaged in work relating to DCT and law. Each of the main *Jurist* websites in Canada, the USA and Australia, supra, is maintained by a legal historian. The Canadian site is maintained by Bruce Ryder of York University; the American site by Bernard Hibbitts, a Canadian legal historian teaching at the University of Pittsburgh; the Australian site by Macquarie University's Bruce Kercher.

to collaborate, to share ideas, and to teach well. Ours is the only such law course of which we are aware.

The course was developed during the first months of 1997 and offered to students during the second semester of Australia's 1997 academic year, mid-August to November, and the first semester of the Canadian 1997–1998 year, early September to the end of November.[17] The significant difficulties that would have been encountered in shepherding a single course through the bureaucracies of three universities, were avoided by each Faculty offering its own course on comparative legal history to its own students. From an internal administrative perspective, three distinct courses were being offered, each following the rules and procedures of its home institution. However, the course content and, to a lesser extent, evaluation, were similar for students at each institution. Students in all three courses received web-based instruction and were required to participate in web-based discussions. The resulting course was unique in several ways:

1. Four faculty members and a graduate teaching assistant at three institutions separated by many thousands of kilometres created the course;
2. Collaboration produced an innovative course, the first we are aware of which explores comparative legal history between two former British Dominions, that would have been unlikely or impossible without the spur of collaborative teaching;
3. The three classes were linked through the internet, and students from each institution participated in the learning process as a single group;
4. The trans-Pacific seminar enabled students to learn about each other's countries on the basis of shared course material and, most importantly, through inter-continental discussion between themselves in the virtual classroom.

This paper reflects upon the conception, creation and delivery of the course, with particular attention to the possibilities and limitations of DCT in physical and virtual classrooms.

## The Idea of the Course

The course originated as an attempt to reintroduce legal history into the curriculum at ANU. In Australia, like Canada,[18] the

17 It was next offered in its full form in the second half of 1999.

18 G Parker, The Masochism of the Legal Historian (1974) 24 *University of Toronto L J* 279; RCB Risk, A Prospectus for Canadian Legal History (1973) 1 *Dalhousie L J* 227.

study of legal history in universities had sharply declined in the late 1960s and early 1970s. Unlike Canada, however, where legal history enjoyed a remarkable revival as part of the maturing of Canadian legal scholarship during the late 1970s and early 1980s,[19] the subject still suffers the taint of unfashionability in Australia. Before the 1960s, a decidedly *English* legal history was a compulsory part of most law school curricula in both Australia and Canada.[20] This disappeared with emerging Australian and Canadian intellectual and academic nationalisms that dismissed the English focus as an anachronistic, if quaint, hold-over from an earlier colonial era. In some quarters, in fact, the feeling was actually rather stronger. Teaching (English) legal history, it was argued, perpetuated a Whiggish/Diceyan view of the world, reproducing cultural stereotypes that were thought harmful. But rather than replace English history in the law curriculum with a distinctly Australian or Canadian counterpart, it disappeared entirely from curricula. History did not seem to offer "relevance" of the sort the 1960's reforms of higher education

19 See, for example, D Bell, The Birth of Canadian Legal History (1984) 33 *University of New Brunswick LJ* 312; D Flaherty, Writing Canadian Legal History: An Introduction, in Flaherty ed, *Essays in the History of Canadian Law, Vol 1* (Toronto: University of Toronto Press, 1981) 3-42; G Marquis, Doing Justice to "British Justice": Law, Ideology and Canadian Historiography, in W Pue & B Wright eds, *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988), B Wright, Towards a New Canadian Legal History (1984) *Osgoode Hall LJ*, 349; B Wright, An Introduction to Canadian Law and History, in W Pue & B Wright eds, id, 7; J McLaren, Meeting the Challenges of Canadian Legal History: The Alberta Contribution (1994) 32 *Alberta L Rev* 423; J McLaren, The Legal Historian, Masochist or Missionary? A Canadian's Reflections (1994) 5 *LER*, 67; J Phillips, Recent Publicatons in Canadian Legal History (1997) 78 *Canadian Historical Review*, 236; J Phillips & G Blaine Baker eds, *Essays in the History of Canadian Law: In Honour of RCB Risk* (Toronto: Osgoode Society, 1999).

20 As an illustration of this, the sole Australian legal history text prior to the 1960s was Sir Victor Windeyer's *Lectures on Legal His*tory (Sydney: Law Book Co, 2nd revised ed, 1958). While it was (and remains) a work of the highest quality, it is significant that of the 37 chapters, only one — the very last — deals with the law in Australia. As regards the teaching of legal history, it is instructive to note that "History of Law" was dropped from the ANU curriculum in 1974. In Canada there is some evidence as to curriculum at Canadian law schools in: W Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia and Faculty of Law, University of British Columbia, 1995), 80-83 (see also URL: http://www.law.ubc.ca/handbook/history/school.html); W Pue, "The Disquisitions of Learned Judges": Making Manitoba Lawyers, 1885-1931, in J Phillips & G Blaine Baker eds, *Essays in the History of Canadian Law: In Honour of RCB Risk* (Toronto: Osgoode Society, 1999).

sought to produce.[21] Few legal history courses were offered anywhere in either country by the mid-1970s.[22]

In Canada the 1980s marked something of a renaissance in Canadian legal history, spurred by the work of a diverse group of scholars both inside and outside law schools. By the mid 1990s an antipodean re-birth of legal history was under way. Legal history was in bloom at several universities, nurtured by a few key individuals: the University of Adelaide (Wilf Prest in history and Alex Castles in law), Macquarie University (Bruce Kercher), La Trobe University (Ian Duncanson, Rob McQueen and, earlier, Chris Tomlins), Griffith University (Mark Finnane), and Flinders University

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21 The narrow notion of relevance that came into play was protested at the time by EP Thompson, Doug Hay, Sol Picciotto and others in EP Thompson ed, *Warwick University Ltd Industry, Management and the Universities* (Middlesex: Penguin Education Specials, 1970) 163-164: "It is sad to see even the scholars themselves hesitate in their work and wonder about the use of what they are doing. Even they begin to feel, defensively, that a salesman or an advertising executive is perhaps a more important and productive human being than an actor, or a designer, or a teacher of English. Able and perhaps eminent men in their own disciplines, they capitulate without a struggle before the intellectually specious proposal that a university can train young men and women, who have no industrial experience, in a "managerial science" in which they master no single academic skill — whether as economists or engineers or sociologists — but which will miraculously equip them to "manage" the affairs of the skilled workers and technicians of Britain. Step by step the defensive scholar resigns his wider allegiances — to a national or international discourse of ideas — and retreats within the limited area of manoeuvre allotted to him within the managerial structure. Step by step he resigns his responsibility, not only to listen selectively for social demands, but to insert into society the demand for priorities which it is his own first duty to make; that man exists and progresses, not only by productive technology, but also by the strength of his ideas and by the artefacts of his culture. In his submission to a subordinate role in a managerial system, he is re-enacting the meaning, for Britain in the 1970's, of the trahison des clercs".

22 Notable exceptions include the University of Adelaide, where Professor Alex Castles, for many years, taught and researched actively in the field of legal history and La Trobe University. Ian Duncanson and Chris Tomlins, two faculty members at La Trobe University's Department of Legal Studies (as it then was), together with Wilf Prest of the University of Adelaide, launched The Law in History Conference Series in 1982, out of which the Australian and New Zealand Law and History Society has grown. In Canada, legal history has continuous presence as a substantial component of law school curriculum only at the University of Manitoba where teaching and research agendas were pursued by several faculty members during Canada's 1960s-1970s "dark ages", most notably Dale Gibson and Cameron Harvey. See, for example: D Gibson & L Gibson, *Substantial Justice: Law and Lawyers in Manitoba, 1670-1970* (Winnipeg: Peguis Publishers Limited, 1972); C Harvey ed, *The Law Society of Manitoba, 1877-1977* (Winnipeg: Peguis Publishers Limited, 1977).

(Suzanne Corcoran). In several Australian universities, most notably the ANU,[23] Macquarie University and the University of Melbourne,[24] Australian legal history is now taught as part of the compulsory first-year program.

Yet despite encouraging signs such as these, a new legal history course at ANU seemed doubtful in the mid-1990s, particularly in light of funding cuts and an on-going program of "rationalization" in the elective program. But the initiative received an important boost by award of a grant by Canadian Department of Foreign Affairs as part of the Faculty Enrichment Program ("FEP"). As part of a program designed to encourage the development of comparative studies outside Canada, this funding provided important moral and material support, in particular the expansion of ANU's library collection of Canadian writers. It also reinforced the move toward a *comparative* approach to legal history. As Comparative Law had not been offered at ANU since the 1970s, a comparative course in Australian/Canadian legal history offered to plug two gaps in the curriculum simultaneously.

There were also strong pedagogical and scholarly reasons for seeking to integrate Australian and Canadian legal history in a teaching programme. Comparing the experience and cultures of two British "settler" colonies allows exploration of similarity and difference along several historical and socio-legal trajectories. If one mission of historical study is to "render the past familiar and the present strange"[25], then the task of comparative legal history, particularly between similarly situated colonies of the same Imperial and legal metropolis, is doubly worthwhile. Notwithstanding the inheritance of a legal tradition from a colonial power, continued fealty to English case authority, subordination to the Privy Council[26] and other mechanisms of metropolitan"policing" of law in empire,[27] the legal cultures of the colonies were refracted, rather than reflected, through the prism of

23 As part of a unit called "Foundations of Australian Law".

24 As part of a unit called "History and Philosophy of Law" introduced in 1991.

25 Borrowing here the words used by Carolyn Strange during her February 1995 panel discussion on "Doing" Legal History Right: Problems, Perils and Prospects of Interdisciplinarity (Green College, University of British Columbia).

26 On this see generally I Holloway, A Fragment on Reception (1998) 4 *Aust J Legal History* 79.

27 See for example, JJ Eddy, *Britain and the Australian Colonies 1818-1831: The Techniques of Government* (Oxford: Clarendon Press, 1969); D Neal, *The Rule of Law in a Penal Colony* (Cambridge: Cambridge University Press, 1991); A Atknison, *The History of Europeans in Australia, Vol. 1* (Oxford: Oxford University Press, 1997); M Finnane, *Punishment in Australian Society* (Melbourne: Oxford University Press).

local needs and conditions. Settlers may have sought to emulate the practices at "home", but the law and its institutions were challenged by situations and contexts that had no parallel in British experiences, and on which British authority was either lacking or inappropriate.[28]

Furthermore, the study of British law's transformations in colonial contexts directs attention to the complexity and diversity of formal and informal law within the United Kingdom, raising questions about which of many possible "British" influences were felt in which colony and at what time.[29] A comparative examination of the choices made by the various colonial authorities reveals the natures, values and power structures of those societies; not only as they existed in the past, but also as they became and, hence, as we experience them now. As a study of the application of law in particular local settings, comparative colonial legal history necessarily becomes a study in legal pluralism,[30] usefully conducted from

28 On the demands of special purposes colonies, see J Manning Ward, *Colonial Self-Government: The British Experience 1759-1856* (Toronto: University of Toronto Press, 1976), Chapter 5, Anomalous Societies: Newfoundland and New South Wales. There are a number of areas of comparative colonial legal history in which there were no British or English precedents and in which there is evidence of borrowing between colonies, and between the colonies and American jurisdictions. Examples would include the regulation of gold mining: see D Fetherling, *The Gold Crusades: Social History of Gold Rushes, 1849-1929* (Toronto: MacMillan of Canada, 1988); D Goodman, *Gold Seeking: Victoria and California in the 1850s* (Stanford: Stanford University Press, 1994), and legal discrimination against Asians, see, CA Price, *The Great White Walls are Built: Restrictive Immigration to North America and Australasia* (Canberra: Australian National University Press, 1974); R Huttenback, *Racism and Empire: White Settlers and Coloured Immigrants in the British Self-Governing Colonies* (Ithaca, NY: Cornell University Press, 1976).

29 See H Kearney, *The British Isles: A History of Four Nations* (Cambridge, Cambridge University Press, 1989); D Hackett Fischer, *Albion's Seed Four British Folkways in America* (New York: Oxford University Press, 1989). Ian Duncanson exhibits a critical awareness of the diversity of Britain and its implications for the colonising process in Close Your Eyes and Think of England (1997) 3 *Canberra L Rev*, 123; John Finnis and the Politics of Natural Law (1990) *UWA Law Rev* 239; Finding a History for the Common Law (1996) *Aust J Legal History* 1; The Politics of Common Law in History and Theory (1989) 27 *Osgoode Hall L J* 687; Legal Education and the Possibility of Critique (1993) 8 *Can J Law and Society* 82.

30 For general surveys see, J Griffith, What is Legal Pluralism? (1986) 24 *J Legal Pluralism and Unofficial Law* 1; S Engle Merry, Legal Pluralism (1988) 22 *Law & Society Rev* 869. For recent Canadian scholarship see Le Pluralisme juridique/Legal Pluralism (1997) *Can J and Society* (Special Issue) 12; J Fiske, From Customary Law to Oral Traditions: Discursive Formation of Plural Legalisms in Northern British Columbia, 1857-1993 (1997/98) 115/116 *BC Studies* 267; D G Bell, A Perspective on Legal Pluralism in 19th-century New Brunswick (1988) 37 *U of New Brunswick LJ* 86.

within the framework of understandings developed by post-colonial scholars. Since Edward Said's powerful application of Michel Foucault's knowledge/power link to the colonial experience,[31] the cultural constructions of "self" and "other" have become the focus of a diverse group of scholars, loosely collected under the post-colonial banner. This body of work attempts to trace the lines of power in colonial settings that flow into and out of cultural constructions of sameness and difference. It is, at its root, a comparative analysis. Although the preponderance of this work, particularly that which involves analysis of metropolitan and indigenous legal forms in colonial settings, is focused on Africa, India and other parts of Asia,[32] the analysis applies equally well to other British settler colonies including part of Canada and Australia.[33] Undertaken at many different levels — self/other, metropolis/colony, Australia/Canada — comparative study can only enhance an understanding of the particular.

From this comparative base, we built an approach to law that we believe both central to the understanding of legal history in colonial contexts and a necessary reference to understanding modern law and contemporary reactions to it. Law was deeply implicated in the expansion of imperial control, from an initial assertion of sovereignty against other European princes, through mercantile trade monopolies and the assertion of juridical authority over original inhabitants,[34] to the regulation of the lives of all inhabitants within the sovereign's territory.[35] The processes by which law became concerned with reconstituting the subjectivities of its subjects so as to render them capable of (liberal) self-governance,[36] accordingly, became a central focus of the course as it developed.

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31 E Said, *Orientalism* (New York: Vintage Books, 1993).

32 For example, P Fitzpatrick, *Law and State in Papua New Guinea* (London: Academic Press, 1980); F G Snyder, Colonialism and Legal Form: The Creation of Customary Law in Senegal (1981) 19 *J Legal Pluralism* 49; M Channock, *Custom, Law and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985).

33 D Harris, *The Legal Capture of British Columbia's Fisheries: A Study of Law and Colonialism* (LLM Thesis, University of British Columbia, 1998).

34 H Foster, Long-Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859 (1990) 34 *Am J Leg Hist* 1.

35 These themes are traced in W Pue, Revolution by Legal Means, in P Glenn ed, *Contemporary Law 1994 Droit contemporain* (Montreal: Editions Yvons Blais, 1994) 1, and developed in C Strange & T Loo, *Law and Moral Regulation in Canada, 1867-1939* (Toronto: University of Toronto Press, 1997).

36 These themes are canvassed in relation to the work of Foucauldian scholars in particular in: D Hannigan, *From Aboriginality to Governmentality: The Meaning of Section 35(1) and the Power of Legal Discourse* (LLM thesis, University of British Columbia, 1998). See also,

Much of this became fully apparent to the course authors, however, only once preliminary thinking about what such a course might involve gave way to concrete planning. Course development began in earnest with ANU's approval of the course in 1997. Simon Bronitt and Ian Holloway's discussion with North American colleagues[37] led to the idea of using DCT to link students on both continents. From that point, the project transformed significantly, aiming now to develop an Australian/Canadian legal history course, taught in ways which would facilitate communication between students in Australia and Canada. As it happened, this technological "add-on", which was intended to connect distant classrooms, presented opportunities and challenges that had not been entirely anticipated by any of the course authors.

## Constructing the Course

Though the course "authors" were inspired by the substantive content and pedagogical possibilities, all five were novices with distance education technology and its applications. The course would not have been possible without the technical support provided by U Vic's Learning Technologies Group ("LTG") and funding through a U Vic Innovative Teaching Fund Grant and a UBC Distance Education Fund Grant. These funds which permitted the hiring of a research assistant (Pamela Cyr) in Victoria, while Doug Harris was engaged first as a research assistant and then as a teaching assistant at the University of British Columbia. Course development between the collaborators at three universities in three cities on two continents and sixteen time zones apart[38] was facilitated by e-mail and through a simple list server. Despite this, the course could not have been developed without a series of face-to-face meetings between the faculty members involved, supplemented by occasional conference calls.

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W Pue, The Case Method & the Colonization of Canadian Space, 1900-1930, in *Misplaced Traditions: The Legal Profession and the British Empire* (special issue of *Law in Context*, forthcoming, autumn, 1998, guest edited by Robert McQueen & W Pue).

37 Including Philip Girard (Dalhousie), Margaret McCallum (UNB), Jim Phillips (Toronto), Carolyn Strange (Toronto), Tina Loo (Simon Fraser), Bernard Hibbitts (Pittsburgh) and Thomas G Barnes (Berkeley).

38 The 16 hour time difference is a significant barrier. 8:00 am in Vancouver is 12:00 midnight in Canberra and 5:00 pm in Vancouver is 9:00 am in Canberra, with the result that the working days barely overlap. Add the International date line and only the mid-week working days in British Columbia overlap at all with the Eastern Australia work week.

From these electronic and personal discussions, a course outline and ideas about how to use the available technology emerged in tandem. Several general decisions were made early on. Regarding course content, we decided the course ought to connect legal history scholarship with other sources of cultural understanding, be they literary, artistic or even musical. We hoped that the course would demonstrate both the connections between legal developments and political, social, economic and intellectual influences, and the necessity of engaging with theoretical scholarship.[39] We also agreed that the course needed to provide students with a basic understanding of the law and legal cultures in Australia and Canada, and with an opportunity to consider several discrete areas in greater depth, allowing critical reflection of historical research on those topics.

As far as technology was concerned, our initial intent was to provide some method for students at the three universities to communicate. Initially, a simple e-mail discussion list seemed attractive. But as the technological possibilities became apparent to us, this somewhat modest goal was transformed. What emerged at the end of the day was a web page containing all the course material including text, pictures, maps, links, and the course readings in various formats. Throughout the process, and on the advice of distance education experts at each of our universities, we attempted to use the lowest possible level of technology necessary for any particular teaching purpose. Rather than replacing teachers, classrooms and books, we hoped that the internet would provide a unique medium to inform and engage students, not only through teacher-led instruction, but also through student to student communication.[40]

## Course Content

Once the project of actually "writing" the course began, John McLaren (aided by research assistant, Pamela Cyr) produced a series of contextual modules intended to provide students with a background in comparative legal history. The modules

39 Our intellectual debts to the likes of Willard Hurst, Robert Gordon, David Sugarman, Constance Backhouse, Ian Duncanson, Hamar Foster, Doug Hay, Chris Tomlins, Alan Hunt, R.C.B. Risk, David Howes, Blaine Baker, Barry Wright, John Beattie, Patrick Parkinson and David Flaherty, amongst others, bears note in this regard.

40 Our ideas about course content and the appropriate use of technology developed simultaneously — one did not proceed the other. For this reason, it is somewhat artificial to separate "medium" from "message", as we have done in developing this narrative.

took their orientation from a theoretical framework derived from critical human geography[41] and critical legal histories, weaving together an analysis of the cultural construction of space and law. Drawing together literature, maps, photographs and other visual material, the first two modules examined the legal construction and appropriation of space by European settlers in the two countries. The settlers' cultural assumptions about the original inhabitants of Australia and Canada were then contrasted with the understandings of land and resources held by indigenous peoples themselves.[42] One underlying message carried through the early modules was the centrality of land in colonial societies, as a mark of economic and social status, as an asset for exploitation, and as a base for commodification of resources on or under the land, or, as in the case of livestock, sustained by it.

Using a similar blend of sources, the next three modules examined in sequence, British imperial policy and law and colonization with emphasis on both its pragmatic and reactive dimensions,[43] the state of English law and its culture at the end of the 18th century[44] and, the process by which English immigrants and their notions of the rule of law penetrated these vast land masses, with stress upon the agency of governors and colonial bureaucrats, judges and the magistracy, lawyers and police.[45] All three modules, emphasized that colonists themselves

41 N Blomley, *Law Space and the Geographies of Power* (New York: The Guilford Press, 1994); W Pue, Wrestling with Law: (Geographical) Specificity vs (Legal) Abstraction (1990) 11 *Urban Geography* 566; Paul Carter, *The Road To Botany Bay: An Exploration of Landscape and History* (University of Chicago Press, 1989).

42 See, for example, B Attwood, *The Making of the Aborigines* (Sydney: Allen & Unwin, 1989); J R Miller, *Skyscrapers Hide the Heavens* (University of Toronto Press, 1989).

43 J Manning Ward, *Colonial Self-Government: the British Experience, 1759-1856* (University of Toronto Press, 1976).

44 JM Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820* (Cambridge University Press, 1993); EP Thompson, *Customs in Common* (New York, New Press, 1991).

45 See, for example, B Kercher, *An Unruly Child: A History of Law in Australia* (Sydney: Allen & Unwin, 1995); B Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict New South Wales* (Sydney: Federation Press, 1996); D Flaherty ed, *Essays in the History of Canadian Law, Vols 1 and 2* (Toronto: Osgoode Society, 1981, 1983); L Knafla ed, *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Calgary: Carswell Co, 1986); P Girard & J Phillips eds, *Essays in the History of Canadian Law, Vol 3, Nova Scotia* (Toronto: Osgoode Society, 1990); H Foster & J McLaren eds, *Essays in the History of Canadian Law, vol. 6, British Columbia and the Yukon* (Toronto: Osgoode Society, 1995); P Romney, *Mr Attorney: The Attorney General for Ontario in Court, Cabinet and Legislature, 1791-1899* (Toronto: Osgoode Society, 1986); J Phillips, T Loo & S Lewthwaite, *Essays in the History of Canadian Law, Vol 5, Crime and Criminal Justice* (Toronto: Osgoode Society, 1994);

were the standard bearers of competing notions of British constitutionalism and English law and that they carried their standard into lands which were already occupied by other peoples, settled by other immigrants, and subject to competing claims. In some cases the British themselves resisted narrow interpretations of constitutional rights and the rule of law, and the centralizing forces of the colonial state.[46] The final two contextual modules related these themes to the colonial experience in two pairs of Australian and Canadian colonies: New South Wales and Upper Canada,[47] and South Australia and British Columbia.[48]

John McLaren designed the contextual modules with a view to encouraging students to think critically about what they were viewing and, in particular, to evaluate the cultural and theoretical significance of the particular matters they were studying. A mixture of downloadable text, photographs,

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B O'Brien, *Speedy Justice, The Tragic Last Voyage of His Majesty's Vessel Speedy* (Toronoto: Osgoode Society, 1992); C Wilton ed, *Essays in the History of Canadian Law, Vol 4, Beyond the Law: Lawyers and Business in Canada 1830 to 1930* (Toronto: University of Toronto Press, 1990); T Loo, *Making Law, Order and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994); D Philips & S Davies ed, *A Nation of Rogues? Crime, Law and Punishment in Colonial Australia* (Melbourne: University Press, 1994); M Finnane, *Police and Government: Histories of Policing in Australia* (Melbourne: Oxford University Press, 1994); G Marquis, *Policing Canada's Century: A History of the Canadian Association of Chiefs of Police* (Toronto: The Osgoode Society, 1993); R C Macleod, *Canadianizing the West: The North-West Mounted Police as Agents of the National Policy, 1873-1905*, in L H Thomas ed, *Essays on Western History* (Edmonton: University of Alberta Press, 1976), 101-110.

46 See, for example, B Wright, Quiescent Leviathan? Citizenship and National Security Measures in Late Modernity (1998) 25 *J Law and Society* 213; R Fraser, "All the privileges which Englishmen possess": Order, Rights, and Constitutionalism in Upper Canada, in R L Fraser ed, *Provincial Justice: Upper Canadian Legal Portraits* (Toronto: Osgoode Society, 1992), xxi-xcii. Raffaello Carboni commented of the Eureka Stockade that "The diggers did not take up arms against British rule, but against the *mis*-rule of those who were paid to administer the law properly; and however foolish their conduct might be, it was an ungenerous libel on the part of one of the military officers to designate *outraged British subjects* as 'foreign anarchists and armed ruffians'.": R Carboni, *The Eureka Stockade* (Melbourne: Melbourne University Press, 1963), at 130.

47 D Neal, *The Rule of Law in a Penal Colony: Law and Practice in Early New South Wales* (Cambridge University Press, 1991); R Fraser ed, *Provincial Justice: Upper Canadian Legal Protraits from the Dictionary of Canadian Biography* (Toronto: Osgoode Society, 1992).

48 AC Castles & MC Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia* (Adelaide: Wakefield Press, 1987); T Loo, *Making Law, Order and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994); H Foster & J McLaren eds, *Essays in the History of Canadian Law: British Columbia and the Yukon, Vol. 6* (Toronto: Osgoode Society, 1995).

maps, drawings, excerpted readings and questions which could not be replicated in print media was designed to stimulate critical thought. All members of the academic and technical planning group provided comment and reaction. This was essential on the academic side in order to match Canadian sources with similar Australian sources and, on the technical side, in order to ensure that an attractive, user-friendly web site would (and could) eventually emerge. The LTG at U Vic undertook to develop a useful website design and also to ensure that what they developed did not exceed the technology in place at each of the partner universities.[49] The process of "writing" the course made apparent that this would be a significant limitation in a cooperative endeavour like this: while U Vic and ANU had new and upgraded student computer facilities, UBC students, on the other hand, were working with aging hardware. Whatever the intellectual or technological merits of the course, it had to be accessible to all students from their home university's computer labs.

These contextual modules provided students with a rich multi-media exposure to a substantive knowledge base. They represented the bulk of intellectual labour involved in developing the course, and a necessary baseline from which a productive a trans-pacific interactive seminar could build. The core of the course, however, was the development of a "virtual seminar" focussed on specific problems or issues in comparative legal history. All of us are of the view that the "value-added" by this means of instruction lies in the emergence of deep and thoughtful inter-continental student discussions of a quality which permits instructors to fall into a background role.

The task of developing "interactive modules" was undertaken by the University of British Columbia partners (Wes Pue and Douglas Harris). These modules were designed to facilitate interaction between students and faculty at the three universities and, in many ways, such modules are the core of any web-based instruction programme. It is this part of the course that most clearly distinguishes teaching through DCT from more conventional methods of instruction. The "multi-media" potential of internet-based instruction is impressive, but, apart from the ability to link in a

49 The extraordinary efforts of Katy Chan, Judy Somers, and Kate Seaborn were immensely appreciated by all collaborators on the project. Phil Drury, Manager of the Information Technology Unit, also provided invaluable technical assistance at the ANU.

moment to many different potential sites of knowledge, it remains essentially similar to what creative instructors have done without DCT: blackboard drawings, slide presentations, overhead transparencies, video showings, audio clips, and dramatizations are all conventionally used to enhance the classroom experience and internet-based education adds little to these. Indeed, any well-designed textbook (of which there are, admittedly, precious few in law) makes use of creative juxtaposition of images, text, half-screened quotations, provocative questions, recommended reading lists, and so on in order to communicate ideas in complex ways. Magazine and newspaper editors know this. So do the producers of high school textbooks. One of us had even tried to imitate these forms in a book on the history of legal education.[50]

The interactive modules presented a focused analysis of themes in legal history. Assigned readings were kept deliberately "light", instructors' text (the web equivalent of lectures) was sparse and provocative. The modules developed four areas of historical and theoretical writing that seemed both well enough studied (in both countries) and intrinsically interesting enough to sustain student discussion. The four themes were (i) Aboriginal-settler relations (the "aboriginal other"); (ii) Ethnicity, immigration & citizenship; (iii) Crime/ sex; (iv) Labour, class & industrial relations. Each of these topics has also generated a literature that fit within general themes relating to the legal technologies of governance during the late nineteenth and early twentieth centuries (often experienced as increasing state intervention in the lives of individuals). Law was thoroughly immersed in the project of "making good" citizens,[51] sometimes out of difficult material. Crudely, the project each of these modules addressed was the attempt to remake rough subjects into citizens capable of self-governance: i.e., conforming as closely as possible to the standards of the Victorian Christian, respectable middle class, modelled on a patriarchal, heterosexual family.

Each contextual module contained three readings: one historical study from each country and one reading of a more explicitly theoretical nature. Our intent, always, was to

50 W Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: Continuing Legal Education Society of British Columbia and Faculty of Law, University of British Columbia, 1995).

51 The recommended Canadian text was C Strange & T Loo, *Making Good: Law & Moral Regulation in Canada, 1867-1939* (Toronto, University of Toronto Press, 1997). We were unable to find a comparable Australian work.

select closely matched readings which would form a focused discussion. Readings on the "aboriginal other", for example, focused on the residential school experience and the attempt to assimilate indigenous people through the removal and education of aboriginal children in state and church run institutions. The race module dealt with the treatment of Chinese immigrants in British Columbia and Melanesians in Queensland. The module dealing with gender focused on the criminalization of prostitution and, more generally, regulation of women's bodies. Finally, the module on class compared the Winnipeg General Strike of 1919 and the Australian Seaman's strike of the same year in order to provide an introduction to the construction of class and the role of law.

A short, deliberately provocative, commentary, peppered with questions, accompanied the readings in each interactive module. Designed to initiate a critical analysis of the assigned texts, a somewhat irreverent approach was developed in a deliberate attempt to ensure that these "provocations" could not confused for a conventional lecturers' "authoritative summary". Links to other web sites were also used as a means of encouraging students to think creatively and critically about the material and to draw connections between many sources.

## Integrating Content and Technology

Selecting from the wide range of available (and rapidly changing) technologies proved challenging. The early decision to use a web-site as a means of distributing course material and readings resulted in a more elaborate and developed undertaking than any of us had originally contemplated. The final version of the course web-site contained contextual and interactive modules, all required readings, illustrations, hot-links and a discussion forum. The "OZCAN website" became our noticeboard, casebook, blackboard and classroom.

The second, rather more difficult, decision was how best to facilitate student discussion. The objective of enabling students to respond quickly and easily to the readings and to each other could have easily been met with a simple e-mail discussion list. We also wanted, however, to ensure that discussion proceeded in a focused manner and that students engaged in a discussion on one topic would not be distracted by irrelevant interjections relating to other topics of class discussion. "Threaded" discussion list software enabled us to structure discussion by designating broad "topics" or

"conferences" under which students could post messages. Other students could respond to a previous message, thereby creating a genealogy of discussion – a so-called "thread" – within a conference. Alternatively, they could post a new message creating another "thread". Each required reading within the interactive modules was designated as a conference on the discussion list website, which was accessible from within the OZCAN website. Once students were in an interactive module on the OZCAN website, they could read the instructors' introduction and provocation, read or download required readings, and post their thoughts to the relevant conference.

To some extent, however, the language we used to describe our pedagogical objectives ("creating an intercontinental seminar") misled us. Whatever our hopes and whatever the promise of DCT, there is a world of difference between a seminar involving people you might chat with informally after class and the type of exchange that existing affordable DCT allows. Due to financial constraints, we were unable to incorporate video-conferencing in our teaching strategy. Intellectual exchange is, after all, human interaction, and the human dimension is diminished when only electrons communicate. The "seminar" analogy led us astray in other ways as well. Seminars organized around student commentaries or critiques of assigned readings, followed by class discussion of the readings themselves and the formal student commentaries seemed, at first, to be a good model to follow. As we originally conceived it, Australian and Canadian student critiques of each week's readings would inform both the physical classroom discussions at each institution *and* the virtual seminar discussion. Students would be required to respond to the readings and the commentaries in class, but also on the threaded discussion list. However, we realized that this apparently straightforward modification of an ordinary seminar would not work so smoothly when we counted student numbers. Though each class was relatively small (approximately 15 at UBC and U Vic, and 49 at ANU) the total class size of 80 students was far too large for a seminar, whether in the physical or virtual classrooms.

Several things, however, were clear from the start. First, our objective of facilitating lateral (student-to-student) rather than "top-down" (staff-to-student) education in the interactive modules required that assigned readings be shorter and more focused than in the "contextual" portions (which were more closely analogous to lecture courses than

seminars). Secondly, if student exchanges were to develop with any degree of liveliness or immediacy the substantive focus of the readings had to be both engaging and provocative. Thirdly, our job as teachers was to move ourselves to the background. Like good Socratic instructors, our task in this portion of the course was to say enough to provoke student thoughtfulness and creativity, but not so much as either to dominate the discussion or to tell students what they should think.

## Teaching the Course

Although students at the three schools worked from the same course materials on the OZCAN website, the authors of the course needed to accommodate several major and potentially disabling differences between the three institutions. Accordingly, there were differences in approach and evaluation between the partner universities. One significant constraint was that the Australian term began in early August, almost a month before the Canadian autumn term started, and finished a month earlier. We assumed that Canadian students would need the month of September to get "up to speed" on the necessary background (i.e., the contextual modules); this narrowed the window of opportunity for trans-continental interaction to the month of October. There were also fairly significant differences in the educational backgrounds of students at the three faculties. The Canadian law degree, while designated as the LLB, or Bachelor of Laws, is in fact taught as a graduate degree at the same level as the American professional law degree (the "JD" or Juris Doctor). The Canadian students were generally further along in their studies than the Australian students who, for the most part, study law as a first degree after high school. Finally the variation in class size also required very different courses.

These dimensions of student difference were known ahead of time. Once student registrations began, however, it became apparent that the three classes diverged even more than we had anticipated. In 1997, UBC had common law Canada's largest graduate program in law and this produced an interesting student body in the Comparative Legal History Course: of 13 students registered, 9 were pursuing LLM degrees, one held a previous law degree from England and was taking the course as part of a second professional law degree, one was an Australian exchange student, three others were from Australia, one from New Zealand, and

two were "ordinary" (though that is hardly the word for them) LLB students. By accident of registration, UBC's class was itself effectively transformed into both a graduate seminar with an "intercontinental" student body.

In light of their large class size, ANU's instructors taught their course as an exercise in group-centered learning. Each week, a group of students was responsible for introducing the assigned module and for initiating a discussion. The introductions took vastly different forms, ranging from role-playing (where students re-enacted a summary trial, including a mandatory flogging with cat o' nine tails!) to convential lecture presentations. Those students who presented were also responsible for initiating student discussion by posting their thoughts to the discussion list and preparing a portfolio of material that would placed in the library for other students to access. Students were graded on their class presentations and on a research project. The students were encouraged to be imaginative in devising their project: several integrated multimedia into their project, one student created a website, while another produced a video documentary.

Given smaller classes, the courses at U Vic and UBC assumed a somewhat more traditional seminar approach, with varying degrees of reliance on the classroom or virtual seminar. At U Vic the emphasis lay in the "virtual seminar" conducted only in part in a traditional classroom setting. For the greater part of the course, the students met in the law school's computer lab, during which time they had an opportunity to work with the course material, communicate by e-mail or in person. A separate, shorter seminar outside the computer lab was used to discuss outstanding questions arising from the materials and discussions. Each student was graded on their posted critical comment on an interactive module and on a major research paper which required work with primary materials. Several students elected to do papers on the comparative historical experience with law in the two countries, including work on aboriginal rights; gold field regulation; and land tenure.

At UBC, the focus remained in the physical classroom and, disproving the adage that students are the only group of consumers always to wish to receive less than they pay for, the students themselves strongly resisted the suggestion of abandoning classroom discussion during the "interactive" phase of the seminar. The class met once a week for two hours of discuss focussed on assigned readings and the

ideas broached on the discussion list. In addition, the computer lab was reserved for two, one hour sessions each week, but attendance was not required and most students chose to make their discussion list contributions outside class time or from home. Students at UBC were evaluated on their participation, both in the classroom and on the discussion list, and by a major research paper. Most students determined that a comparative research essay would be too daunting a task given the time constraints, and elected to use historical and legal material from either Canada or Australia.

## Evaluating the Course

Each university conducted its standard end-of-course evaluations of teachers, course content, and methods of instruction. At ANU, the standard student questionnaire developed by the Centre for Educational Development and Methods was tailored to included specific questions about the use of technology in the learning process. The instructors at UBC and U Vic conducted separate, informal surveys to learn what students thought about the technology.

Quite predictably, student response to the course was as varied as the students enrolled in the course. Given the different approaches to teaching and different methods of evaluating student response, the results of student surveys from the three institutions cannot be compared with any precision. Overall, however, the course was *very* favourably assessed by students, particularly for its content, but also for its innovative use of available technology.[52] Student comments focused on four areas: course content, technology, teaching styles and evaluation. Although both are central to the student experience, the latter two were particular to each instructor and, accordingly, will receive less attention in the following discussion. Course content and technology

52 The standard course evaluation survey at UBC, based on a scale from 1 (completely unsatisfactory) to 7 (excellent), reported an overall rating of 6.64, compared to a three year Law Faculty mean of 5.63. At U Vic the scale ranges from 1 (very low scoring) to 5 (excellent scoring). The evaluation rated this course overall at 4.06 (compared with a faculty average for the semester of 3.88. The lowest score recorded for the course related to workload (3.18). At ANU, the unit questionnaire used the scale from 1 (very poor) to 7 (excellent). The question relating to the learning climate obtained a mean score of 6.1 and the question relating to the overall impact upon learning and development obtained a mean score of 5.5.

however were the same at each university and student responses on these aspects of the course bear comparison.

Although student perceptions on course content varied considerably, some strong themes emerge. Many students enjoyed the comparative aspect, particularly the exposure to the histories and legal systems of another country, and the light that exposure cast on their understanding of the legal systems and histories with which they were more familiar. "There is so much potential", wrote one Australian student, "for gaining a better understanding of law from a comparative and a historical perspective". As the comment suggests, this student and others responded well to an approach to legal education that moved beyond simple analysis of legal doctrine to situate law and legal institutions within a larger social and historical context. Another Australian student wrote that the course "made sense of the law to me (probably for the first time!)". There are, of course, many approaches to "making sense of the law", and this course explicitly offered two — historical and comparative approaches. Comments like this, however, underline the importance and relevance in professional legal education of courses which provide a broad contextual perspective on the operation of law in the communities of which it is a part.

Students at all three universities remarked on the positive learning climate, their interest in the material, and the encouragement to evaluate critically the required readings. The course faired less well on the relevance of instructional materials, and least well in course planning and organization. One of the course's great strengths was that it combined the energy and intellectual ability of four faculty members and one post-graduate teaching assistant with diverse research interests and areas of expertise. The combination of creative talents produced a course that none of the instructors could have created alone, but it also resulted in a somewhat less focused course than any one of us might have developed alone. Some students commented on this lack of focus that was, perhaps, the inevitable result of a first attempt by five cooks working with new and unproved ingredients. However, the collaborative nature of the course enabled students to access that broad array of expertise. Having five instructors, as one Australian student observed, provided more opportunity for student/faculty interaction "than could be achieved by a lone lecturer".

A course that combines the physical and virtual classroom is a much different creature than either a traditional seminar or a course taught entirely through DCT. Integrating physical and virtual classrooms was not an easy task, and the surveys indicate that none of the law schools was entirely successful. The physical classroom tended to remain the focus of the course for students, particularly at ANU. This was a function, in part, of the course delivery at ANU (group-led classroom discussion) and of technological growing pains that were particularly severe for the Australian students who met first thing each week, ahead of their Canadian counterparts. Furthermore, they reported insufficient technical support, something that is still required in these early stages of DCT. For a few students at each university, the course presented a first opportunity for intensive use of the internet. Those who participated, however, did so with enthusiasm. "Interaction on the web discussion", commented one ANU student, "was exceptionally rewarding — it promoted sophisticated discussion of concepts in a structured and easily accessible manner". Another student wrote, "I found the interaction with the Canadians to be an exciting experience".

Other students thought the participation rate on the discussion list should have been higher. This led to some frustration for the students at UBC, but particularly at U Vic, where the virtual classroom was the principal focus of the course. Participation was uneven, and although some students from U Vic and UBC contributed frequently to the discussion list, general participation was not as extensive as it might have been. This pointed to another, more general, difficulty involved in creating a coherent seminar from students with very different backgrounds, at three universities, at various stages of their university careers, and involved in three courses that, although using the same course material, were using it very differently. While some students at the Canadian institutions were disappointed by the relative lack of interaction with Australian students, several ANU students commented that the Canadians seemed to make more use of the assigned readings in their postings, leading one to speculate that, "the Canadians invested more time in their class discussions and as a consequence their internet contributions were more sophisticated and coherent". Undoubtedly, the uneven participation in email discussion by ANU student may be due simply to the fact this was not a compulsory (ie assessable) component of the course.

That said, it was not clear that we were in reality properly prepared for heavy student participation. If each of the seventy students taking these courses had contributed only a few sentences each week (some contributed much more), very large volumes of additional reading would have resulted. As it was, students noted that the reading load we had designed was excessive and probably minimized their discussion list participation as one strategy to keep their workload manageable. Not surprisingly there were logistical difficulties in the early weeks that probably discouraged student participation in electronic discussions somewhat. The challenge of structuring student participation so to enable spontaneous and informed, yet manageable, discussion is a difficult one.

Nonetheless, the opportunity to communicate with students and faculty through a discussion list added considerably to the class. The regular contributors to the list were not necessarily the same as those who spoke most frequently in the physical classroom. Even those most comfortable speaking in person found this other forum useful. Most weeks, profitable discussion could have long outlasted the assigned class time, and one UBC student appreciated the discussion list for permitting conversation about the topics to continue even "if you don't have a chance to make points in the phys[ical]. seminar". Discussion lists, however, are not a complete foil for shyness or other sources of reticence to speak in class.

Discussion lists also offer a valuable record of discussion and a useful reference tool for those who want to review earlier contributions. But as useful as this is, it is precisely the creation of a record that is off-putting to some students. In response to a survey question one UBC student wrote, "Record of discussion. Installed in me the sense of surveillance technology which eventually led to self-surveillance, self-disciplining, self-governing that has destroyed my life!" This comment, presumably offered partly as a Foucauldian jest, does raise some important issues about the effects of technology on students. The use of discussion lists creates a formal record for the life of the course (maybe longer) of what would otherwise be free and relaxed classroom discussion. In order to provide students with a sense of security, the discussion list was password protected, allowing only those who were participating in the course to read and contribute to the discussion. Nonetheless, the instructors' gaze remained, as did that of other students who, but for the web page interaction, were strangers. There is no doubt that

DCT creates a new range of communication possibilities, but it also creates dangers that must be considered carefully.

Many students appreciated the access to course readings through the web site, in part because it saved them the cost of a casebook. The readings could be viewed on the site, downloaded to be viewed on another computer, or printed. Many students chose the later option, preferring not to read large quantities of text on a computer screen. At UBC a hard copy of the web site and required readings was placed in the reference section at the library. Even though readings could be downloaded, the web site itself contained extensive text, particularly in the contextual modules, that had to be read from the screen or printed, but could not be downloaded directly. Added to the many students contributions to the discussion list, many students commented negatively about an excessively heavy reading load, much of it having to be done from eye-straining computer screens.

## Lessons Learned

The experience of teaching the course has provided an opportunity to reflect on the utility of distance education technology in relation to legal education. Three "lessons" have been learned through developing and offering this particular course and the experience opens the space for some modest reflection as to the possible impacts of this technology on legal education in the longer term. Beginning with specifics, a first run-through of the course has lead to conclusions about "flaming", contextual modules, appropriate faculty (and student) workload and interactive teaching strategies.

"Flaming" is, perhaps, the easiest of these to address. Fortunately, we were spared any difficulties in this respect during the first offering of the course. Nonetheless, we are intensely aware of the danger not only of flaming but of serious and hurtful misunderstandings developing more innocently as widely dispersed students communicate through e-mail, list-serves, and related media. Consideration and respect for the views of others must be emphasized in courses involving use of DCT. Internet communication brings a new ease and informality to communications with strangers but, again, one of DCT's great advantages is simultaneously a source for potential problems. The danger of vigorous exchanges going "off the rails" as they are conducted, with relative anonymity, through electronic media are real. Anyone who has ever been in a university classroom knows that

communications offered earnestly and in good faith can sometimes, accidentally, be extremely hurtful. The possibility that ideas might be misconstrued grows exponentially when the personal context is removed. Ironic tone can be missed, self-deprecation mis-read, humour missed, and ambiguous phrasing misconstrued with frightful ease. Teachers need to take care to explain and, quite undemocratically, insist on compliance with generally accepted principles of "Netiquette".

As with all new academic ventures, there were design flaws in the course. These were, no doubt, partly a product, of the tight time-lines within which the team worked, partly a result of five cooks stirring the broth, and partly the inevitable result of novices encountering new instructional media for the first time. Some of the contextual modules looked and read too much like lecture notes with only occasional forays into other forms of communication. When this happened we failed to take advantage of the uniqueness of the web teaching environment. Our contextual modules were at their best where there had been a conscious effort to blend short, often provocative and sometimes conflicting quotations of theoretical import, compact expository paragraphs, and dramatic, thought-provoking visuals such as art work, photographs, documents or maps. The modules were less engaging where the expository paragraphs lengthened, and when the visuals were purely illustrative. Interestingly, a web site one student constructed as his research project on the potlatch and Canadian attempts to suppress it provided the most successful model of the value of web site-based instruction.[53] This was achieved by a skilful juxtaposition of short descriptive passages and a wealth of visuals and documentary material available from banks of material connected to the site.

This lesson about the need to construct a web site so as to balance the need to communicate information with an immediacy of intellectual challenge so as to draw students into active engagement with the material presented has been taken to heart by the contextual module designer (John McLaren). Work has been underway to reduce the length of the expository sections. At the same time the site is being enriched by the use of a wider range of demonstrative material, including

53 The student, Anthony Bettainin, has published the material on the internet, which may be viewed at URL: http://www.anu.edu.au/~e950866/potlatch/.

54 By way of example there is a fine multi-media website at the State Library of Victoria in Melbourne, providing a range of images relevant

artwork, photos, sketches and portraits, literary allusions, maps and audio clips of interviews, folk songs, and ballads. Greater efforts are being made to encourage students to access some of this material by links with other web sites as other relevant resources become available.[54] In addition to an existing map bank, a bank of documents is being developed to accommodate a wider range of original legal instruments, correspondence and newspaper reports. A link has also been provided to a web site of early judgments of the Supreme Court of New South Wales under development by Macquarie University's Bruce Kercher.[55] Finally, this course, like any other needs on-going review of secondary literatures from many disciplines in order both to keep current and to add greater richness to both the contextual and interactive modules.[56]

With respect to workload issues, it is important to note that the creation a course of this sort is labour intensive, involving significant investments of time by both academics and technical support personnel. Once the web site is built, technical assistance is required to ensure its ongoing proper functioning and students require technical instruction on the use of the site and communications software. Moreover, e-mail communication creates the possibility of extending discussion beyond the spatial and temporal boundaries of the classroom. Students can post messages and respond on their own time. The greatest single advantage of the technology, this is, however, one of its greatest hazards. What was once neatly

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to law and legal culture in Australia, see www.slv.gov.vic.au. Also of great value is the BC History website operated from the British Columbia Archives and Record Service (BCARS) by David Mattinson.

55 See www.law.mq.edu.au/scnsw. The site is also accessible through the Australian Legal Information Institute, see: http://www.austlii.edu.au.

56 See eg R White, *The Middle Ground: Indians, Empires and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991); RK Williams Jr, *The American Indian in Western Legal Thought* (Oxford: Oxford University Press, 1990); R Milliss, *Waterloo Creek: The Australia Day massacre of 1838, George Gipps and the British conquest of New South Wales* (Sydney: UNSW Press, 1992); S Ryan, *The Cartographic Eye: How Explorers saw Australia* (Cambridge: Cambridge University Press, 1996); C Healy, *From the Ruins of Colonialism: History and Social Memory* (Cambridge: Cambridge University Press, 1997); T Murray Greenwood & B Wright, *Canadian State Trials, Vol 1, Law, Politics and Security Measures, 1608-1836* (Toronto: Osgoode Society, 1996); J Walker, *Race, Rights and the Law in the Supreme Court of Canada* (Toronto: University of Toronto Press, 1997); S Brawley, *The White Peril: Foreign Relations on Asian Immigration to Australasia and North America 1919-78* (Sydney: UNSW Press, 1995).

confined to a three-hour seminar in a classroom has the potential to become all-consuming, both for students and instructors.

A number of strategies might be employed to make better use of the interactive component of the course, even within the constraints of a seminar with seventy participants. Though formal structuring of discussion groups in advance of the interactive phase of the course would detract from the spontaneity of discussion, it might improve the intensity of exchange without overwhelming the limits of the medium. One possibility would be to construct groups including students from each of the partner schools, each of which would have the assigned task of focussing on one specific historical themes. Each group, using a "chat-room", would develop a virtual seminar in which the theme and the readings would be discussed, reflections and questions posted for consideration, and response by the other students in the course sought. The quality and inclusiveness of small group discussion might be assisted by having a mentor (a faculty member or a graduate student with expertise in the field) to excite discussion and bring structure to the exchanges. The University of Guelph's Gilbert Stetler has used this sort of approach in teaching Urban History, linking students directly to experts from various parts of the globe. Beyond this, the sense of intimacy and immediacy could be enhanced considerably by creating video links. The devil is in the details however. Where Australia and Canada are involved, the efficacy of either chat groups or video-links requires careful syncronization of time-tables and computer access if the sixteen hour time difference is to be overcome. DCT may collapse space and time but it does not obliterate time zones.

## Concluding Thoughts: DCT and the Future of University Legal Education

It would be naive to think that DCT holds forth the potential of liberating ideas and education from all of the constraints of materiality. Though web-sites and discussion lists can be opened to the entire world if that seems desirable, the numbers of students involved in this project at the three sponsoring schools make it difficult to contemplate adding any significant number of further partners without some fairly significant reassessment of the course's pedagogical objectives. A concomitant and equally fundamental redesign of the instructional environment would also be required. Modestly, a course of similar design, taking advantage of

many but not all of the www's multi-media advantages, might be made available to other institutions by "burning" all or part of the existing course materials on to CD Roms for the use of instructors elsewhere. A half-way point between a book and a web-site, this newish technology holds forth promise of greater educational collaboration between institutions, as well as economic distribution of educational materials.

Although our course was not designed to probe the limits of legal education in any fundamental way, a widened horizon of legal education is nonetheless discernible from our new perspective "on the other side" of distance education, as it were. Each of us, to varying degrees, is an educational conservative. We believe deeply in the value of the physical classroom and think that something immensely worthwhile will be lost if the personal, human-to-human, contact traditionally associated with academic communities is replaced by something colder, more mechanical and bureaucratic. Nonetheless, there is no reason to think that the communication of information, intellectual challenge, and rigorous evaluation requires the residential campus or full-time education. Moreover, unlike correspondence courses and older techniques of distance education, contemporary DCT permits an interactive learning environment and one in which lateral as well as vertical education is possible. A law school without walls and even a law school without a "place" is not unthinkable.

To some extent it may be desirable. If professional degree courses can be provided without requiring that students attend classes, a more diverse body of students will be able to take advantage of legal education and the career benefits it has to offer. This matter is of no small importance for legal education and for the future of the legal profession. It could make part-time legal education a meaningful option for individuals who cannot take time off work to attend law school classes scheduled without their needs in mind.

DCT promises too to enhance the quality and experience of graduate education in law through a pooling of resources. To take one example, agreements are presently in place between most of Canada's major universities allowing students to take graduate courses at any of the linked universities for credit in their own programme.[57] In practice of

57 For an explanation of these agreements see: www.ubc.ca under the Faculty of Graduate Studies entries. Cross-institutional study is similarly permitted at most Australian Law Faculties.

course these arrangements mean very little if a student in Edmonton has to fly to Vancouver on a weekly basis to sit in a UBC class, or a Vancouver student has to commute to Montreal (five hours away by air) to take a three credit-hour course. Because it obliterates distance, DCT can make quality specialist seminars available to a small number of advanced students effectively, efficiently, and at reasonable cost. Graduate programmes at the LLM, MA and PhD levels could all benefit immensely from this and to the mutual advantage of all partner institutions.

At the other end of the educational spectrum, DCT can also provide means of teaching undergraduate courses to classes of almost limitless size and in more effective ways than the continuous play video-taped lectures of urban myth ever could. The analogy here is not the seminar room but the large lecture theatre, the undergraduate class taught to 300 or 500 students at a time. DCT conveys an immediacy and sense of involvement to class participants that video-taped or televised lectures, and even than the overcrowded lecture theatre itself cannot emulate. A well-designed web teaching environment draws students in whereas other, "colder" media leave them outside looking in — distanced from their own education, alienated from their own learning. Web-CT, a web "course tools" package developed by the University of British Columbia's Continuing Studies department, provides a series of tools which facilitates all aspects of distance education from delivery of materials through to student evaluation. An appropriately structured course of considerable rigour and intellectual integrity could be taught intra-university, inter-city or internationally to 500, 1,000, or 5,000 students. If qualified teaching assistants were employed and tutorials offered (most likely through "chat-room" utilities) to groups of 20 to 30 students at a time, the course would surpass in almost all respects the over-large lecture courses which characterizes undergraduate education at most North American and Australian universities.

Some big questions remain and, obviously, we cannot know clearly where trends are heading until such time as we know more about both the future of the legal profession and emergent technology. An unbounded university education does seem to be on the horizon though. Whether it is a "nightmare" which offends against all the values of a liberal education, or a "noble dream" which fulfills the promises of liberal education, depends on what we make of it.

ENDNOTE:

Should readers want any further information on the OZCAN project, or the various comparative legal history courses, they should feel free to contact any one of the authors. Among the things available are a fuller discussion of the relationship of the interactive modules to the contextual modules, and sample instructions on how to approach the interactive seminars.

# A Circle Game: Issues in Australian Clinical Legal Education

*Jeff Giddings**

## Introduction

The 1998 Federal budget included an allocation of $1.74 million over four years (1998/99 to 2002/2003) for "[d]eveloping more and better Clinical Legal Education to maximise service delivery to disadvantaged clients and cooperation with universities". This is a significant development for Australia's small clinical legal education (CLE) movement which, with only one exception, had not previously received direct Federal funding.[1] While this provision of funding is obviously welcomed, the Commonwealth government's objectives for this funding appear to focus on community service rather than educational outcomes. The Commonwealth is clearly of the view that CLE has potential as a vehicle for the provision of inexpensive legal advice.

The Commonwealth government has now selected four CLE projects to be funded under this program. Funds will be provided to Griffith University, Monash University, Murdoch University and the University of New South Wales (UNSW). Both Griffith and Monash will be establishing specialist family law CLE projects while Murdoch and UNSW will be using their funding to maintain existing programs. All four successful projects strongly emphasise the importance of community service objectives, something which has been a hallmark of Australian CLE programs since the Monash, La Trobe and UNSW programs were established in the 1970s. The early Australian CLE programs benefited from the increasing availability of legal aid funding during the 1980s and this has now occurred once again with these new Commonwealth funds.

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* School of Law, Griffith University. Thank you to John Boersig, Fran Gibson, Richard Grimes and the 2 *LER* referees for their helpful comments on this article.
 (1999) 10 *Legal Educ Rev* 33.

1 In 1996, the Federal Government committed itself to contributing $190,000 for a 3 year (1 July, 1996 to 30 June 1999) pilot project for the establishment by Murdoch University of the Southern Communities Advocacy, Legal and Education Service (SCALES). Murdoch University contributed $210,000 for the project.

While CLE has gained greatest prominence in the United States of America (USA),[2] interest in clinical law has increased in a range of countries. 1998 saw the publication of books on CLE from both England[3] and India.[4] It appears that many of the challenges with clinical teaching (the resource intensive nature of clinic, limited opportunities for scholarship, supervision of students by non-academics, marginalisation within law schools, limited prospects for promotion and tenure) are fairly universal in nature.

The announcement of the CLE funding provides a useful opportunity to review the development and current state of Australian CLE. This article considers what types of legal education can be described as clinical and then outlines the history of Australia's CLE movement. The article then considers the scope for integration of clinical teaching before raising issues for the future.

## Clinical Legal Education in the Australian Context

The term clinical legal education has been used quite loosely in Australia. The definition of CLE may well become a contested one in the near future as law schools position themselves to obtain a share of Commonwealth funds earmarked for this area. Students and practising lawyers tend to relate CLE to work with real clients or to "skills". This is also the model which has been adopted by the Commonwealth government for its funding of CLE programs. Other law teachers usually give CLE a broader meaning, focussing on the use of teaching methods other than traditional lectures and seminars.

To clinical law teachers, the key to CLE is usually the central role played by reflection and critique of student performance and students taking greater responsibility for their work.[5] CLE can make use of a range of different models, from simulations through integration of experiential aspects

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2 For recent examples of clinical scholarship from the USA, see Symposium: Fifty Years of Clinical Legal Education (1997) 64 (4) *Tennessee Law Review*.

3 H Brayne, N Duncan & R Grimes, *Clinical Legal Education: Active Learning in Your Law School* (London: Blackstone Press, 1998).

4 M Menon ed, *Clinical Legal Education* (Lucknow, India: Eastern Book Company, 1998).

5 See S Rice, *A Guide to Implementing Clinical Teaching Method in the Law School Curriculum* (Centre for Legal Education, 1996) at 12-15; Brayne *supra* note. 3, at 11-12.

into traditionally taught subjects to live-client experiences. Australian CLE programs have tended to involve the live-client model. This involves students working directly with people in relation to actual legal issues under the direct supervision of academic staff. Law schools have either established vehicles for such education themselves or have grafted CLE programs onto existing community organisations.

There is clearly scope for other models and combinations of models to be used as and where they are appropriate. I suggest that sites for clinical teaching can be usefully characterised by way of a clinical continuum which relates to the degree of control exercised over the teaching setting. The emphasis on critique and reflection is a constant while control over the environment varies. Simulation exercises need to be very closely planned and controlled, live-client clinics and external placements see students responding to relatively unstructured situations.

It is important to recognise that these various clinical models are complementary rather than being in competition, often working best in combination. A wide range of variations and hybrids can be used to tailor the clinical experience to suit the teaching objectives and available resources. The integration of clinical teaching into the law curriculum is covered later in this article.

## Increasing Australian Interest in Clinical Legal Education

The 1990s have seen increasing interest in CLE in Australia.[6] The Australian Clinical Legal Education Association (ACLEA) was established in 1996 at a conference attended by academics from 17 law schools. The *Guide to Clinical Legal Education Courses in Australian Universities 1998* contains descriptions of 13 CLE programs. Eight of these programs use a live-client model and none of these involve more than 100 students per year.

Most of these live-client clinics are of a generalist nature although specialist clinics have been established by Monash

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6 S Campbell, Blueprint for a Clinical Program (1991) 9 *Journal of Professional Legal Education* 121, JA Dickson & MA Noone, The Challenge of Teaching Professional Ethics, *Skills Development for Tomorrow's Lawyers: Needs and Strategies*, conference papers (Sydney: Australasian Professional Legal Education Review Council 1996) Vol 2, at 845-860 Rice, *supra* note 5.

and Griffith Universities. Monash commenced a pilot sexual assault clinic with the South Eastern Centre Against Sexual Assault in 1996.[7] Griffith commenced an alternative dispute resolution clinic with the Alternative Dispute Resolution Branch of the Queensland Department of Justice and Attorney-General in 1998. Griffith and Monash have now been funded by the Commonwealth to run specialist family law clinics. Externship arrangements (where students are placed in external sites and supervised by someone other than a legal academic) are run by five law schools.[8] Some externships involve graded assessment while for others only attendance is monitored.

Rice has referred to a "crisis of sorts in the manner and sufficiency of articles or post-degree skills training" as the reason for the growing interest in CLE.[9] While this crisis has prompted greater consideration of skills training and Practical Legal Training (PLT) courses, it has not focussed on the elements of reflection and critique central to CLE. It may be that the increasing interest in undergraduate CLE is related to the very rapid increase in the number of both law schools and law students. The more competitive law school environment has ironically promoted a teaching method which emphasises, amongst other things, the value of working cooperatively.[10]

## *Still a Small Movement*

Despite this increased interest, the Australian clinical movement is currently quite small. The funding announced by the Commonwealth may assist the Australian CLE movement to reach "critical mass". There are only a limited number of

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7 A Evans, Specialised Clinical Legal Education Begins in Australia (1996) 21 *Alt LJ* 79.

8 A Lamb & J Goldring, Professional Placement Programs in Undergraduate Law Courses (1996) 14 (1) *Journal of Professional Legal Education* 109; J Giddings, External Placements for Law Students: Out of Sight, Out of Mind or Putting Students in the Picture? *Skills Development for Tomorrow's Lawyers: Needs and Strategies* conference paper (Sydney: Australasian Professional Legal Education Council, 1996) Vol 1, at 575-598.

9 Rice, *supra* note 5.

10 See D Chavkin, Matchmaker, Matchmaker: Student Collaboration in Clinical Programs (1994) 1 *Clinical Law Review*, 199; C O'Grady, Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer (1998) 4(2) *Clinical Law Review* 485. Interestingly, O'Grady suggests that the collaborative opportunities presented in clinical legal education generally contrast sharply with the working collaborations commonly experienced by new lawyers.

senior academics currently working in Australian CLE programs. No Professors teach in such programs in Australia. At Monash, the CLE program is coordinated by an Associate Professor. The PLT programs run at Queensland University of Technology and Wollongong are coordinated by Associate Professors. At Newcastle, La Trobe, Griffith, and Murdoch, the clinical programs are coordinated by Senior Lecturers. The University of New South Wales clinical program (three semesters per year, 25 students per semester along with a new program involving brief placements for all 400 students involved in a compulsory year-long subject) is coordinated by a Lecturer. There are also limited opportunities for Australian clinicians to get together which can lead to clinic teachers feeling isolated.

## A History of Australian Clinical Legal Education

CLE in Australia began in the early 1970s at Monash University in Melbourne with the establishment of an in-house clinic in 1975. La Trobe University, also in Melbourne, established a clinic in 1978 which provided clinical experience for legal studies students rather than law students.[11] UNSW in Sydney established an external placement program in 1977 followed by an in-house clinic in 1981. It was not until the early 1990s that further clinical programs were established, generally making use of the live-client model.[12]

### *Community Service Focus*

Each of the early Australian CLE programs developed a strong focus on the provision of community service. The law teachers involved had strong links to the developing community legal centre (CLC) movement. The first Australian CLCs developed in the early 1970s with Victoria taking the lead.[13] It is interesting that even in the late 1990s, a majority of the academics involved in Australian clinical programs have a

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11 La Trobe organised a second clinic site in 1994, having commenced a law degree program in 1991. Law students can now undertake a placement at the Preston office of Victoria Legal Aid. See Dickson & Noone, *supra* at note 6.

12 Much of this historical material comes from a "roundtable" discussion conducted on November 20, 1996 with Sue Campbell, Adrian Evans, Ross Hyams, Guy Powles, Neil Rees and Simon Smith, each of whom has played a key role in the development of clinical legal education in Australia. Thanks to them all.

13 J Chesterman, *Poverty Law and Social Change: The Story of the Fitzroy Legal Service*, (Melbourne: Melbourne Press, 1996).

background working extensively in CLCs. In 1995, Sherr referred to conference meetings of old and new clinicians in the USA often showing a clear contest of style between the anti-authoritarian pioneers and the next generation of "analytically strong but often politically absent" skills technicians.[14] This observation does not fit the Australian context.

While some Law Schools developed formal links with CLCs through clinical programs, others forged close informal links. Many of the legal aid developments of the time received major input from various legal academics.[15] Close contacts had been developed in the late 1970s between academics from the law school at UNSW and Redfern Legal Centre but these did not result in the establishment of a formal CLE link between UNSW and that centre. The major reason for the unwillingness of the Redfern Legal Centre to become involved in CLE with UNSW was fear of takeover by the University. Those UNSW academics who strongly influenced the direction of Redfern Legal Centre in its early years greatly prized the independence of the centre. These people supported the establishment of a CLE program at UNSW but wished to see the establishment of a new in-house legal centre rather than a merger with Redfern Legal Centre. There were also other UNSW academics who criticised clinical work for not focussing on systemic issues and for fulfilling an apologist function involving "keeping a lid on the legal system garbage can". This contributed to UNSW establishing its own independent placement site, Kingsford Legal Centre, rather than grafting the clinical program onto the Redfern Legal Centre.

## *Student Involvement*

Students played a key role in getting the early Australian CLE programs started. Students identified and worked with sympathetic academics in establishing services which

14 A Sherr, Clinical Legal Education at Warwick and the Skills Movement: Was Clinic a Creature of its Time? in G Wilson, (ed) *Frontiers of Legal Scholarship* (John Wiley & Sons, 1995) at 119.

15 For example, Professor Ron Sackville from Melbourne University (and Dean of the UNSW Law School at the time of the establishment of the UNSW clinical program) was responsible for the Law and Poverty reports produced as part of the Henderson Inquiry into Poverty in Australia conducted in the mid-1970s. Peter Hanks from Monash University (who was heavily involved in the establishment of the Monash clinical program) conducted research for the Commonwealth Government in relation to legal aid issues. See P Hanks, *Social Indicators and the Delivery of Legal Aid Services* (Canberra: AGPS, 1987).

endeavoured to put into practice what they were hearing from such teachers. The Monash clinical program can be traced to a Legal Referral Service which opened in 1971 and was run from a Citizens Advice Bureau in central Melbourne, some 20 kilometres from Monash.[16] People could phone to seek information in relation to their legal problem and, where appropriate, would be referred to a lawyer or some other person or organisation. Monash law students worked with local community workers to have a branch of the Legal Referral Service open at Springvale, a low income area close to the university. This Service moved beyond being a referral service with the establishment of Springvale Legal Service in 1973. Monash also developed two further clinic sites in nearby suburbs, Monash Legal Service (now known as Monash-Oakleigh Legal Service) and Doveton Legal Service.[17]

Staff members of the Legal Studies Department at La Trobe had established the La Trobe Legal Service in 1974.[18] In 1978, the Department also employed a lecturer to establish the West Heidelberg Community Legal Service at the local community centre.[19] These legal services became the sites for the La Trobe CLE program. Students also played a key role in the development both of these services and the clinical program. There was strong student demand both for the provision of legal services to the student population and for involvement in the delivery of those services. In 1976, the La Trobe Legal Service employed a lawyer with Students' Representative Council funds and by 1977 "it was clear that the time was ripe to begin training "para-legal" personnel for work in the service."[20] The La Trobe Legal Service maintained an involvement in the clinical program until 1992 and the West Heidelberg Community Legal Service remains a major placement site.

The age of the universities involved appears to have been significant in the development of Australian CLE programs. Monash, La Trobe and UNSW were all "second wave" universities, established in the 1960s. The law schools of these universities were "new kids on the block", needing

16 S Smith, "Clinical Legal Education: the Case of Springvale Legal Service" in Neal ed On Tap, Not on Top (1984) Legal Service Bulletin Co-operative, 49.

17 The Doveton Legal Service is no longer a CLE site but continues to operate as an independent CLC.

18 A Evans, Para-legal Training at La Trobe University (1978) 3 (2) *Legal Service Bulletin* 65.

19 D Neal, The New Lawyer Bloke (1978) 3 (4) *Legal Service Bulletin* 148.

20 Evans, *supra* note 18.

to find their niche. These universities attracted academics interested in developing new teaching methods. Clinical teaching was able to establish itself in the early years of the Monash law program and this has no doubt contributed to the Law School's continued support. Several Monash law deans leant strong support to the establishment and operation of the CLE program. It has apparently been more difficult to develop clinics within long established law schools. Of the older "sandstone universities", none have established live-client clinics. Adelaide and Sydney have established externship arrangements.

## *Funding Through Legal Aid*

The community service focus and CLC links of these early clinics were reinforced with the increasing availability of legal aid funding. The Monash, La Trobe and UNSW placement sites attracted such funding in the early 1980s and this support continues. Springvale Legal Service has four positions funded by Victoria Legal Aid (VLA), due in no small part to the fact that it has the largest casework load of any Victorian CLC. Monash-Oakleigh Legal Service receives VLA funding equivalent to 50% of the cost of the Co-ordinator's position. The West Heidelberg Community Legal Service has three VLA-funded positions. The Kingsford Legal Centre operated by UNSW retains two legal aid-funded positions.

It would without question be difficult for these programs to retain such funding if they were to reduce their caseload for educational reasons. My experience of CLE in Australia suggests that these programs remain strongly committed to community service as a key clinical objective such that they would be unlikely to entertain significant caseload reductions.

## *The Third Wave of Law Schools*

The number of law schools in Australia expanded dramatically following a range of reforms to the university sector in 1987. Interest in CLE was reactivated with a number of these "third wave" law schools setting up clinical programs in recent years. While a number of these new programs make use of a live-client clinic,[21] simulation-based

21 For example, University of Newcastle, Griffith University and Murdoch University.

and placement activities have also been characterised as clinical. Clinic appears to have been viewed by some of these new schools as a means of differentiating themselves from other new law programs in an increasingly competitive environment.[22]

The clinic-oriented law degree at the University of Newcastle is the largest and most ambitious of these new programs. The incorporation of the pre-admission practical legal training (PLT) requirements into the undergraduate degree is discussed below. A substantial amount of limited-term "soft money" was used to develop the Newcastle Legal Centre which is the program's centrepiece. The external funds used to fund the development of the Newcastle clinical program were provided by the solicitors Trust Account Fund.[23] Since 1995, the law school at Newcastle has also received a clinical loading of approximately $250,000 per year from central university funds. This payment is made in recognition of the fact that the Relative Funding Model used by the Commonwealth Department of Education, Training and Youth Affairs renders it almost impossible for law schools to maintain substantial clinical programs. The five Law School staff members employed at Newcastle Legal Centre are now all funded from the Law School's recurrent grant.

The Newcastle Law School is currently considering a range of options aimed at reducing the resource-intensive nature of its current "Professional Program".[24] Increasing student numbers in the Professional Program (from 17 in 1995 to 90 in 1999) will result in increased reliance on Newcastle Legal Centre as a placement site as well as requiring additional use of external placements. Relationships will be fostered with a range of legal service providers. The number of compulsory subjects will be increased while elective offerings will be reduced. In line with new guidelines for practical training adopted by the NSW Legal Practitioners Admission Board, the 20 week "clinical semesters" will be reduced to the more conventional 14 weeks. Four new subjects will be introduced which are designed to coordinate

22 See R Handley & D Considine, Introducing a Client-Centred Focus into the Law School Curriculum (1996) 7 *Legal Education Review* 193 at 208 for a discussion of the increasingly competitive law school environment in Australia.

23 This fund comprises interest payments on funds held in solicitors' trust accounts which are not centrally deposited. The fund was established in the 1980s following agreement between the major banks and the Law Society of NSW.

24 This information regarding the Newcastle clinical program comes from Newcastle Legal Centre Director, John Boersig.

the clinical hours which students must complete as part of the Newcastle Professional Program.

## Links between CLE, Skills and Practical Legal Training Courses

This is an area in which we can expect substantial movement with a number of law schools either introducing or exploring the possibility of offering a pre-admission Practical Legal Training (PLT) course themselves or incorporating teaching which satisfies PLT requirements into their LLB program. PLT courses were first offered in Australia in the 1970s as an alternative, adjunct to or replacement for articles of clerkship.[25] These courses are offered by various approved institutions, most of which are not attached to universities.[26] While students have participated in short term placements as part of such PLT programs, these placements have not been assessed other than on an attendance basis. These PLT programs are now moving to include more extensive placements but have been criticised as doing no more than teach students how to fill out forms, being over-packed with transaction-based activities and not emphasising the teaching of generic skills essential to a broad range of legal activities.[27]

The dividing line between undergraduate CLE and PLT courses is becoming increasingly difficult to define. This lack of clarity arises from changing perceptions of the place of legal skills teaching in undergraduate law programs. Rice states that "In those jurisdictions such as Australia where articles or post-degree, pre-admission practical education courses are compulsory, the need for undergraduate skills training is less pressing. Consequently the teaching of legal skills [at undergraduate level] need be necessary only to a degree that enables students to work effectively in the

25 J Disney, P Redmond, J Basten, S Ross *Lawyers* 2nd ed (Sydney: Law Book Company, 1986) at 261.

26 The following universities are currently involved in delivering PLT courses: Queensland University of Technology, Australian National University, University of Technology Sydney, Wollongong University, University of Western Sydney (Macarthur), Bond University, University of South Australia, and University of Tasmania. The College of Law (New South Wales) and Leo Cussen Institute (Victoria), Australia's 2 largest PLT providers, are non-university based.

27 J Boersig, Clinical Legal Education: The Newcastle Model *Skills Development for Tomorrow's Lawyers: Needs and Strategies* conference paper (Sydney: Australasian Professional Legal Education Council, 1996) Vol 1, at 463, 466.

clinical program while pursuing other aims."[28] This view of the limited role of skills training in CLE programs is likely to be undermined due to extra pressure being placed on the PLT system with the increase in law graduates seeking entry to the profession. As Campbell anticipated in 1995, PLT providers are now granting some students credit for skills learning contained in their LLB studies, including involvement in a CLE program.[29]

Legal skills development can play an important part in clinical teaching but this relates to the value of these skills as more general learning tools rather than their value simply as skills. While I would advocate that CLE programs should not focus strongly on legal skills training, it is important to acknowledge the central role which the prospect of skills development plays in attracting students to clinical programs. Students are understandably concerned to maximise their future employability. They will be interested in acquiring skills which they see as directly relevant to their prospective work.

The prospect of intensive training in skills such as interviewing, negotiation and advocacy will often be the thing which prompts student interest in an undergraduate clinical experience. Of course, once they are participating, many students come to appreciate the diversity of issues which clinic exposes them to. They recognise the other, more interesting aspects of experiential learning and begin to appreciate the value of the intensive nature of the student-supervisor relationship. This initial underestimation of the value of CLE is not confined to students. Lawyers and academics who have developed an interest in CLE often indicate that they initially underestimated the educational value of the clinic environment.

In the early 90s, the University of Newcastle Law School, under the stewardship of Neil Rees (who played a key role in the establishment of both the Monash and UNSW clinical programs), moved to introduce a different system whereby students could satisfy their PLT requirements through their undergraduate program by way of involvement in a range of clinical activities.[30] The University established the Newcastle Legal Centre which has been the key clinic site and has been involved in an impressive range of major litigation, particularly in relation to police accountability. For

28 Rice, *supra* note 6, 25.
29 S Campbell, *Clinical Legal Education Newsletter*, No 8, November 1995, 2.
30 Boersig, *supra* note 27.

example, the Legal Centre has been acting for the family of Leigh Leigh, a Newcastle teenager who was murdered in 1989[31] and the family of Roni Levi who was shot dead by police on Bondi Beach in July, 1997.

Ninety students are able to participate in what is described as the Newcastle "Professional Program". This program requires students to complete a range of subjects during the final four semesters of their law degree. These semesters have been of 20 weeks duration although this has changed in 1999 with reversion to the standard 14-week semester. Students have also been required to complete at least 80 hours of clinical work in each of the eight subjects which form part of the program.[32] This clinical component is integrated in a range of forms, including simulations and work placements with an emphasis on bringing these experiences back into the classroom for reflection. It may be that elements of clinical integration will not survive the restructure of the "Professional Program".

## The Resource-intensive Nature of CLE

Concerns in relation to CLE tend to be raised particularly in the context of the resource commitment required. To a large extent, the resourcing of clinics is an issue because of the mechanism used to allocate public funding to Australian universities. The Commonwealth Department of Education, Training and Youth Affairs (DETYA) funds Universities on the basis of agreed profiles of student intakes, with different disciplines allocated places in a Relative Funding Model. Law forms part of the lowest of the five funding clusters, with a weighting of one. In the top funding cluster is medicine with a weighting of 2.7. As law is in cluster 1, the choice of a law school to offer a substantial CLE program must be made at the expense of other activities, many of which (such as a reasonable choice of elective subjects) are seen as being an essential part of legal education. While additional (albeit limited) government funding is provided for the conduct of work placements for education and social work students, no such funding is available for law placements.

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31 J Fife-Yeomans, What Really Happened to Leigh Leigh? *The Australian* 30 September 1996, at 10.

32 Three of the 8 subjects are taught over a full academic year with a requirement that students complete at least 80 clinical hours each semester. This means students are required to complete at least 1246 clinical hours during the professional program.

Universities are not bound to apply the DETYA relative funding model and use their own internal formula, the characterisation of law as a "low cost" degree places additional pressure on proposals or programs which involve more intensive teaching. Ironically, students starting law studies in 1998 and subsequent years must contribute to the Federal Government's Higher Education Contribution Scheme at the highest of the three differential rates set despite law being funded at the lowest rate.

In 1994, the Centre for Legal Education published the results of a joint project with the Committee of Australian Law Deans relating to the cost of legal education in Australia. The project report noted that "only a few law schools, for various reasons but mainly cost, will have clinical programs, and their costs should be treated separately."[33] The report also stated that "Probably the best way to obtain more money for the discipline of law would be for law deans to be prepared to make a commitment to clinical legal education. There is little doubt that where it can be shown that the money would be spent on things which are tangible and visual the money is more likely to be forthcoming."[34]

The staff-student ratio for clinics are very different to those for lecture-based teaching. CLE programs should be promoted on the basis that their benefits extend well beyond the students who participate directly in the program. Some of these benefits are pedagogical while others are pragmatic. The clinic can be viewed as enriching other aspects of a law program in terms of giving students the opportunity to benefit from the use of a further and very powerful teaching method.

The clinician can provide other academic staff with support on how to diversify their teaching. This support can of course take many forms including:

- providing avenues for working together on planning of simulation problems or materials for classroom use, particularly in areas of the law related to the practice of the clinic.[35] Feinman identifies planning, particularly in the area of identifying goals, as crucial to the success of simulations.[36]

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33 Centre for Legal Education & Committee of Australian Law Deans, *The Cost of Legal Education in Australia*, (Centre for Legal Education, 1994) at 73.

34 *Id*.

35 K Mack, Bringing Clinical Learning Into A Conventional Classroom, (1993) 4 *Legal Ed Rev* 89.

36 J Feinman, Simulations: An Introduction, (1995) 45 (4) *Journal Of Legal Education*, 469.

- making suggestions as to how to enliven the treatment of issues in traditionally taught subjects. The teaching of legal ethics continues to be identified as an area which can benefit from the infusion of issues generated by the clinic.[37]
- exploring possibilities for the establishment of specialist legal clinics or external placement components within courses. For example, Griffith University has established both an externship program with students placed with a diverse range of organisations as well as a specialist alternative dispute resolution clinic. It will now be establishing a family law clinic.
- the nature of CLE lends itself to clinicians developing expertise in the teaching of various generic skills, particularly interviewing, drafting, negotiation and advocacy. Given the interest of students in skills-based learning, the clinician's expertise can usefully be harnessed by those academics who do not have a practice background.

The clinic can also form part of the bridge between the academy and various elements of the profession, a priority in particular for newer law schools needing to establish their credibility with prospective employers of their graduates. The clinic provides law schools with an opportunity to publicise the practical aspects of their activities. The law school can be seen to be making an impact in a very tangible way. University administrators tend to be understandably interested in making use of clinics to bolster the community service profile of the university. This has seen Commonwealth government funds awarded to universities for "community service quality" directed towards capital works expenditure on a number of clinical programs.[38]

## Linking Clinic with the Rest of the Curriculum

This is without doubt an area set to receive increasing attention from Law School decision makers. To date, Australian clinical teaching has been focussed on live-client clinics

37 E Burg, Clinic in the Classroom: A Step Toward Cooperation (1987) 37 *J Legal Educ* 232.

38 For example Griffith (computer facilities for the placement site, Caxton Legal Centre), La Trobe (extensions to the premises of West Heidelberg Community Legal Service), Monash (substantial renovations of both Springvale Legal Service and Monash-Oakleigh Legal Service), Murdoch (establishing premises for the Southern Communities Advocacy Legal and Education Service) and Newcastle (substantial renovations to Newcastle Legal Centre premises).

although some such programs have remained small and could be viewed as "showpiece" arrangements which are inaccessible to most students. Integration of clinical elements into more traditionally taught subjects may be seen as enabling the benefits of clinic to be achieved at a lesser price. This view fails to recognise that the real benefits of a clinical approach relate to students receiving detailed feedback from their clinic supervisor on their performance. Clinicians should be wary of law school attempts to dilute the student:supervisor ratio by increasing the number of students participating.

In 1998, UNSW has trialed a new program with all 420 students undertaking the compulsory subject, *Law, Lawyers and Society* spending up to 10 hours at Kingsford Legal Centre. This program has been more effective than was anticipated by Kingsford Legal Centre staff. The evaluations completed by students indicate that the experience has significantly changed some of their views and is likely to result in an increased demand to participate in the *Clinical Legal Experience* subject.[39]

Obviously, the definition of CLE is central to any discussion regarding clinical integration. For integration to be clinical, it is necessary to consider both what elements are being incorporated and how they are incorporated. Without provision being made for detailed and intensive review of the performance of participating students, the incorporation of a series of simulations into a course cannot be said to amount to clinical integration. Similarly, unless students are required to actively respond in role to unstructured legal problems, the incorporation of site visits does not involve clinical integration. This is not to say that programs which do not come within the definition of clinical are not valuable. It simply indicates that they are not clinical legal education.

## *Clinical Integration at Griffith – A Case Study*

I teach at Griffith University in Brisbane, Queensland and have been responsible in part for the integration of a range of clinical and skills elements across the law program.[40] I have included this case study of clinical integration because not a great deal has been written about Australian CLE programs.

39 Interview with Fran Gibson, 3 September, 1998.

40 The contributions of my colleagues Geoff Airo-Farulla and Marlene Le Brun, and former colleagues Sally Kift, Stephen Parker and Charles Sampford to this process deserve special mention.

The Griffith law program was founded in 1992 with an understanding of the need to ensure that skills learning was not relegated to the periphery.[41] As with most things, this understanding has been subsequently tempered by the reality of limited funding and increasing student numbers. Griffith Law School pioneered the use in Australia of teacherless, leaderless groups known as offices as a central aspect of the law program.[42] These offices provide a site for reinforcing the skills and clinic elements introduced elsewhere, principally in small groups.

While those who established the Griffith law program were committed to students being given opportunities to develop their generic lawyering skills, the use of live-client clinical models was not part of that commitment. The original Griffith approach involved clinical elements only in the sense of using detailed simulation exercises and encouraging students to develop the ability to reflect on their own work. A live-client clinical program commenced in 1995 in conjunction with Caxton Legal Centre and has operated three semesters a year since then. Two further clinical programs commenced in 1998:

1 an externship program with 12 students placed in law firms, barristers offices, community legal centres and industrial relations consultancies; and

2 a specialist Alternative Dispute Resolution Clinic (ADR Clinic) with 12 students on placement with the Alternative Dispute Resolution branch of the Queensland Department of Justice and Attorney-General.

Each of the Griffith clinical programs emphasises the importance of students developing their ability to analyse information and situations and reflect on the performance of themselves and others. CLE students learn how to respond effectively to unstructured situations and to take responsibility for their own learning and development. Given the limited resources available for the establishment and running of CLE programs, Griffith law school has concentrated on developing partnership arrangements with existing legal service providers rather than establishing an independent CLE site.

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41 M Le Brun, Law at Griffith University - The First Year of Study (1992) 1 *Griffith Law Review* 15.

42 S Kift & G Airo-Farulla, Throwing Students in the Deep End or Teaching Them How to Swim: Developing Offices as a Technique of Law Teaching (1995) 6 (1) *Legal Education Review* 53; B Dick *et al*, The Use of Action Research in Developing Curricula in Law: Convergent Interviews and the "Offices" Project (1996) 30 (1) *The Law Teacher*.

One of the clinics is supervised by a law school academic while both the externship and ADR Clinic programs involve students being supervised by staff in the host organisation. Several mechanisms have been used to address quality control concerns in relation to such external supervision. Detailed manuals tailored to each individual CLE subject were developed for both supervisors and students.[43] Academic staff have discussed each students progress with the relevant supervisor at least four times during the 14 week semester. Considerable importance has been attached to discussion and agreement between all interested parties and in particular the student and host organisation supervisor as to the tasks to be performed by the student. In a study in the United States of America (where externship arrangements are used very extensively) Givelber *et al*[44] refer to students who shared expectations with their supervisor being far more likely to rate externship placements highly than those who did not.

In 1996, Griffith Law School adopted a "Lead Skill" structure to support the teaching of skills and legal practices. Lead skills were specified and attached to each year of the degree program as follows:

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|---|---|
| Year 1 | Legal Research and Writing |
| Year 2 | Communications, both written (letters, notes for file) and oral |
| Year 3 | Negotiation, incorporating drafting |
| Year 4 | Interviewing and Advising |
| Year 5 | Workplace Management. |

Each year's "lead skill" is attached to a core subject in that year. This is then buttressed by other on-going clinical and skills elements being offered in each of the years. The lead skill approach is designed to provide a focus for skills development in each year with a view to avoiding situations where law teachers assume that skills are being developed elsewhere in the law program. This approach also aims to encourage an ongoing commitment to skills development with students being given opportunities to further refine skills initially discussed in earlier years. Legal research development is incorporated into the assessment of core subjects in each year of the program. Cross-cultural issues are

43 Copies are available from Jeff Giddings, Law School, Griffith University, Nathan, 4111.

44 DJ Givelber, BK Baker, J McDevitt & R Miliano Learning Through Work: An Empirical Study Of Legal Internship (1995) 45 (1) *Journal Of Legal Education* 1, at 34.

specifically dealt with in Years 2, 3 and 4. Advocacy exercises are incorporated in most years.[45]

The incorporation of opportunities for critical reflection on these activities is central to the "lead skill" approach as it is for other elements of the Griffith law program. Such opportunities are incorporated into small group classes and offices. It is also recognised as valuable for students to receive written feedback on their performance. In the 1997 Course Experience Questionnaire for Australian Law Schools, Griffith achieved the second highest ranking out of 21 schools for the teaching of generic skills.[46]

Teachers considering integration should assess the range of models across the clinical continuum. Contact with real clients, whether through externships or in-house clinics, should be considered along with simulations. The choice of clinical aspects to be incorporated will vary from course to course on the basis of teaching objectives, subject matter and availability of time and other resources. Too often, the objectives receive insufficient attention during planning or are set without input from those responsible for the supervision and teaching. The purpose of the integration will be significant in determining the type and intensity of clinical elements to be incorporated. The utilisation of brief simulations or short field placements may be a useful primer for subsequent more intense clinical experiences. This appears to have been the experience with the pilot offering of the *Law, Lawyers and Society* placements at Kingsford Legal Centre.

Australian clinicians have encountered concerns from academics (both established and new) uneasy with these different teaching methods and their impact across the teaching staff. The line is "That's fine so long as you don't expect me to teach that way". In other instances, there has been some resistance to these different teaching methods, with the notion of academic freedom sometimes invoked to justify such a stance. In my experience, only a patient and supportive approach has any real likelihood of persuading such colleagues as to the merits of clinical teaching.

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45 A Lynch, Why Do We Moot?: Exploring the Role of Mooting in Legal Education (1996) 7 *Legal Education Review* 67; M Keyes & M Whincop, The Moot Reconceived: Some Theory and Evidence on Legal Skills (1997) 8 (1) *Legal Education Review* 1.

46 Figures taken from T Johnson, *The 1997 Course Experience Questionnaire: A Report Prepared for the Graduate Careers Council of Australia* (Australian Council for Educational Research, 1998).

## Assessment

The assessment of student performance in clinical programs continues to generate considerable discussion amongst clinicians.[47] Assessment is often viewed as an area of difficulty. Whether all or part of a clinical subject should be assessed will depend on the objectives of the subject. It will also depend on whether the law school can be flexible enough to allow its CLE program to be "different" both as to the teaching methods used and as to nature of assessment. If graded assessment is used, it should be stressed to students that this is non-competitive, being based on personal achievement rather than relative merit.

In my view, the more intensive contact between the clinical supervisor/assessor and the student brought about by the much smaller class sizes enables the supervisor to more accurately gauge whether the student did what was expected of them and, if so, how well. The assessment process should be linked very closely to the provision of useful feedback to students, something of central importance in any clinical program. The provision of such feedback, along with the assessment process, can be enhanced by:

- the development of detailed performance criteria which are provided to students before they commence the program. Students need to know what will be expected of them.[48]
- the feedback being provided regularly. This enables the provision of more detailed feedback on a timely basis, something many students value.
- the incorporation of a formal "mid-semester review" which identifies both strengths and weaknesses and which gives the student the opportunity to address issues which have been identified. Several Australian CLE programs already make use of such a review process.[49] While useful, this process can also be very time-consuming.

I have referred earlier to difficulties in ensuring that the integration of non-traditional teaching methods into traditionally taught subjects involving large groups of students is clinical in the sense of incorporating opportunities for critique, reflection and discussion. Similar concerns arise in relation to assessing such integrated clinical elements. The clinical nature of such large group work may well be

47 For an Australian example of such discussion, see *Clinical Legal Education Australia Newsletter*, No. 10, December 1996, 8-13.
48 For example, see Campbell, *supra* note 6, at 134-135.
49 For example, Griffith, Monash & Newcastle.

enhanced by the development of peer and self assessment mechanisms.[50]

## Accreditation

Accreditation issues related to Australian CLE may become significant in several respects. At this stage, Australia's clinical movement remains small such that those interested to "belong" are welcomed. However, this openness may be strained by the prospect of CLE funding from the Commonwealth government. Teachers in existing CLE programs will want to ensure that current or proposed programs seeking Commonwealth funds in fact incorporate opportunities for comprehensive critique and reflection.

Australian legal education is not as heavily influenced by requirements specified by external organisations as is the case in England with the Law Society and Bar Council and in the USA with the American Bar Association (ABA).[51] It is interesting that the trend in England appears to be towards a less prescriptive approach, similar to that used in Australia. It is of course possible that the relevant Australian legal professional associations will take the ABA's lead and embark on a MacCrate-style review of the adequacy of skills teaching.[52] The Law Admissions Consultative Committee is currently conducting an examination of the development, content and delivery of Practical Legal Training courses.

## Commonwealth Funding for Clinical Legal Education

The relatively small nature of the Australian CLE movement increases the significance of the funding initiative announced in the 1998 Federal budget. The importance of the initiative also needs to be gauged in the context of a university sector in yet another period of transition. The Howard Federal Government elected in March 1996 reduced university funding in the 1996/97 budget, increased the partial fees charged to students, and appointed a Committee of Review of Higher Education. The Howard government also

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50 N Tarr, The Skill of Evaluation as an Explicit Goal of Clinical Teaching (1990) 21 *Pacific Law Journal* 967.

51 R Handley & D Considine, *supra* note 22.

52 American Bar Association, Section of Legal Education and Admissions to the Bar (ABA), *Legal Education and Professional Development - An Educational Continuum, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap*, (American Bar Association, 1992).

moved to allow universities to charge full fees on additional places made available to Australian students who had not gained entry through the existing tertiary entry system.

Such changes appear to have prompted Law Schools with substantial CLE programs to question the level of their financial commitment. The ongoing viability of UNSW's CLE program was called into serious question while the Monash clinical program faced a series of budget reductions. Funding restrictions are also threatening the comprehensive nature of the Newcastle CLE program. As outlined above, the sites of some CLE programs have been reliant on funding provided by the Commonwealth Community Legal Centre Funding Program administered by the Federal Office of Legal Aid and Family Services. With increases in community legal centre funding in recent Federal budgets, law schools with established CLE programs expressed understandable concerns that they were funding services which should be provided from legal aid resources.

The prospect of direct Federal government funding of CLE programs had been raised in 1996 when significant federal funds were provided for the establishment of Murdoch University's CLE program.[53] This program places students at the newly established Southern Communities Advocacy, Legal and Education Service (SCALES) of which Federal Attorney-General, Daryl Williams, is a strong supporter. This was followed by the evidence given by various clinical teachers to the Senate Inquiry into the Australian Legal Aid System. In February 1997, the Inquiry heard evidence from five academics involved in the CLE programs at La Trobe, Monash and Murdoch. The message to the Inquiry was clear: Universities and their law schools are subsidising the provision of legal services to the community, universities are under funding stress and universities cannot be expected to fill the gap created by legal aid cuts. The Inquiry also heard from academics involved in the CLE programs at Griffith, Newcastle and UNSW. The Senate Inquiry's Third Report refers to community legal centres as a principal element of the legal aid community and notes that some CLCs receive indirect funding or subsidies from sources including universities.[54]

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53 Clinical Legal Education at Murdoch (1997) 22 (2) *Alternative Law Journal* 158.

54 Senate Legal and Constitutional References Committee, Inquiry into Australia's Legal Aid System, *Third Report*, (Canberra: AGPS, 1998) Ch 8 at 1.

Papers released in connection with the 1998 Federal Budget indicate that the Commonwealth was initially focussed on the establishment of new CLE programs. It appears this approach was re-thought prior to funding being allocated. Had it been implemented in its initial form, the emphasis on developing new programs may have exacerbated existing funding difficulties facing established CLE programs. Why would a law school continue to use its own resources to support a CLE program if this prevented such a program attracting specific Commonwealth funds? Of course, those law schools with existing CLE programs which did not attract Commonwealth funding may well continue to face such pressure.

The Commonwealth also initially referred to the establishment of "a service delivery model" which would form the basis for Commonwealth-funded CLE programs. This model was to be determined following a benchmarking process and would seek to ensure best practice in service delivery and accountability. The conduct of a benchmarking process and the establishment of a "service delivery model" did not eventuate.

## What the Commonwealth has Funded

After shortlisting eight expressions of interest from Australian law schools late in 1998, the Commonwealth announced in early March 1999 that Clinical Legal Education Project funding would be provided to Griffith, Monash, Murdoch and UNSW.[55] Each program will receive $100,000 per year for four years. Both Griffith and Monash will be operating specialist family law CLE programs while Murdoch and UNSW will be using the funding to continue existing programs.

The Commonwealth has focussed heavily on community service outcomes. The family law focus indicates clearly the concern to provide services in areas of Commonwealth legal responsibility. It is unclear what significance the Commonwealth attached to the educational merit and objectives of CLE programs when it was making funding decisions. The funded programs will be required to meet similar reporting requirements to those placed on Commonwealth-funded CLCs.

The Commonwealth has also allocated $100,000 towards the CLE National Quality Project (NQP). The NQP involves

55 G Healy, Law students to staff justice clinics *The Australian*, 10 March 1999, at 41.

one-off project grants for activities designed to "maximise legal service delivery to disadvantaged clients through the Commonwealth Community Legal Services Program and promote cooperation with universities."[56] The Commonwealth has identified priority areas which include mediation and primary dispute resolution, servicing regional, rural and remote Australia, the cost of CLE programs, student supervision, proposals for a Student Practice Rule, integrating CLE across the curriculum and developing external placements.[57] As well as benefiting Australian CLE programs, the NQP will also provide valuable opportunities for Australian clinicians to develop their research expertise.

## Where to From Here for Australian CLE?

The Commonwealth government is increasingly interested to explore the possibility of greater law student involvement in legal aid service delivery. Such involvement is likely to continue to occur through clinical programs linked to CLCs. In 1997/98, Victorian CLCs were the subject of a major review instigated by the Commonwealth and Victorian Governments. The report of the review, published in July 1998, referred to law and legal studies students making "a significant contribution to the provision of services by CLCs and the experience gained in working in a service environment contributes significantly to the legal education of potential legal and paralegal practitioners."[58]

The CLC Review report further referred to CLCs specialising in CLE activities as having a specialist function which had hitherto been unacknowledged, describing the function of CLE as "a distinctive competency which contributes to the education of legal practitioners and leads to direct positive outcomes for clients as the volume of community legal service oriented legal practitioners grows."[59] While recommending the amalgamation of various other Victorian CLCs, the Review supports the retention of centres involved in CLE and suggests that growth in student demand for CLE will facilitate the CLCs involved becoming "centres of excellence".[60]

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56 Letter dated 3 March, 1999 from Dr Margaret Browne (First Assistant Secretary, Family Law and Legal Assistance Division, Attorney- General's Department) to Curriculum Committees of Australian Law Schools.
57 *Ibid*.
58 Impact Consulting Group, *Review of Victorian Community Legal Centre Funding Program: Final Report*, (July 1998) Vol 1, at 74.
59 *Ibid*, 138.
60 *Ibid*, 140.

> The Review nominated CLCs associated with the La Trobe and Monash programs as CLE providers along with Fitzroy Legal Service. Fitzroy, which is not currently involved in any formal CLE program, is referred to in the report as the inner urban CLC with the greatest capacity to establish a formal CLE program with the University of Melbourne 'when the latter institution accepts the inevitable necessity to expand training opportunities for law students'.[61]

The Commonwealth CLE funds have been directed towards existing programs rather than to law schools considering the establishment of CLE programs. Law Schools which do not currently operate CLE programs may consider it strategic to develop their CLE expertise in anticipation of further CLE funds becoming available. Such law schools will need to think small and smart with a view to minimising the set-up costs. For those law schools with existing CLE programs, there is likely to be pressure to increase participating student numbers, something which may call into question the very basis of clinical teaching method.

Australian law schools are likely to explore options for external placements and more specialised live-client clinics. So far, there has been only limited involvement in external placement programs. Such programs are operated by several law schools (Adelaide, Griffith, Newcastle, Sydney and Wollongong). Not all of these existing programs involve assessment of the students performance[62] and some involve students in assuming only very limited responsibility for the work which they do.[63]

Whether such externship programs fit a definition of CLE which emphasises reflection and critique will depend on the program in question. More sophisticated models are likely to be developed although some elements of the legal profession are likely to view such placements as another training burden they do not wish to bear. All such programs rely on the goodwill and cooperation of the placement sites and, unlike in the United States of America,[64] there is not a

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61 *Ibid*, 139.
62 Lamb *supra* note 8 (Lamb & Goldring) at 380-1.
63 Lamb at 376, Boersig supra note 27 at 476.
64 In 1990/91, more than 10,000 law students in the USA participated in an externship placement. American Bar Association, Section of Legal Education and Admissions to the Bar, (1992) *Legal Education and Professional Development – An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 253.

strong ethos in the Australian legal profession in relation to hosting such student placements. The Griffith program takes external placements beyond mere work experience and incorporates them within a coherent seminar program which critiques the roles played by legal professionals as well as covering a range of generic skills. The first offering of the subject has resulted in several students receiving articled clerkships with prestigious city law firms with which they were placed.

The first specialist live-client clinic in Australia was established on a pilot basis by Monash University with the South Eastern Centre Against Sexual Assault in 1996.[65] Griffith University established an alternative dispute resolution clinic in 1998 which involves students in policy and client-intake work for the Alternative Dispute Resolution Branch of the Department of Justice. As outlined above, the Commonwealth will now be funding specialist family law clinics to be run by Griffith and Monash.

It appears likely that law schools will consider establishing specialist clinics in areas where they have academic strengths. Areas likely to be considered for such programs include:

- law for older members of the community. There is an abundance of evidence that older people encounter a range of difficulties in accessing various community services. This is despite the fact that in 1990 11.2% of Australia's population were more than 65 years of age. By 2030, it is estimated that this figure will have increased to 19.1%. Access to free legal advice and, where appropriate, ongoing representation would be of significant assistance to older people, particularly those who are on fixed incomes. While many community legal centres provide assistance to older people, these centres and legal aid organisations have not been able to develop detailed expertise in areas of particular concern as outlined above.
- environmental law. A network of environmental defenders offices (EDOs) was set up with funds from the *Justice Statement* launched by the then Federal Labour Government in 1995. Subsequently, this "soft money" source has dried up. Such EDOs may well consider links with clinical programs as a mechanism for broadening the services which they can offer. University of Sydney Law School has established a

65 A Evans, Specialised Clinical Legal Education Begins in Australia (1996) 21 *Alt LJ* 79.

program where students spend a half-day per week at the New South Wales EDO for eight weeks. Clinical work on environmental issues has been particularly politically contentious in the USA.[66]

- industrial relations. The current Federal Government and a range of conservative state legislatures have introduced legislation which substantially limits the ability of trade unions to fulfil their traditional roles in negotiating conditions of employment. In the UK, the Bar Vocational Course has since 1992 provided students with an opportunity to be involved in representing clients in employment disputes before the industrial tribunals.[67]

CLE programs are likely to seek to formalise student rights of appearance[68] before courts and tribunals with a view to making greater use of appearances as a learning experience. While advocacy simulations in the form of moots have been used extensively,[69] Australian Law Schools have been slow to promote rights of appearance in court being extended to students. Newcastle, Monash and Griffith all incorporate student appearance work into their CLE programs.[70] Each of these programs rely on the discretion of individual magistrates and judges to grant leave to students to appear in their court and this has recently created difficulties for the Monash program.[71]

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66 See P Joy & C Weisselberg, Access to Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege (1998) 4 (2) *Clinical Law Review* 531 where, in the context of a discussion of threats to the Tulane Environmental Law Clinic in Louisiana, they state "No law school clinic has been the target of as many sustained attacks as the in-house environmental law clinic at the University of Oregon."

67 N Duncan, On Your Feet in the Industrial Tribunal: A Live Clinical Course for a Referral Profession (1996) 14(2) *Journal of Professional Legal Education* 169.

68 There is no student "right" of appearance before Australian courts. Rather, students must obtain leave from a court before making their appearance.

69 Lynch, *supra* note 45.

70 For an outline of the Monash program, see S Campbell My Learning Friend (1993) 67 (10) *Law Institute Journal* 914.

71 Changes to the *Legal Profession Practice Act* have raised concerns regarding the standing of students to appear in court as advocates. See J Faine, Student Counsel Scheme Under Threat (1997) 71 (1) *Law Institute Journal* 17. Noone suggested in 1991 that legislative amendment was the best way to create the certainty needed to promote student appearances. MA Noone, Student Practice Rule – Is it Time? (1992) 66 (3) *Law Institute Journal*, 190.

## Conclusion

The Commonwealth's interest in CLE clearly arises more from a concern to deliver cheaper legal services to the community rather than an agenda primarily directed to improving legal education. The question is the extent to which both community service and educational objectives can be achieved in the same program. The links with CLCs and the commitment to improving access to legal services, central to the establishment of most Australian CLE programs, have now resulted in some CLE programs receiving significant funding support from the Commonwealth. It is in this sense that the title of this article refers to Australian CLE as a "circle game".

The Commonwealth will no doubt monitor carefully the progress of the funded CLE programs. Whether further Commonwealth funds are made available for CLE will depend substantially on the performance of the funded programs. Attorney-General, Daryl Williams, commended Australian law schools for their overwhelming response to the call for expressions of interest regarding such programs. Mr Williams also commended the high standard of the submissions.[72] Those law schools which did not receive CLE funds will now need to consider whether to continue or commence allocating resources towards CLE with a view to obtaining Commonwealth funds if and when further funds become available.

72 "Clinical Legal Education Initiative", News Release from the Hon Daryl Williams, 29 January, 1999.

# Simulating Multilateral Treaty Making in the Teaching of International Law

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## Introduction

The general course in Public International Law has not traditionally been considered a "black letter law" subject along the lines of the legislation and case law based domestic law subjects in most Australian Law School *curricula*. Despite the general acceptance among international law educators that international law is much more than simply a set of rules,[1] teaching methods in the subject, at least in Australia, have rarely focused on the actual practices of international law, particularly the peculiarities of the process of international law making.[2] Indeed, a clinical international legal education program has yet to be developed anywhere in Australia.

This lack of attention to teaching about the making of international law poses a particular problem in the area of multilateral treaty making. Treaties are one of the four major formal sources of international law[3] and, increasingly, are seen as the most significant component of the international legal order. An understanding of the principles of treaty law is fundamental to any analysis of the substantive provisions of an individual treaty and therefore indispensable to any student of international law. Yet, the methods and processes by which treaties *emerge* remains relatively unexplored in the

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 (1999) 10 *Legal Educ Rev* 61.

1 Clinical legal education is discussed in some detail in Kathy Mack, Clinical Learning for Conventional Classrooms (1992) 3 *Legal Educ Rev* 89. See also the introductory chapter in Rosalyn Higgins, *Problems and Progress: International Law and How We Use it* (Oxford: Clarendon Press, 1993) entitled 'International Law is Not Rules'.

2 "Teaching in university law schools, with a few notable exceptions, is narrow, focusing primarily on exposition of legal doctrine and rather half-hearted in its application". Richard Johnstone, Rethinking the Teaching of Law (1992) 3 *Legal Educ Rev* 17, at 18.

3 Statute of the International Court of Justice, art. 38(1)(a).

discipline. This can be contrasted with scholarly activity in domestic law where "emergence studies" into national legislation is a thriving field.[4]

Accompanying the predominance of treaties in international law is the associated proliferation of international organisations. These organisations vary in scope and subject matter. The UN itself is, of course, the quintessential global, multi-faceted multilateral organisation. Other global organisations, usually in some affiliation with the UN, are issue specific such as the World Trade Organisation, the Organisation for the Prohibition of Chemical Weapons and the International Labour Organisation. Other multilateral organisations have a limited membership based on, for example, geographic location (the European Union), commodity production and export (Organisation of the Petroleum Exporting Countries) or level of economic development (Organisation for Economic Co-operation and Development). Whatever their nature or mandate, every significant organisation created since 1945 has been established after a process of multilateral treaty making. Understandably, international lawyers have focused on the constitutive instrument in order to interpret and evaluate the work of the organisation. Again, however, the teaching of international law has tended to under-emphasise the process by which these organisations come into existence through the negotiation of a multilateral treaty.

In this article we suggest that the use of simulations offers at least one means by which this over-emphasis on doctrine at the expense of practice can be remedied. Through simulations students can understand that process is vital to an adequate comprehension of the political context in which international law operates and the legal forms which international law adopts and utilises. This is, of course, true of all law teaching. To some extent, this article advocates the use of simulations generally and not just in international law[5]

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4 P O'Malley, Accomplishing Law: Structure and Negotiation in the Legislative Process (1980) 7 *Brit J of L and Soc'y* 22, at 22-35; W Carson & C Henenberg, The Political Economy of Legislative Change: Making Sense of Victoria's New Occupational Health and Safety Legislation (1988) 6 *L in Context* 1, at 1-19.

5 Johnstone, *supra* note 3. See also Richard Ingleby, Translation and the Divorce Lawyer: Simulating the Law and Society Interface (1989) 1 *Legal Educ Rev* 237. For other examples of simulation see Stacy Caplow, Autopsy of a Murder: Using Simulation to Teach First Year Criminal Law (1989) 19 *N M L Rev* 137; Philip G Schrag, The Serpent Strikes: Simulation in a Large First-Year Course (1989) 39 *J of Legal Educ* 555; Robert G Vaughn, Use of Simulations in a First-Year Civil Procedure Class (1995) 45 *J of Legal Educ* 480.

because in Richard Ingleby's words: "Simulation is a direct way of demonstrating the links between the legal world and the non-legal world".[6]

Simulations have been used extensively in law school teaching for many years. The archetypal law school simulation — the moot — has been an integral part of Australian law school *curricula* since the inception of tertiary studies in law in this country.[7] Since then, academic colleagues have made extensive and creative use of simulation techniques to teach procedural as well as substantive issues and this is as true in international law as it is in other subject areas.[8]

In this Article we intend to describe how we have drawn on these previous efforts to devise a simulation exercise aimed at redressing the lack of emphasis on process and negotiation in the teaching of international law and organisations.[9] We begin by offering some possible explanations for the absence of a drafting/process component in International Law *curricula* and outline the background to our drafting/process module. We then describe in detail the structure, logistics and content of a particular simulation exercise we run involving the drafting of the Statute for an international criminal court. We identify particular problems that have arisen in the course of successive experiences with this particular exercise and offer the solutions we have implemented in response to these problems. Every use of the exercise has been successful and we conclude the essay with an evaluation of the benefits of adopting this form of teaching.

## Why Process or Drafting is Not Taught

The doctrinal focus of much international law teaching can be explained partly by the difficulties inherent in any attempt to teach process and negotiation. Communicating information about legal rules and principles is, on the whole, more straightforward than engaging students in the simulated

6 Ingelby, *supra* note 5, at 246.

7 James R Crawford, Teaching and Research in International Law in Australia (1984) 10 *Australian Y B of Int'l L* 176; also Ivan A Shearer, The Teaching of International law in Australian Law Schools (1983) 9 *Adel L Rev* 61.

8 Christine Chinkin & Hilary Astor, *Dispute Resolution in Australia* (Sydney: Butterworths, 1992). For an example of this method, see Paul J Spiegelman, Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web (1988) 38 *J of Legal Educ* 243.

9 Johnstone, *supra* note 2, at 51.

practice of international law. We have identified the following reasons, in particular, for the hesitancy to use this teaching method more readily.

## *Time-Commitment Involved*

A successful simulation exercise on the negotiation of a draft multilateral treaty requires a substantial time commitment on the part of both teachers and students. Teachers need to identify an appropriate subject for negotiation — either from an existing multilateral negotiation process or by creating a hypothetical subject and process. We have always used an actual negotiation process in order to maximise the benefit of existing materials. There is added benefit too in that a current process is usually known by at least some of the students and involvement in the simulation will encourage students to more closely follow the real negotiation process. Even with the adoption of a current negotiation process, however, the advanced planning for the exercise can be administratively burdensome.[10] The sheer logistics of identifying appropriate materials for each student, copying relevant numbers of each document, distributing the correct documents to each student and scheduling time to clarify aspects of a particular country brief for students involves a substantial amount of time and effort.

In addition, the amount of time the actual exercise consumes is a factor for consideration. If the exercise occurs during normal class time, a teacher would need to allocate a substantial proportion of the lecture/seminar time allocated to the subject. The most successful simulation exercises we have been involved in have usually taken one whole day. In the context of an intensive graduate course on the Law of International Organisations, for example, one day of "negotiations" to establish a new organisation in the context of the rest of the course has worked very well. We cannot envisage a successful simulation split over several weeks and this automatically raises problems for undergraduate or graduate teaching where courses are often allocated only a 1-2 hour teaching slot per week. While it might be possible to organise a simulation exercise outside of the normal class time (for example, a whole day on a weekend or during a non-teaching period) this would inevitably exclude some students from the exercise.

10 Jay M Feinman, Simulations: An Introduction (1995) 45 *J of Legal Educ* 469.

## *Lack of Exposure to Negotiation Processes*

A successful simulation will also rely on the experience and knowledge of the teacher(s). Clearly, inside knowledge is invaluable not least because it permits the teacher(s) to devise a simulation that more closely resembles the reality of negotiation and also allows them to compare the simulation to that reality in a debriefing session. We have been fortunate to attend key moments of multilateral institutional design as advisers to the Australian Government. In relation to the International Criminal Court in particular, these opportunities have included successive periods at the Sixth Committee of the UN General Assembly in New York, numerous departmental briefings in Canberra and the Conference of Plenipotentiaries in Rome.[11]

This level of involvement is unusual but not unprecedented in Australia. Many of our Australian international law academic colleagues have close working relationships with the international law offices of relevant government departments (particularly the Department of Foreign Affairs and Trade (DFAT), the Department of Defence and the Attorney General's Department) which are often keen to encourage academic involvement. Indeed, several of the early simulations we developed were partly devised by DFAT legal officers and these individuals have attended several simulations, often adopting roles or acting as advisers to student representatives.

The other obvious benefit of such collaboration is the increased availability of source material. Conversely, the lack of access to such material can act as a disincentive to the use of simulations. Again, the solution to this must lie in ongoing cooperation between academics in order that knowledge and material can be distributed as widely as possible. The current article is an attempt to contribute to this process.

## *Motivation, Unpredictability and Coverage*

Other possible deterrents include the suspicion that students may not be sufficiently motivated to make the simulation work and the sense that such events are rather unpredictable. The question of motivation is one worth raising. In our

11 Our experience in other institutions like the Unrepresented Nations and Peoples Organisation (Simpson) and the Conference on Disarmament, the Organisation for the Prohibition of Chemical Weapons and the Conference of States Parties to the Geneva Conventions (McCormack) have also afforded us a wider context with which to work.

experience, simulations work only when students engage with the activity and take it seriously. If students are already motivated by a course of learning, the simulation is likely to be successful but even where a class has lacked sparkle, simulations can inspire renewed interest in the subject-matter. This is partly attributable to the fact that simulations are invariably entertaining as well as edifying. However, simulations also allow students to speak in a different voice or adopt a fresh *persona*. This can liberate otherwise diffident students to speak more freely that they would otherwise have been inclined to do. We have often observed that student contributions in a course become more regular and fluent after a simulation.

Simulations are, of course, unpredictable. In this, they are rather like practice itself. This makes them risky, *ad hoc* and experimental. They can also be somewhat emotional affairs. Teachers may have to relinquish their control over a course for a period. This is not always easy but one clear advantage of the simulation is that it is a departure from the centralised model of teaching where the teacher is principally a disseminator of information. In the words of one teacher, "[s]imulations can transform students from passive, detached observers into involved participants in the learning process."[12]

The teacher concerned with getting through a mass of material in a course will find simulations an unappealing way to teach international law. Students teach themselves more slowly than we can teach them. But they teach themselves more effectively. So, while a simulation may take a large proportion of the time allocated to the unit and while the coverage of material will be unpredictable, all of this is offset by the deeper level of self-education engendered by the simulation.[13]

## Background to Involvement

Reflecting upon our development of the simulation exercise on the negotiation of a draft statute for an international criminal court, we have identified several shared experiences which have contributed to a "gestation period" fundamental to the

12 Spiegelman, quoted in Mack, *supra* note 1, at 101.

13 See, for example, GR Williams, Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses (1984) 34 *J of Legal Educ* 307; Marlene Le Brun and Richard Johnstone, *The Quiet ()evolution: Improving Student Learning in Law* (Sydney: Law Book Co Ltd 1994), at 304-307.

emergence of this exercise. A brief account of some of these key experiences will help explain both our conception and our development of the exercise:

## *Earlier Simulations in International Law*

When the UN General Assembly declared the 1990s "The Decade of International Law", Member States of the UN were asked to implement measures to promote the teaching of International Law.[14] As part of its response to this request, The Australian Department of Foreign Affairs and Trade helped to organise a number of international law simulation exercises in Australian Law Schools. We participated in two such exercises in 1992 and 1993 in the Law School at the University of Melbourne. Both exercises simulated meetings of the UN Security Council. The first involved a debate in the UN Security Council on the question of whether to impose economic sanctions on Libya for the failure to surrender the two Lockerbie bombing suspects to the governments of the UK and the US. The second involved a hypothetical debate about the admission of Taiwan and Palestine to the UN.

These two UN Security Council simulations were both extremely successful experiences and introduced us to the educational possibilities of simulation exercises in international law. We subsequently attempted a number of simulation exercises in two international law related subjects — Human Rights Law and Current International Legal Problems. These exercises included arguments before the UN Human Rights Committee on the Toonen Case[15] pursuant to Australia's accession to the 1st Optional Protocol to the International Covenant on Civil and Political Rights and a war crimes trial of Lt William Calley[16] charged with offences in relation to the My Lai massacre in Vietnam. Again we observed that students responded enthusiastically to these initiatives and many students have cited the exercises as foremost among their personal highlights from the courses.

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14 GA Res 44/23, U.N. GAOR, 44th sess , U.N. Doc A/RES/44/23 (1989). The General Assembly declared the period 1990-1999 the U.N. Decade of International Law to promote acceptance, respect and progressive development of international law as well as its teaching and dissemination.

15 *Toonen v Australia* UN Hum Rts Comm, UN Doc CCPR/C/50/D/488/1992 (1993).

16 *US v Calley* 46 C M R 1131 (1971), aff'd in 22 USCMA 534, 48 CMR 19 (1973).

### *Exposure to Multilateral Negotiations*

Our participation in various negotiations exposed us to the idiosyncrasies of the multilateral process — the unwritten rules of multilateral diplomatic etiquette, the practical application of the principle of sovereign equality of States, the complexities of delegation flexibility within the parameters of the negotiating brief, the creation of sometimes unexpected coalitions of States to pursue common negotiating positions, the diversity of strategies to encourage particular States to change their positions on specific issues. As a consequence, we recognised the significance of the process of multilateral negotiation to an understanding of the making of international law. Our increasing familiarity with the process emboldened us to attempt to teach aspects of the process through the technique of simulation.

### *Access to Primary Materials on the International Criminal Court*

An additional benefit of participation in "real" multilateral negotiation processes, particularly in the Sixth Committee discussions of the International Law Commission's Draft Statute for an International Criminal Court, was the access to primary materials for the simulation exercise. National delegations making formal statements in the course of Sixth Committee debates invariably provide written copies of their statements. These statements do not become official UN Documents, are not allocated UN Document numbers and are not available commercially through the usual channels for distribution of UN Documents. Copies of the statements are often only made available after a statement has been formally presented in oral form. Consequently, unless an individual, present throughout the entirety of a debate on a particular agenda item, makes a concerted effort to collect a comprehensive set of the statements, it is very difficult to acquire them.

We were able to collect three incomplete sets of delegation statements from the 48th, 49th and 51st sessions of the UN General Assembly's Sixth Committee debates on the question of an international criminal court and these documents have been indispensable to the success of the exercise. The formal documents from the debates on the international criminal court, particularly the text of the draft statute itself, are of course readily available in the public domain. However, the individual delegation statements, which are much harder to acquire, make it possible to assign

specific country roles to participating students and to provide each of them with an indication of their "State's" position on the issues under discussion.

## Preliminary Steps for the Simulation

We have developed a particular exercise that involves a simulation either of UN General Assembly Sixth Committee debates on, or the Preparatory Commission negotiations for, a permanent international criminal court. Here we identify and explain the specific steps we have undertaken in preparation for the simulation exercise.

### *Preparation of Materials*

One key preparatory step for the simulation exercise is to identify the materials students will use in the exercise and gather those materials for distribution. We have prepared appropriate numbers of copies of the following documents:

- the relevant provisions of the Draft Statute for an International Criminal Court (specifically the provisions on the definitions of the substantive crimes; on the triggering of the court's jurisdiction; and on the relationship between the court and the UN Security Council).[17] We have asked students to use the actual text of the Draft Statute as the basis of "negotiations" in the simulation exercise and so the text itself has been fundamental;
- relevant extracts from various secondary sources commenting upon the aspects of the Draft Statute the subject of the simulation exercise.[18] These materials have helped provide background information for students and to help clarify the contextual basis for the specific positions in their country statements;
- the country statements from the Sixth Committee already referred to above. We only give each student copies of the

17 We have never considered it necessary to provide the Draft Statute in its entirety because so much of the document is not directly relevant to the simulation exercise and copies of the entire document only increase the costs of the exercise and the time involved in preparing for it. However, there is certainly no reason in principle why students could not receive the complete document.

18 We have published joint commentary on the aspects of the Draft Statute also the subject of the simulation exercise and so have tended to use that material with some other authors. Our tendency has been to provide relevant extracts from 2-3 different articles. Again, there is no reason why more could not be provided but we have found that students do not need copious secondary sources to engage in the exercise.

statements delivered by the State they are "representing" in the simulation exercise. We have selected particular States to be represented on the bases of: geography (that is, at least two States from each of the 5 regional groupings in the UN System — Africa, Asia, Eastern Europe, Latin America, and WEOG — Western Europe and Others Group); political significance in the actual negotiations for the international criminal court (for example, all five permanent members of the UN Security Council); availability of statements from the same States in different years (entirely dependent upon our own collection of statements); and availability of statements in English, or a language accessible to one or more students participating in the simulation exercise.[19]

## *Presentation of Background Lectures*

We have found it helpful to provide one or two lectures as background preparation for the simulation exercise. These lectures have concentrated on an introduction to both the concept and the process of multilateral negotiation as well as upon the arguments for and against an international criminal court, a critical evaluation of past unsuccessful attempts to create such a court, a brief overview of the negotiating history of the draft statute and, particularly, the key issues of contention we have made the subject of the simulation exercise. Here we have identified and attempted to explain different national positions in relation to the definition of war crimes, crimes against humanity and genocide; the consent of particular States for the initiation of criminal proceedings; and the relationship between the UN Security Council and the Court.

The lectures have always helped students participating in the simulation exercise gain a greater sense of familiarity and, as a consequence, confidence with the substantive issues the subject of the simulation exercise. We have attempted to present the lectures some days prior to the exercise itself to allow students the opportunity to follow-up the lectures with their own reading of the secondary sources referred to above.

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19 Most statements are provided in English including by those States whose representatives speak one of the other official U.N. languages (Arabic, Chinese, French, Russian, Spanish). However, some statements are only provided in French and others only in Spanish. We have always found fluent French speakers and often found fluent Spanish speakers among the students participating in the exercise and have allocated them roles accordingly.

### *Explanation of Exercise and Allocation of Roles*

At some stage prior to the actual day of the simulation exercise, we have held a session to outline the proposed agenda, to explain the way in which we propose to conduct the exercise and to allocate specific country roles to each of the students. In allocating country roles we have regularly assigned one student only to each of the developing States and the smaller developed States and at least two students to each of the five permanent members of the UN Security Council and the larger developing countries (for example, Germany, Japan, Canada). We have regularly allocated more students to the US delegation than to any other State and on occasions have had up to five students "representing" the US with no more than 2 students "representing" any other single country.

These disparities in relative sizes of country delegations are indicative of our attempts to replicate at least some of the realities of multilateral negotiations. The more influential States regularly have much larger delegations than smaller States and the US routinely has delegations which dwarf almost all other States in terms of numbers of personnel. The actual number of States "represented" in the simulation and the number of students allocated to each delegation is ultimately dependent upon the number of students participating in the exercise. We have found that 30 or more students representing 20-25 States is ideal but we have also conducted successful exercises with as few as 14 participating students.

In the explanatory session we also attempt to describe some of how multilateral negotiations work — both in terms of procedure and conventional forms of negotiation as well as in terms of the pursuit of national objectives and priorities. Although this session is necessarily brief and somewhat superficial, it is also important for the overwhelming majority of students uninitiated in the process of multilateral negotiations many of whom may be apprehensive of what is expected of them personally in the simulation exercise.

## Conduct of the Simulation

### *Prefatory Sessions*

The simulation exercise cannot commence without the appointment of a chairperson. We have usually selected a confident and articulate student for this role but, on occasions,

we have also used a government official experienced in multilateral negotiations and invited to participate in the simulation exercise. The role of the chairperson is critical to the success or otherwise of the exercise because we do not use formal rules of procedure for the conduct of the exercise and this person exercises their own discretion as to the way the meeting will be conducted and take its decisions. The chairperson directs the discussion, calls for statements on particular issues, has the responsibility to move through the agenda concluding discussion on specific items and initiating breaks in the plenary sessions for informal consultations when impasses emerge, and to call for votes on specific issues when required. If a student is chosen for the task they will invariably need some brief instruction on how to perform their responsibilities but it has always been an encouragement to us to see particular individuals rise to the opportunity afforded them in this role.

The formalities of the exercise commence with "representatives" of States taking their seats behind their State namecards (arranged in English alphabetical order as occurs in most multilateral negotiations) with the chairperson calling for 2-minute statements from each of the delegations. This brief statement reflects the particular State's position in relation to the creation of a permanent international criminal court and to some of the substantive issues under discussion. The students base their own statements on the country statements they have already received and it is the responsibility of the chairperson to ensure that "delegates" do not take an excessive amount of time. The length of time for this initial session will obviously depend upon the number of State delegations but these have often occupied up to one hour.

After the initial session of introductory statements, we have often had the chairperson instruct "delegates" to break for informal discussions and caucusing with "like-minded" States. This informal session is the first of several throughout the exercise and we have encouraged delegates to use morning and afternoon tea breaks and the lunch break to continue with informal discussions. We have played a role ourselves as "capitals" for all delegations so that they can approach either of us at any time with requests for advice or clarification as to their national position on any particular issue. Delegates tend to use this resource on a regular basis as a way of confirming their own ideas and initiatives on particular issues. We also take a more active role and approach delegations with suggestions about positions they should

initiate or support to alter the dynamic of a discussion in relation to a particular issue. For example, we regularly approach the larger delegations and suggest that they threaten specific developing States' delegates with cancellation of aid programs or with the imposition of economic sanctions if those States do not change their position to support particular initiatives in the discussions.

In the initial informal discussions after the plenary session on introductory statements, we arrange for the chairperson to indicate that delegations will be asked to nominate cities for the seat of the court and that they should caucus within their State's geographic grouping, and lobby beyond that grouping, for nominations they wish to promote. It is always intriguing, and often humorous, to observe what proposals particular groups of students produce from these discussions. On one particular occasion the "representative" of Slovenia wanted to nominate her own capital for the seat of the Court but then, embarrassingly for her and for her "country", had to check what the name of the capital city actually was! On another occasion separate delegations in the simulation nominated Melbourne and Sydney for the seat of the Court and the debate at Australian Federation about the national capital was replicated all over again. Other more interesting and better conceived proposals have included Nuremberg, Tokyo and several capitals in the Developing World.

After a period of up to 30 minutes, we have the chairperson call the meeting to order and to ask for nominations for the seat of the court. Delegations nominating host cities are asked for a brief statement articulating the rationale for their particular nomination. We leave the nominations of host cities entirely to the creativity of the students themselves. If there is only one nomination, that host city is elected unopposed by decision of the chairperson. We have seen that outcome only once after some sustained and clearly effective lobbying by one delegation in the informal discussions. It is much more common for there to be multiple nominations, all usually supported with creative and thoughtful arguments as to the relative merits of the nomination.

## *Definitions of Crimes*

Once the host city for the Court is appointed we move to the first substantive issue for the exercise — the definitions for the crimes making up the subject matter jurisdiction of the Court. The crimes in the draft statute for the Court were

genocide, war crimes and crimes against humanity. In some exercises we have chosen just one of the three substantive crimes and concentrated on the negotiation of that definition because of time constraints. In other exercises we have dealt with the definitions for each of the three "core crimes". Naturally, the definitional problems are different for each crime. For genocide, for example, the draft statute relied exclusively on the definition incorporated in the 1948 Genocide Convention.[20] Criticisms of the limits of this definition have focused on the high threshold mental element of the requisite specific intent to destroy "in whole or in part" the victim group as well as on the exhaustive and, therefore exclusive, list of target groups the subject of the genocidal activity. In relation to war crimes there were issues about the extension of the Court's jurisdiction beyond international armed conflicts to also cover internal armed conflicts. There was also uncertainty about the scope of the Court's jurisdictional competence in respect of the means and methods of warfare — for example, the use of certain weapons types, the targeting of protected objects and/or persons, perfidious use of protected emblems and the question of proportionality and military necessity.

## *Exercise of the Court's Jurisdiction*

Another key issue for discussion has been the various options for the exercise of the Court's jurisdiction — otherwise known as "triggering mechanisms". Here the draft statute envisaged two relatively non-controversial options — a complaint from a State Party alleging a violation of the Statute of the Court or a referral of a situation by the UN Security Council for the investigation of the Prosecutor of the Court. The third proposed trigger, and much more controversial than either of the other two proposed triggers, was that the Prosecutor be authorised to act *proprio motu* — or on her own initiative — to investigate a possible commission of a crime within the subject matter jurisdiction of the Court.

This question of triggering mechanisms is inextricably linked to the question of the consent to the exercise of the Court's jurisdiction. There were issues about whether States Parties ought to automatically cede jurisdiction to the Court over some or all of the crimes in the Court's Statute *ipso facto* as States Parties to the Statute or whether they ought to be

20 Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec 9, 1948, *entered into force* Jan 12, 1951, 78 UNTS 277.

entitled to select the specific crimes they will cede jurisdiction over and which they will not. There was an additional issue about non-States Parties to the Statute of the Court — particularly where one of more of the territorial State, the custodial State and the State of nationality (of the accused) are not party to the Statute of the Court.

### *Relationship Between the Court and the UN Security Council*

One of the final issues the students negotiate is the precise relationship between the UN Security Council and the international criminal court. After the students have broken for informal discussions and negotiations, we have often arranged for the chairperson to call the meeting together and to ask delegations for statements on the wording of the relevant provision of the current version of the draft statute for the court. The earlier versions of the Draft Statute prior to the Rome Diplomatic Conference on the International Criminal Court envisaged the court being precluded from considering any situation currently under consideration by the UN Security Council. Such a provision could have seriously limited the potential jurisdiction of the Court because "under consideration" by the Council could be interpreted to mean any situation listed on the agenda of the Council whether or not the Council was actively considering the situation in debates. Students are invited to accept the status quo or to come up with some alternative proposal which may still allow some capacity for the Council to block the court's consideration of a situation but on the basis of a more onerous formula.

Because this session has usually been the final substantive session in the exercise we have often been in the situation of having to rush our deliberations. However, the issues here are particularly interesting and conducive to creative and intriguing compromises to bridge the gap between apparently polarised positions. Consequently, we have attempted to save at least 30–45 minutes for the negotiations and have offered a 10–15 minute break for informal negotiations where this has seemed appropriate.

### *Debriefing*

We have always concluded the exercise with a "debriefing" discussion. This session enables us to talk through our perceptions of the benefits of the exercise and to give the students the opportunity to express their views about their experiences. We have taken the opportunity to help some

individuals emerge from the national roles they have so enthusiastically embraced and to remind others that any frustrations with delegates from other States encountered in the exercise ought not to spill over into interpersonal relationships outside the limited context of the exercise. It is always encouraging to hear students speak of what they have learned through the exercise and we have often received invaluable feedback with suggested improvements for future exercises.

## Problems and Possible Solutions

In this section we identify a series of problems and possible solutions associated with our use of this particular simulation. It should be borne in mind that these problems have often occurred only intermittently or have been revealed to us only through consultation with the students after the simulation is completed.

### *Inadequate Background and Expertise*

It is usually the case that students have relatively little background in either multilateral negotiations or the history and politics of the State they are purporting to represent. This can lead to either a lack of confidence on the part of students or a tendency to enter the realm of the fantastic in adopting debating positions. To avoid this, teachers must provide adequate briefing papers in good time for students to absorb these papers and develop positions. A prior lecture combined with some accessible secondary materials on both substantive and procedural issues is vital if students are to enter the negotiations with sufficient knowledge and skill. Needless to say, no set of briefing papers will ever be complete (this is, after all, the experience of negotiators and diplomats in real life) and students must be encouraged to improvise while remaining faithful to the material before them.

We have found that the general diffidence or shyness of students can be overcome using two techniques. One is to have each representative make an opening statement of about a minute in duration. Students immediately feel part of the debate having had their voices heard. The second technique we have employed is to begin the simulation with a technically straightforward and non-legal issue where students can afford to make ingenious or imaginative suggestions without feeling too constrained by the material. In many cases involving the ICC, we have used a debate about

the location of the Court to help students relax. This exercise also serves a useful intellectual end by revealing to students how few of the UN's primary institutions are situated in the Southern Hemisphere.

An associated difficulty is that students, instead of improvising, become fixed in rigid positions or arid debates. In these cases, the simulation can lose momentum and meander rather fitfully. One possible solution to this lies in providing "instructions from capitals" throughout the day in order to steer the negotiations towards meaningful subjects. This is a role at least one of the lecturers can adopt for much of the day (see above).

### *Frustration of Participants*

Either during or after a simulation, students will come to realise that "[t]hey do not possess the answers"[21] or that the process is highly procedural, frustratingly slow, surprisingly informal and inelegant. These are, of course, insights but it will not always be clear to students that these are valuable conclusions. It is important that teachers engage in a serious debriefing at the conclusion of the simulation. In this period, the teacher must emphasise how realistic an exercise the simulation has been and, in particular, she must ensure that students use their frustrations productively. A simulation is a small move from the controlled environment of a class-room where problems are presented and solutions outlined to a less controlled setting in which problems are very often not solved and issues are left hanging in the air. Simulations represent an advance from the comforts of formalism and should be presented in this light to potentially disenchanted students. De-briefings are important for the usual reason that passions can become highly inflamed when roles are adopted. A period of decompression is vital!

### *Lack of Time*

Simulations are time-consuming exercises both in terms of preparation for the simulation and the simulation itself. While we believe this is time worth spent, it can represent a significant proportion of the time allocated to a particular subject or unit. In an International Organisations course, it means devoting around a fifth of the course to the International Criminal Court. This may appear excessive, especially for an institution not yet functioning. On the other hand,

21 Ingleby, *supra* note 5, at 248.

students do not simply learn about the Court in participating in the simulation. They learn about negotiation, about procedure, about establishing institutions and about drafting processes. So, even in terms of substance, to say nothing of the skills acquired during the simulation, there is enormous scope for deep learning. In the International Criminal Court simulation, we have remained immodest in relation to coverage seeking to explore two or three issues in real depth (jurisdiction, consent of States, relationship of the Court to the UN Security Council) rather than aspiring to what would inevitably be a superficial view of the whole Statute for the International Criminal Court.

In the case of a specific course on International Criminal Law, there is the possibility of the greater luxury of being able to run the simulation across a longer period. We are yet to teach a course in International Criminal Law but at least one, admittedly radical, proposal would be to spend the entire course on simulated negotiation of the whole Draft Statute for an International Criminal Court from establishment to the Final Act. There are, coincidentally, 13 Parts in the Rome Statute. An approach such as this would omit a great deal — for example, the Tribunals in Yugoslavia and Rwanda, the Nuremberg legacy and inter-agency cooperation in fighting transnational crime. However, again, the sacrifice in coverage might be compensated by the unique potential to engage in a single drafting exercise in real depth.

## *Artificiality of the Exercise*

We would not wish to claim too much for simulations. "A simulation resembles something but is not the thing itself."[22] One has to accept from the outset that a simulation cannot entirely replicate actual negotiation and drafting. There are severe time-constraints that do not exist to the same extent in reality; there are no second chances in simulated negotiations; cultural factors are often missing from simulations; inter-state histories do not wield the same influence; and, realpolitik differentials are impossible to reproduce effectively in a simulated context. Again, the important point is to acknowledge the artifice and explain the departures from reality.

The nexus between law and politics is one that can be explored rather usefully in post-simulation briefings. Students

22 Feinman, *supra* note 10, at 469.

tend to believe either that the simulation was artificial because it was "all politics … there was no law … the arguments were too general or too personal" or, conversely, that the arguments were "too technical … too legalistic … unrealistically procedural given the weight of power politics."

It seems to us that these impressions would recur in the context of observing international negotiations at different points and in different situations. In other words, they are likely to be accurate for some negotiations in some cases. There are cases of multilateral treaty making or inter-state negotiation where politics seems dominant and where law tends to fall away, at least prior to the commencement of more technical drafting processes. One might say that the Cuban Missile Crisis is an example of this sort of international negotiation.

However, in the case of the International Criminal Court negotiations legal arguments carried a surprising amount of clout. The negotiators, drafters and diplomats in Rome viewed themselves as both State representatives and lawyers engaged in a collective endeavour. Sometimes, this latter role assumed the primary significance and politics became the absent partner.

One rather acute problem facing us in future is caused by the success of the Rome Diplomatic Conference. The Rome Statute is now open for signature and ratification. There is little left to negotiate on matters of substance. How should we proceed with future simulations? One possibility is to run mock-trials of suspected war criminals but this would be a quite different sort of exercise and would not achieve the aims we have in running the simulation. Another possibility would be to ignore the fact that the Statute has been finalised and run the simulation as if the year was perpetually 1998. This would, we fear, exacerbate the problems of artificiality. It may be that we will have to move to a different substantive area for future simulations.

Alternatively, we may continue to use the Rome Statute for the International Criminal Court but, instead, focus on domestic implementation or the mechanics of institution-building subsequent to agreement on the Statute. This latter approach holds some promise for successful future exercises. Prior to entry into force of the Rome Statute, State Signatories will be engaged in a Preparatory Commission process with a mandate to attempt to define the crime of aggression, negotiate the elements of each of the substantive crimes and agree on the Rules of Procedure for the new

Court. It may well be possible to simulate a negotiating session of the Preparatory Commission. Alternatively, the Rome Statute will be subject to future Review Conferences of the States Parties and a useful simulation exercise could focus on amendments to the definitions of the crimes, additional crimes to be included in the Statute or other aspects of the Court's operation.

## Conclusion

In any educational activity, the prior determination of goals is one of the keys to success.[23] In the case of the International Criminal Court simulation what should these goals be? The literature on educational objectives reveals a taxonomy of possible goals or skills. These are cognitive, performative and affective.[24] Traditional legal education has focused on cognitive learning (doctrinal, formalistic problem solving and information gathering). The performative and affective objectives concerning "what students can do and how they feel and experience a situation" are insufficiently emphasised. The simulation accomplishes all three if done correctly.

The students clearly absorb the doctrines and rules in a meaningful context (*cognitive* learning). Students who negotiate over a particular rule and who make arguments in support of certain drafting changes are far more likely to retain a sense of the content of this rule than those students who simply learn rules in the abstract. But in the case of successful simulation, students learn how to do international law and by learning how to *do* international law, they "learn by doing."[25] The learning process is converted "from passive listening to action."[26] The *performative* aspect is central. Students immerse themselves in the process as actors (in both senses of that word) and, on leaving the academy, they should find the world a more recognisable place as a result. Equally, students learn skills rarely taught in international law – oral skills, negotiating skills and inter-personal skills.

Finally, there is the *affective* skill – the skill that emphasises self-criticism and experimental elements of a role-play. This requires a period after the simulation in which students de-brief. Here, a combination of feedback [27] and "critical

23 Feinman, *id* at 471.
24 *Id*.
25 Thomas A Robinson, Simulated Legal Education: A Template, (1992) 42 *J of Legal Educ* 296.
26 Mack, *supra* note 1, at 101.
27 *See* Johnstone, *supra* note 2, at 59.

review"[28] is vital, if students are to reflect on their responses during the simulation. In order to facilitate this the teachers can develop a series of questions. These could resemble the sorts of questions asked by Richard Ingleby in his divorce law simulation.[29] However this is accomplished, it is indispensable in securing one of the goals of a simulation: what Amy Zeigler calls (in relation to evaluating clinical legal education) "reflective practice".[30] This reflective practice includes a moral element in which the participants think about their ethical responsibilities as actors within a certain process. In the case of the International Criminal Court simulation this is indispensable in ensuring that students think globally as well as acting as conduits for a specific State interest.

So, the simulation can be a success on these three levels. However, we believe it achieves other more specific goals. First, it permits collaboration on meaningful tasks. One of the unfortunate by-products of our highly individualised mode of assessment in the academy is a tendency to depreciate the benefits of cooperative endeavour and yet much of what we do on leaving university is by necessity done as part of a team (whether in government or private practice). Simulations give students a rare opportunity to develop these very particular group skills.[31]

Second, students can better see the value of their own ideas in a simulation. They are given the time to develop positions and strategies as opposed to responses to teacher questions. The agenda is placed back in the hands of the students who gain both autonomy and responsibility. One of the remarkable aspects of the various simulations we have held over the years is that they often produce ideas or proposals that are later reflected in subsequent inter-state negotiations. The "Singapore Proposal", which was suggested in order to break the impasse over the role of the Security Council in the Rome Statute, closely resembled a similar idea developed by students in one of our early simulations in 1997. It is vitally important that students are made aware of these achievements.

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28 Mack, *supra* note 1, at 92.

29 *See* Ingleby, *supra* note 5, at 239.

30 Amy L Ziegler, Developing a System of Evaluation in Clinical Legal Education, (1992) *42 J of Legal Educ* 575, quoting Donald A Schon, Educating the Reflective Practitioner: Toward a New Design of Teaching and Learning in the Profession (San Francisco: Jossey-Bass, 1987). See also Feinman, *supra* note 10.

31 *See* Mack, *supra* note 1, at 92.

Third, the simulation can be an entertainment, a break from the routines of lectures and tutorials.[32] Certainly students in the simulations we have run over the years have had a great deal of fun dressing up in national costume, adopting national characteristics (assumed or actual) or engaging in heated confrontations. Apart from freeing students of the constraints of classroom dialogue, this aspect of the simulation can have positive consequences. At one simulation on the UN Security Council, the Russian delegate removed his shoe and banged it on the table to underline a point he was making. Many students later said they felt this was an implausible act in the context of such a meeting, a case of over-acting. Yet, the student playing the Russian delegate was merely adverting to the famous incident where Khrushchev did exactly that in moment of anger. So simulations, even at their most picaresque, can provide students with a useful insight into the peculiar realities of inter-state negotiation.

Ultimately, as Richard Johnstone puts it, simulations such as this one, "enable students to understand practical aspects of the operation of the law, to explore their own values and assumptions in relation to the law, or to find out about the "internal logic" of a situation in which a lawyer might be placed".[33]

This article has argued for the use of simulations to enhance the teaching of international law. While, these exercises are time-consuming and unpredictable, they can and do work. They achieve a number of educational goals, provide variety for teacher and student alike and inspire an interest in international law that, for many of the students involved, is ongoing.

32 As Kathy Mack puts it, "students are less bored" *id* at 101.
33 Johnstone, *supra* note 2, at 51.

# Packing Them in the Aisles: Making Use of Moots as Part of Course Delivery

*Andrew Lynch**

## Introduction

Post-Pearce Report,[1] many Australian law schools have moved to embrace the teaching of legal skills with an enthusiasm that few could have foreseen prior to 1987, or indeed, in the immediate aftermath of that Report.[2] In many instances, it has been the fourth-wave[3] law schools which have been at

* Faculty of Law, University of Western Sydney, Macarthur. The author wishes to gratefully acknowledge the contributions made to the mooting program in Constitutional Law by Susan Fitzpatrick (the course co-ordinator at UWS Hawkesbury), Rita Shackel and Cameron Stewart. This article reports on the ongoing development of the mooting program at UWS Macarthur and builds upon a conference paper presented by Susan Fitzpatrick and myself at ALTA'98. Susan's input on that paper, and thus her influence on this one, is acknowledged with thanks. The author alone is responsible for the contents of this paper.  (1999) 10 *Legal Educ Rev* 83.

1 D Pearce et al, *Australian Law Schools – A Discipline Assessment for the Commonwealth Tertiary Education Committee*, AGPS, Canberra, 1987. I am somewhat wary about referring to the Pearce Report within the very first words of this paper as its age is starting to show. But as my reference demonstrates, its significance as a landmark remains despite the growing irrelevance of much of its content. To peruse its pages now is truly to read an historical document. The landscape of legal academia has altered dramatically since 1987. The conversion of the CAEs to universities, the survival of the law school at Macquarie and the creation of several new Faculties elsewhere (in contradiction of the Report) have combined to create a great temporal distance in the last twelve years. The most touching evidence of the Report assuming the status of archival resource is found in paragraph 16.53 with the statement that "for all law schools a minimum target staff:student ratio of 18:1 is essential" (at 641).

2 As McInnis and Marginson remind us, "the only explicit formal suggestion given by the Pearce Committee to law schools on aims and objectives was a clear message that they should 'examine the adequacy of their attention to theoretical and critical perspectives'". C McInnis & S Marginson, *Australian Law Schools After the 1987 Pearce Report*, AGPS, Canberra, 1994 at 157.

3 "Fourth wave" is a reference to the post-1987 law schools, though admittedly the terminology, which is derived from C McInnis & S Marginson, *id*. at 99 has the potential to create confusion. The pre-Martin Report 1964 law schools are "first wave" while those that

the forefront of this development.[4] The incorporation of skills into the undergraduate curriculum has always been a source of great concern and debate.[5] The teaching of skills "on the run" as it were, is often seen to necessitate a corresponding lack of attention to the teaching of substantive law or theoretical perspectives[6] and, as a result, true "integration

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came after are "second wave". But as McInnis & Marginson point out, Macquarie and La Trobe are so ideologically distinct from the remainder of the second wave that they can be said to form "a distinctive third wave in legal education". The confusion arises because it seems that the second and third waves were occurring roughly simultaneously. Curiously, McGinnis & Marginson themselves, ignore the distinction of a third wave in the presentation of tabled information at the end of their work.

4 See the review of skills development in the law schools after 1987 found at C McGinnis & S Marginson, *id*. at 168-170. The authors do not make any direct conclusions about their comparisons between the pre and post-Pearce law schools' attitudes towards skills training. However, phrases such as "the new schools responded strongly to this item" (skills of oral expression and legal advocacy); "overall, the skill of drafting was integral to the new school courses"; and "all but one of the new schools responding to the survey identified subjects specifically designated to develop negotiation and interpersonal skills" indicate that the fourth wave schools were at least keeping up with their pre-1987 counterparts if not seriously surpassing them in commitment to skills teaching.

Wade acknowledges the role of new law schools in the development of the "third wave of skills" (these are waves distinct from those used to categorise the schools themselves) but places this as occurring in the 1980s. JH Wade, "Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges" (1994) 5 *Legal Educ Rev* 173 at 180. I would suggest that the findings of both the Pearce Committee and McInnis & Marginson, aside from the fact that the "new law schools" only started to emerge at the beginning of this decade, indicate that the increased presence of skills in law undergraduate programs has certainly occurred well into the 1990s and in a much more enthusiastic way than prior to 1987.

5 S Kift, "Lawyering Skills: Finding their Place in Legal Education" (1997) 8 *Legal Educ Rev* 43 at 43-45; K Mack, "Bringing Clinical Learning into a Conventional Classroom" (1993) 4 *Legal Educ Rev* 89 at 89-90; and M Le Brun & R Johnstone, *The Quiet Revolution: Improving Student Learning in Law*, Law Book Company, Sydney, 1994 at 169.

6 As Spiegelman says, "much of the call for reform in legal education can be seen as a conflict between theorists, who want to move toward more sophisticated abstraction, and practice-oriented teachers, who want to move toward more concrete learning". P Spiegelman, "Integrating Doctrine, Theory and Practice in Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web" (1988) 38 *J Legal Educ* 243 at 245. Some key literature in this area includes W Twining, "Pericles and the Plumber" (1967) 83 *LQ Rev* 396; N Jackling, "Academic and Practical Legal Education: Where Next?" 4 *Journal of Professional Legal Education* 1; J Goldring, "Academic and Practical Legal Education: Where Next? — An Academic Lawyer's Response to Noel Jackling" 5 *Journal of Professional Legal Education* 105.

of skills development, skills theory and practice, into a holistic and effective educative process has proceeded slowly".[7] A dismissive attitude to the old liberal education versus skills training debate has been adopted by those who now argue that the "existing challenge that confronts legal education … is the integration of doctrine, theory and practice into a unified, coherent curriculum".[8] Accepting this as the task presently facing legal educators, the underlying purpose of this paper is to demonstrate, by reference to an example of the use of moots in a Constitutional Law subject, that skills exercises can be used to good effect as part of course delivery to all students — not just those performing the skill at any particular time.

Usually the only audience which mooters have, aside from the specially-constituted Bench, are those few friends or family who come along to lend their support. In some cases these people may not be welcome and the moot occurs in camera, as it were. But even when there is an audience, there is little suggestion that they are intended to benefit in any way by observing the moot. Their role is normally confined to the curious one of silent cheersquad. Certainly, the idea that those present should be able to (or would even be remotely interested in attempting to) follow the arguments made by counsel seems to have been given little credence. The fact that the spectators are rarely, if ever, provided with any information concerning the moot problem indicates the neglect of the benefits of mooting to the audience.

This seems to reflect a rather limited appreciation of mooting and its power as an educational device. While it is widely acknowledged that moots provide skills training for those students involved, this paper argues that moot programs which are run in the context of a particular area of study may be structured so as to enhance the acquisition of knowledge of the substantive law by both the participants *and* the audience.

This idea has been tested by the author in delivering the Constitutional Law course at the University of Western

7 S Kift, above n 5 at 44.

8 P Spiegelman, above n 6 at 245 where he also says, "If it were necessary to choose among teaching doctrine, teaching practice, and teaching theory, then a continuing debate might make sense". See also K Mack, above n 5; K Mack, "Integrating Procedure, ADR and Skills: New Teaching and Learning for New Dispute Resolution Processes" (1998) 9 *Legal Educ Rev* 83.

9 The same course structure was employed for the delivery of Constitutional Law at UWS Hawkesbury. Students undertaking Bachelor of

Sydney, Macarthur[9] over the last two years. The findings from that experience support the view that a mooting program provides, not only an educational experience for the mooters, but also serves as a means of engaging the interest of the spectating students in a substantive topic by situating that topic in a discipline specific context, and one which is very different from lectures or tutorials.

## The Commonly Perceived Advantages of Mooting

Before examining the educational possibilities that mooting presents when one considers spectators, it is helpful to quickly revisit the advantages of the exercise for its active participants. It is widely acknowledged that students gain a number of generic skills from mooting.[10] These can be grouped under the umbrella name of "communication skills" and include the ability to present an oral argument

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Commerce/Law degrees at UWS Hawkesbury complete a number of subjects from the law program at UWS Macarthur as part of their undergraduate course, before transferring to UWSM to complete their combined law degree. Constitutional Law is one of the UWSM subjects taught by the staff at UWSH.

10 Only in very recent times has mooting been subject to serious criticism about its ability to teach useful legal skills which adequately prepare students for legal practice. This is found in A Kozinski, "In Praise of Moot Court — NOT!" (1997) 97 *Colum L Rev* 178. Although Kozinski is addressing the use of mooting in most American law schools, there seems no reason why his views should not extend to most moot programs in Australia. Kozinski's article is a timely attack on our complacent assumptions that moots provide students with "real world" experience. However, the article fails to appreciate the significance of contextual variables upon skills training in the undergraduate curriculum. Speaking as one who is obliged to conduct moots with first year students, I can foresee disastrous consequences of an application of Kozinski's school of hard knocks style of mooting in such an environment. So, whilst Kozinski has provided a fresh perspective in the sparse literature on moots, I submit that many of the suggestions he makes may only have value in moot programs at an advanced level — perhaps even beyond the undergraduate curriculum altogether and at the stage of professional training only. That said, I do not deny that most undergraduate skills training is noticeably artificial when contrasted with the reality of practice. See J Costinis, "The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education" (1993) 43 *J Legal Educ* 157 at 171-5.

11 See T Gygar & A Cassimatis, *Mooting Manual*, Butterworths, Sydney, 1997 at 3-4; J Snape & G Watt, *The Cavendish Guide to Mooting*, Cavendish Publishing Limited, London, 1997 at 11-12. The latter publication tends to present the art of moot presentation as a uniquely legal skill and the authors talk of "the presence of a certain nebulousness — an indefinable quality" which enables lawyers to "explain simply and clearly what may be very complex legal material" (at 11-12). However, the view of Bentley seems preferable when he states that "the skills identified as essential to good lawyering are not exclusive to the

(whilst being interrupted),[11] to be capable of conveying meaning through written expression and also to work as a team with the various forms of communication that entails — notably negotiation and explanation.[12] Of course, the very legal nature of the exercise ensures that mooters must be competent legal researchers and confident in their knowledge and use of legal language.

None of this is surprising and all these benefits of mooting have been appreciated (at least implicitly) since the practice of mooting evolved at the Inns of Court several centuries ago.[13] However, in recent times, attention has been given to the substantive content of moots and how the exercise encourages interest in, and retention of, that material.[14] This would seem to be the case whether the content of the moot has previously been taught to students or is in fact being exposed to them for the first time as part of an exercise in problem-based learning and knowledge construction.

An example of the former situation (which may be called "confirmatory") is the undergraduate tax mooting program described by Bentley when he says:

> The advantage of an integrated skills program is that the substantive and skills components can feed off each other while achieving their own objectives and learning outcomes. For example, a moot topic could focus on the difference between capital and income. Students acquire the substantive tax knowledge through lectures and through preparation for the moot. They acquire the mooting skills using the substantive subject matter. They then demonstrate the learning outcomes for both the substantive subject matter and the mooting component through their performance in each element of the moot.[15]

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legal profession. The skills are often defined in different terms in other disciplines, but the content is essentially similar". D Bentley, "Mooting in an Undergraduate Tax Program" (1996) 7(1) *Legal Education Review* 97 at 99.

12 T Gygar & A Cassimatis, above n 11 at 4; J Snape & G Watt, above n 11 at 12-13; A Lynch, "Why do we Moot? Exploring the Role of Mooting in Legal Education" (1996) 7(1) *Legal Education Review* 67 at 86-88.

13 See generally W R Prest, *The Inns of Court under Elizabeth I and the Early Stuarts 1590-1640*, Longman, London, 1972; and WJV Windeyer, *Lectures on Legal History*, 2nd ed., Law Book Co., Sydney, 1957 at 137-139.

14 A Lynch, above n 12; D Bentley, above n 11 at 117; JT Gaubatz, "Moot Court in the Modern Law School" (1981) 21 *J Legal Educ* 87 at 89.

15 D Bentley, above n 11 at 104. This approach is similar to that adopted in the Constitutional Law course at UWS Macarthur which will be described in detail below, however, the focus of this paper is upon the learning experience for spectators of the moot.

The alternative approach to setting moot problems is to have them deal with material which is initially foreign to the students but which they must learn in order to complete the task successfully. The content may be dealt with in lectures or tutorials subsequently or it may be covered solely through the moot. Definitely more challenging for the mooters, the educational theory behind such an approach is best identified as a form of constructivism — the active attainment of knowledge through the student's exercise of their own initiative and work (hence the label "constructivist" seems appropriate). In particular, such moot programs are problem-based learning in its purest form.[16]

The acknowledgment that mooting assists student understanding of substantive law as well as developing a multitude of practical skills, may seem obvious, however, as noted above, these have been identified as outcomes for those students actually involved — the mooters. This paper seeks to look at moots from the neglected angle of the spectator. In essence it does this by asking two questions:

1 How may mooting be incorporated into a subject, not just as an assessable task for the participants, but also as part of the overall course delivery to all students enrolled in the subject.

2 Does watching a moot significantly assist a student's understanding of the substantive law concerned?

## Constitutional Law Moots at UWS Macarthur — 1997

All core subjects of the Bachelor of Laws curriculum at UWS Macarthur must feature a 25% skills component. This means that in each of these subjects, a quarter of the teaching time and the assessment must relate to a specified legal skill. For example, in Introduction to Law, students receive instruction in legal research techniques for (on average) one hour a week and must complete a substantial legal research exercise known as a "pathfinder" which is weighted at 25% of the total marks available for the subject. The skill which is concentrated upon in Constitutional Law is mooting which

16 For an overview of the educational theory relevant to moots, see A Lynch, above n 12 at 74-81. See also S Kift, above n 5 at 59-71; M Le Brun & R Johnstone, above n 5 at 71-80 for discussion of constructivism. It goes almost without saying that either kind of moot — confirmatory or constructivist — is an example of experiential learning for the mooters. See DA Kolb, *Experiential Learning: Experience as The Source of Learning and Development,* Prentice-Hall Inc, New Jersey, 1984. This concept is also explained in all three of the above sources.

is worth 30% in total. The slightly higher weighting was a recognition of the very high demands which mooting makes upon students in contrast to some other legal skills.[17] Additionally, there comes a point where immutable delineation between substantive content and skills is both unrealistic and negative.[18] The students were marked just as much on their understanding of the legal issues involved in answering the moot problem as on their advocacy and court etiquette.

In 1997 a number of changes were made to the delivery of the subject with the aim of pacing mooting throughout the semester[19] rather than the previous system of the moots being clumped at the end of the course where they occurred not only in the designated skills hour but also the two hour blocks set aside for tutorials. Once that decision had been made, it was only logical that some sort of relationship should be established between the lectures, tutorials and skills sessions. As most of the skills sessions would be given over to the hearing of moots, it made sense for the moots to concern material already covered in lectures and tutorials so that there would be some definite connection between all three arms of the course. Thus a model was adopted under which a topic would be lectured upon in, say, week five of semester. The students then prepared for a tutorial on this topic in week six and, finally, witnessed four of their classmates perform a moot concerned with this area of the law in week seven.

There were two attractive features of this approach. Firstly, it enabled the benefits that Bentley found in his undergraduate tax program[20] — the reinforcement of student understanding of lectured topics through preparation for the moot, and the assessment of students in the professional context provided by the moot court. This, of course, comes at the price of foregoing the benefits of asking students to actively construct their own knowledge in addressing a moot problem dealing with issues they are unfamiliar with, as described above. This is the difficult choice which faces anyone who is devising a moot program. Essentially, it is a

17 In 1997 the 30% was split evenly — 15% for oral argument and 15% for written submission. In 1998 the teaching team decided it was desirable to tip the balance in favour of the oral work required of students. Hence this component was weighted at 20% and the written submission was worth 10%.

18 Above n 8.

19 All subjects at UWS Macarthur are one semester in length.

20 See quote accompanying n 15.

question answered by the context surrounding the program. In this instance, where the moots are but a part of a larger subject, the limitations of the subject must also apply to the moot program. Ultimately, the factor which determined that the Constitutional Law moots would be confirmatory, rather than constructivist, was the limited time available to teach the course, with the corresponding demand which that imposes upon students to assimilate a lot of information quite quickly.

Secondly, looking beyond the issue of the mooters' learning, it presented an opportunity for what may be best described as informed spectating. Essentially, all this does is seek to extend some of the benefits of mooting to the audience. Surely their understanding of a legal topic can be improved by watching others debate the correct application of the law to a problem? We often request our students to make tutorial presentations to each other. The fact that a moot is situated in an extremely legal environment — unlike lectures or tutorials — should only strengthen the learning experience for all concerned.[21] To that end, over the course of semester, all students watched the moots of their colleagues in the same skills/tutorial group.[22] They were provided with the moot problem about 15-20 minutes before the moot actually commenced and given that time to read it.[23] The moot problem was based around the topic covered in tutorials in the preceding week and lectured upon the week prior to that.

Any significant educational benefit to the audience is absent if the moots are constructivist in nature. If the students have not studied a topic in the subject but some of their number answer a moot problem on it, the two groups — mooters and audience — are not operating from a remotely similar knowledge base. In these instances, the audience is too far removed from the issues under discussion and will gain little from hearing a series of complex arguments on a topic with which they are unfamiliar. It was only by adopting a confirmatory role for the moots that there was any

21 The importance of presenting knowledge in some context related to its use is discussed by JS Brown, A Collins & P Dugid, "Situated Cognition and the Culture of Learning" (1989) (Jan-Feb) *Educ Researcher* 32.

22 Fortunately in 1997 the numbers in the groups facilitated this in almost all cases. Most groups were of 24 students each and with four students appearing weekly in one of six moots, the moot program was completed with only a few extra moots needed to accommodate extra students. In 1998 however, student numbers rose to about 32 in each skills group with the result that many more extra moots had to be held outside of contact hours. These moots had no audiences.

23 Student feedback on this aspect of the program was fairly critical and shall be examined below.

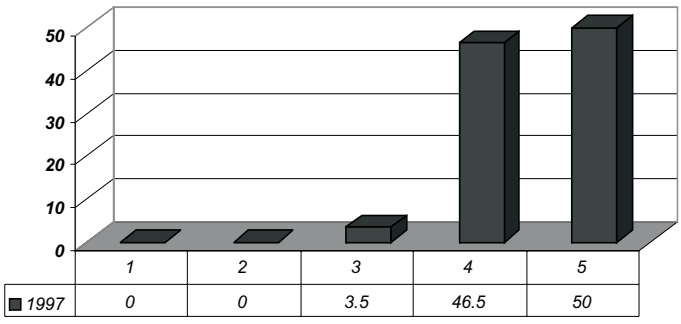
possibility of them assuming the role of a third form of delivery of the subject matter.

## Do Informed Spectators Learn from Observing Moots?

Having described how the moot program was integrated into the Constitutional Law course so as to assist student understanding of the substantive content through the participation in *and watching of* moots, the next question must obviously be: did it work? There is no justification for packing the gallery of a moot court with students if they are not going to learn anything but merely cause distraction and add to the anxiety of the mooters.

At the end of the moot program in 1997, the students were surveyed and asked three questions as well as invited to make any general comments. The statistical results and a representative sample of student responses help to indicate their attitude towards the program and explain the reasons behind the changes implemented in 1998. Of the three questions, it is the second which is of primary interest to this paper (Watching other moots assisted you in understanding the subject matter of Constitutional Law?) but the responses to question 1 complement the earlier discussion about moots generally.[24]

### *Question 1: Performing in moots in Constitutional Law was a valuable experience.*




[Total Responses: 56 (1997)]

24 The third question asked of students was their views about the general organisation of the program and the results for this are contained in Appendix 1. This information is included solely to give some indication about the program which has been the source of the data analysed below.

These figures are hardly surprising given what we already know about the (normally retrospective) fondness which students have for mooting.[25] Some of the comments on the survey forms explain these figures and lend further support to the numerous advantages of mooting identified earlier:

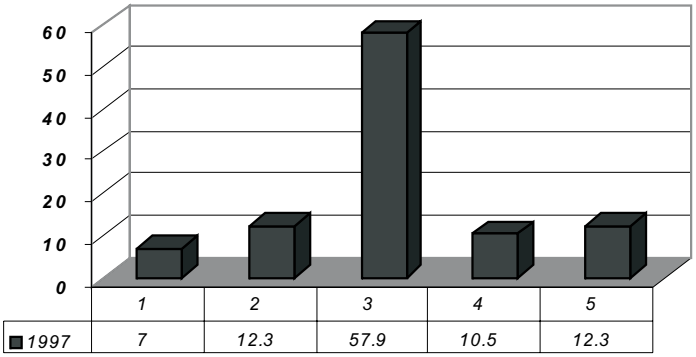
- It showed me what it was to be a Barrister — if you know what I mean. It showed me I was not wasting my time doing law because this was definitely what I want to do with my life;
- It gave a better understanding on the general themes of Constit Law and an indepth understanding of the particular topic being mooted;
- Learning from experience is far more educational than reading out of a thick textbook;
- I may feel it scared the proverbial shit out of me, but most people, including myself, loved the rush.

And from a student who wanted to cover all bases:

- It allowed me to practically apply my knowledge
- It was an enjoyable challenge
- A good practical experience
- Allowed me to gain more experience in legal research.

From establishing that most students found value in their mooting experience, the next question focussed upon their role as spectators across the semester.

*Question 2: Watching other moots assisted you in understanding the subject matter of Constitutional Law.*




[Total Responses: 57 (1997)]

25 See the section above titled "The Commonly Perceived Advantages of Mooting".

An immediate glance at these results indicates that they are much more evenly spread out and hence require a more thorough analysis. Further complexity arises because the comments which students wrote do not bear a great relationship to the numerical ranking they gave in response to the question. It is almost as if there are two scales in operation. Student A may give a score of 1 but when asked "why" may have given a very similar response to Student B who gave a score of 3. This works the other way also — Student A may give a score of 5, but still express reservations echoing the response of someone who gave a score of 3. The 3 mark is clearly the focal point and all sorts of comments — highly critical and highly favourable congregate there. To clarify matters, each quote below will indicate what score the particular student gave in answer to the question.

Firstly, it is probably best to start with the negative reactions. In a lot of these, the students were very honest and volunteered that the reason the spectating was unsuccessful was due to their own lack of interest. This does not invalidate their feedback on this aspect of the program but is a very real factor to be considered in evaluating the educational benefits of watching the mooting of others:

- Waste of time. No-one was paying attention (1);
- I think because our class was so late at night there was less effort made to listen to the moot going on (2);
- Subject mater is a little dry, so our concentration span is NON-EXISTENT! (1);
- Didn't always pay attention (3).

Responses which highlighted a more intrinsic problem with the concept of moot spectating were of the following kind:

- They tended to be boring and besides the basic law, it was useless because of the lack of knowledge we had (2);
- Mooters have gone into [so] much detail — have carefully & comprehensively analysed each judgment. So at times, veiwers may get a little lost (1);
- Although we were given the question sheet, only the people actually involved in the particular moot had researched it enough to understand the issues on that level (2);
- We didn't have the same degree of understanding on the topics as the mooters (3).

The audience's feeling of alienation from the moot due to a less detailed understanding of the issues involved is something that needs to be solved if spectating is to be beneficial.

Whilst it is obvious that students will have a much deeper knowledge of the topic covered in their own moot, it was anticipated that the broad issues raised in the questions would not be beyond the basic understanding students should have of an area through lectures, tutorials and their own reading. Clearly, for some students, this was not the case.

A number of the survey responses were critical of the way in which the audience was provided with information regarding the moots. As stated above, the fact problem was distributed to non-mooting students at the conclusion of their tutorial and about 15 minutes prior to the hearing of the moot. As only two of the six questions were over a page in length, it was thought that there would be plenty of time for students to read them and have a fairly good idea of what was to unfold in the Moot Court. It seems this was an error of judgment:

- It would be good to get the question at a time when we can actually read them (2);
- Not as much as I would have liked. Maybe if we got the moot question the day before or had 15 minutes to discuss it in class it would have been more beneficial (3);
- Suggestion: a copy of the written arguments given to the rest of the class one week prior to the moot (3).

The last comment was echoed in several responses, however, it is just not feasible in terms of administrative time and expenditure, though it would have the potential to enhance the experience for those students who chose to prepare properly. Not all the students advocated an early distribution of the moot problems, as the following response demonstrates:

- It might have helped to look at other people's moot question in advance but in all honesty I doubt whether I would have thought about how I would have answered it in advance (4).

However, the overall impression gained was that the moot question should be made available much earlier and this was done in 1998. This can only serve to maximise the potential benefits of spectating[26] for those students who wish to read it and will make no difference for those others who do not read the question until the hearing of the moot itself.

26 Survey responses considered below, indicate that there may actually be some, despite the comments considered so far!

The suggestion that some discussion of the question occur prior to or after the moot was supported by several of the responses:

- If the mooter was confused or they said the wrong thing, it made me confused (3);
- Sometimes the arguments made sense and sometimes you could not understand a word. Although necessary, the questioning made it harder to understand because you did not know where the 'judge' wanted the speaker to go (3);
- Arguments [are] not always correct (3);
- If something was said [that] I didn't understand, there was no way to clarify anything (3).

These comments highlight two things: the student perception that some guidance, additional to the mere distribution of the moot problems, was required for the spectators, and the necessity of providing adequate opportunity for reflection on the moot for the whole group. Whilst timetable constraints prevented a review of the moot immediately after the judgments were handed down, time should have been allocated in the tutorial in the following week to review the moot. This realisation led to significant redesign of the course which is described below.

Before looking at the more positive feedback, it should be mentioned that there was only one response which indicated a dislike of the spectating aspect on the ground of inappropriateness — "private moots would have given more confidence (considering this is our first year of law)". This is an issue that has to be considered and the adoption of spectators in a first-time moot program should be approached with a degree of caution. In the case of this subject, almost all of its cohort have already completed a bail application exercise in Criminal Law (which does occur in private) and so it was felt that as they were at least familiar with the moot court and its formalities they would not be as uncomfortable as students completely fresh to public speaking of this sort. Certainly there was little comment or complaint from any of the mooters about the presence of the audience. Rather it was the spectators who tended to find reasons why they should not be there!

Despite all of the above feedback, it is just as apparent that some students found spectating extremely worthwhile. The statistics display a general balance in the responses and on the high side of the score of 3 the favourable comments reflect the advantages of spectating which the course was designed to achieve:

- Didn't see the written submissions so only saw snippets of [the] line of reasoning. *But*: What we did see were the main issues: YES this did assist. *And:* If we didn't see anything it couldn't possibly have assisted (3);
- You could listen about the mooters' view and ideas of the law on the topic (5);
- It was helpful in so much as it allowed viewers to have a quick think about arguments they would raise for a particular moot (3);
- It gave us a deeper insight and a much more comprehensive understanding of the other topics (5);
- It puts into play the principles which are often obscure in the text book and cases. It does this in an alternate forum to the tutorials (3).

Interestingly, the concerns examined earlier where some students felt that the moot had the potential to cause confusion due to the presentation of the law from two opposing sides, were seen by some of the higher scoring students to be a strength:

- I found sometimes it confused me — I thought I understood a topic and the speakers proved I didn't know it as well as I thought I did (3);
- [We] got different interpretations of the law from both sides (4);
- … the arguments presented for both sides made it easier to understand the subject matter of that moot and the legal concepts involved in that area of constitutional law (3).

In all, the responses to this question can be construed in a number of ways. Statistically, the percentage of students who indicated that watching moots assisted their understanding of Constitutional Law in some way is encouraging — 80.7% of the responses gave a score of 3-5 on this question. However, one should be mindful that over 70% of those responses are clumped at the midway point of 3 and, as noted above, a numerical response of 3 was not always accompanied by a positive response to the benefits of observing the moot.

That a proportion of the student body viewed the exercise as without benefit is interesting — but it is hardly surprising. In the eyes of staff involved, it did not seem to justify the abandonment of moot spectating in future offerings of the course — especially in light of the favourable reception it received with many other students. Instead it stimulated us to adopt strategies which would hopefully overcome some of the perceived weaknesses in the program.

The challenges for the 1998 teaching team were twofold. Firstly, to address the organisational gripes which students expressed about distribution of moot information. Secondly, and far more intimidating, to combat student disinterest and boredom and provide encouragement for spectators.

## A Considered Revision — 1998

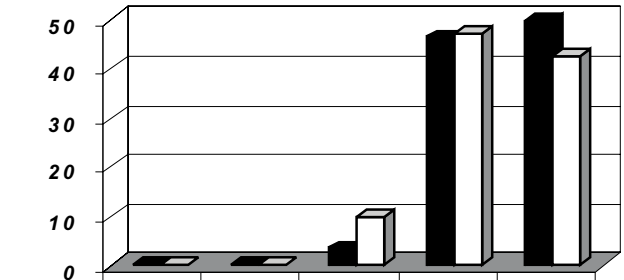
The heavy emphasis on skills at UWS Macarthur can often mean that when one attempts to revise that component of a subject the rest of the course must inevitably be redesigned also. This was very much the case with Constitutional Law. The key to increasing student interest in the moots they watched was obviously to make them more relevant to the remainder of the course. To this end the coverage of a topic changed from the weekly progression of lecture/tutorial/moot which was described above. A re-ordering occurred so that a topic would be covered, again across the span of three weeks, but using a lecture/moot/tutorial sequence. The placement of the moot between the two traditional means of delivery was designed to enable a full debriefing of the moot problem in the subsequent tutorial. The aim of this was twofold — firstly, students were made aware that they would be expected to discuss the problem in the tutorial and would be asked about what the mooters had said in relation to it. They were given the problem a full week in advance of the actual moot and told to prepare an answer to it for discussion in the tutorial, two weeks later. Obviously, there was now a reasonable incentive for closely following the proceedings in the moot court. Secondly, by discussing the problem after the moot, staff were able to clarify particular issues that may have become confusing in the course of the legal submissions.[27]

In order to best evaluate the success of these changes, the moot program survey was slightly expanded in order to be more precise. To overcome any possible confusion over the results of the question which asked whether spectating assisted an understanding of the subject matter of Constitutional Law, a new question addressing just the skills aspect of spectating was included. A question on the tutorial debriefing of the moot problem was also added. Before examining the responses

27 Obviously, this process calls for tact on the part of the tutor. In providing a legal answer, great care should be taken not to be too harsh on some of the more outlandish submissions which counsel have made.

to these, it is worthwhile to "set the scene" as it were by seeing how students answered the initial question:

*Question 1: Performing in moots in Constitutional Law was a valuable experience.*




| | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| 1997 | 0 | 0 | 3.5 | 46.5 | 50 |
| 1998 | 0 | 0 | 10.1 | 47.1 | 42.6 |

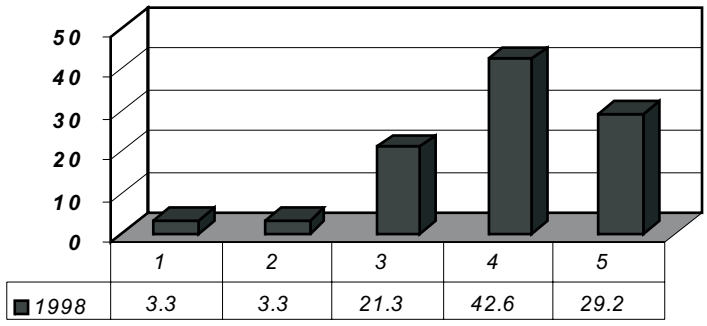
[Total Responses: 56 (1997) 89 (1998)]

The 1998 results are not dramatically at variance with those of 1997 — there are still no students who will rate the value of the experience as a 1 or 2. The drop of 5 responses and the corresponding increases in 3 responses is hardly pleasing, however. The comments which students made do not provide any clear explanation for this and it may well be just a consequence of the larger student numbers. There may also be an element of lack of novelty value — by the time students moot in Constitutional Law at UWS Macarthur they have already performed in the moot court twice — a viva exam and a bail application having already been assessed. It will be interesting to see whether the 1998 spread of statistics remains roughly fixed or whether it is just an anomaly of that particular cohort.

## Do the 1998 Survey Results Provide (greater) Support for Moot Spectating?

Turning to the central issue of this paper, the teaching team were obviously very curious to see whether students reacted favourably to the spectating component of the moot program — especially in light of the changes we had made in order to improve it. There were three questions asked of students in order to determine this — the first addressing the benefits of watching others *do* the moot rather than following what they said:

*Question 2: Watching other moots assisted you in familiarising yourself with techniques.*




[Total Responses = 89]

The results for this question are hardly surprising as it was anticipated that the number of favourable responses would be high. As one student succinctly put it, "Always helpful to see how others stuff up and what they do well". Other comments showed a more thoughtful response but really were variations on this theme:

- Not being actually involved allows you to pick up on things that you should and shouldn't do that you don't often notice whilst in your own moot;
- It is helpful when you can see and hear the different approaches taken, so as to fine tune your own style;
- The way the judge interacted with the advocates also helped me to prepare my own work;
- It was reassuring to see other people being nervous!;
- It reminded you NOT to say "yeah" & "OK" when someone else did;
- Some mooters were positive examples of calm control under pressure.

Clearly, there is an enormous benefit if students can learn from each other in this way. These statistics support this but it must be acknowledged that they are an incidental result of this study and it was not our original intention to demonstrate anything so extremely obvious in the first place. Even so, it is worth considering whether we enable our students to learn from each other enough in the skills area. Even ignoring the possible academic benefits of following a moot, the absorption of advocacy skills would seem enough of a reason in its own right for leaving the doors to the moot court open and encouraging the existence of an audience.

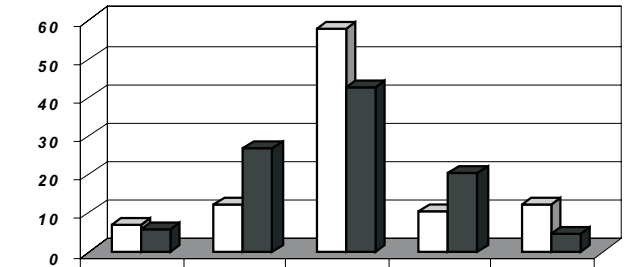
A small percentage of people tended to disagree with the proposition, seemingly for reasons of alienation from the process and a lack of constructive guidance:

- It was sometimes counter-effective as you may copy the way someone did it and think it was good when it really wasn't. [It] strongly influenced your own presentation for better or for worse. We didn't hear the criticisms that [the mooters] did afterwards;
- It both did and didn't. Whilst we saw others attempting to abide by the rules of advocacy, no comment about their attempts were made so that we were really informed of what was correct or incorrect!

These are fair comments but it seems rather undesirable to give feedback to a (first time) mooting student in full view of their peers. It also seems a little unnecessary given the preparation provided to students at the start of the program which should enable them to be pretty good judges of a mooter's performance. Do they really need to have it pointed out to them that John seemed poorly prepared and could not answer simple questions and that Sarah made irritating clicking noises with her pen? Surely their exposure to various videos and instruction books should enable them to spot this behaviour as undesirable without having to publicly embarrass the student at such an early stage of their career. The responses of a majority of students made it clear that they were able to discern the good performances from the bad through watching enough of the moots and also by identifying the attitude of the bench. However, giving students more detailed instruction on how to critically peer evaluate moot performances might ensure less confusion for some.

Having ensured that survey respondents would not confuse the observation of advocacy with their understanding of the academic content of the moot, the students were then asked the same question as their 1997 counterparts:

*Question 3: Watching other moots assisted you in understanding the subject matter of Constitutional Law.*




| | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| 1997 | 7 | 12.3 | 57.9 | 10.5 | 12.3 |
| 1998 | 5.6 | 26.9 | 42.6 | 20.2 | 4.4 |

[Total Responses: 57 (1997) 89 (1998)]

A number of observations may be drawn from these results. Firstly, they are more evenly spread across the five possible responses than those of 1997, with over 30% of students expressing disagreement with the proposition. Not only is this a fairly high percentage in its own right, but it is a substantial increase on last year's figure of 20%. This may be explained due to the difference between the 1997 and 1998 surveys. The suspicion that some 1997 students answered this question thinking of the advocacy aspects and not the subject matter seems to have been well founded. Hence, the appearance of the new question 2 above leads to a more accurate portrayal of student feeling on this question in 1998.

That said, there are still 70% of students who either agree strongly with the proposition or are neutral about it. And so while it must be acknowledged that there are a greater number of negative responses, there are also slightly more students prepared to circle 4 or 5 indicating agreement with the proposition. The 1998 results are more polarised than those of 1997 yet overall they do not signify a particularly strong case for abandonment of moot spectating in Constitutional Law — especially when they are taken in conjunction with the figures from question 2 which indicate that most students benefited from exposure to the practice of mooting. The fact that a fair proportion also learnt something about the law as well, seems to support continuation of this feature of the course.

Many of the written responses confirmed what had been said by the 1997 cohort. This was especially the case with

respect to the interest factor of students and the difficulties in following what was going on — for a number of reasons:

- It was difficult to hear what each person was saying. The level of argument [was] too detailed for comprehension;
- It became "boring" (for lack of a better term) because the gallery could not act. Perhaps it should not have been compulsory to attend the moot;
- It was helpful to watch the other moots but sometimes I really couldn't follow what was being said so I didn't walk out knowing very much;
- They were boring and hard to follow.

There was a slight trend amongst the 1998 students to throw blame for the failure of the spectating on to the inadequacy of the participants!

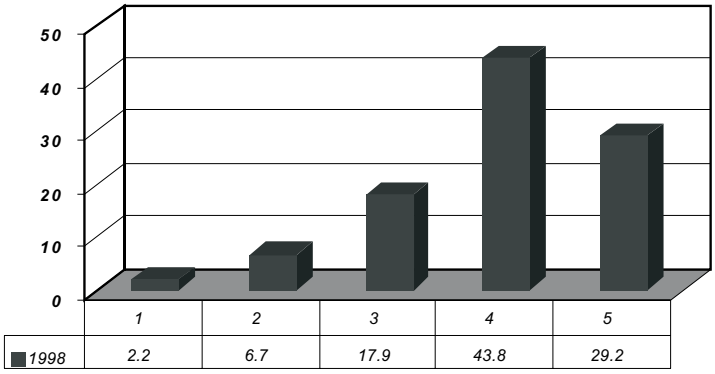
- If the argument wasn't convincing or clear it didn't help at all. Admittedly the participants were nervous and if you hadn't read the material it was really hard to concentrate;
- It depends on the efforts of moot participants to research the moot topic effectively;
- Some people were all over the place, softly spoken and obviously nervous which at times made it difficult to follow what was being argued. Sometimes you would learn more just reading the textbook.

All these criticisms are valid — it *is* difficult to learn from any presentation if you have trouble hearing the speaker and the material is poorly presented. However, even in making this point, these respondents acknowledge that there were other mooters who were clear, well-read and illuminating speakers. Other students added praise whilst also recognising the limitations of what was being attempted:

- It was helpful although as a supplementary method of learning only. The substantive issues were essentially covered in lectures allowing for a brief idea of the issues of the mooters;
- It did assist in understanding subject matter, but it was by no means an extension of the area covered. A great deal of the arguments were detailed and directly related to the question, not necessarily to the subject. In spite of this, it was still valuable in seeing subject matter applied in a mooting format;
- It allowed for a clear understanding of both views of the problem and how to apply the constitution and authorities;
- The moot problems help illustrate the operation of the substantive law in a more practical sense.

While the statistics and written responses indicate little real difference between the views of the 1997 and 1998 cohorts about the value of spectating, the 1998 students had an altogether different course structure — namely the holding of the relevant tutorial in the week following the moot to enable discussion of the problem. They may not all have been wildly enthusiastic about the spectating, but this new aspect seemed to be more warmly received:

*Question 4: The analysis of the question in tutorials in the following week was a valuable part of the moot program.*




[Total responses = 89]

Students tended to agreed with the proposition for fairly obvious reasons, indicating that the change in the order of modes of delivery was successful:

- Cleared any misunderstandings between conflicting views that were not clearly discussed with relevant authority during the moot;
- This alleviated many of the problems of not understanding completely the specifics, as well as the cases, of the moots;
- Great discussion and debate led by the mooters;
- It showed the strengths and flaws of the arguments put forward in the moots. It also gave instructive feedback on the content of the arguments presented surrounding that question.

This feedback aspect of the subsequent examination of moot problems in tutorials was highlighted by a number of students. This was an agreeable outcome and one not really

appreciated at the time of the course's design. The teaching team was primarily motivated by the need to clarify the legal issues, but, of course, in doing so we necessarily gave plenty of informal feedback to the students upon their understanding of the moot topic:

- One of the most important parts of learning, especially in this type of thing, is feedback, and being able to discuss the question the week after was a most invaluable part of the program;
- It was important to get feedback on our own moot and what should have been included in the question. And for the others [the spectating students], it was an aid to understanding the subject matter;
- I do agree & I do think that this should be the way to go. Reason:
  - We have a broad picture of what the issues are;
  - It can serve as feedback;
  - Can enhance and encourage students to learn and remember the issues.

However, while all of this was very positive, we had become aware of a significant flaw in the course design during semester and the students also commented on this quite heavily in completing the surveys. The teaching of a particular topic over three weeks through the various mediums of lecture, moot and, finally, tutorial was needlessly drawn out. Given that moot and tutorial were taught in a three hour block, there seemed no good reason not to have a topic covered in both those formats in the one week. So rather than having the moot on topic *y* and then following that immediately with a tutorial on topic *x* (the subject of the moot from the week before), it would have made far more sense to have had the moot on topic *y* occurring just before the tutorial on that same area. This would have had two results. Firstly, students would come to the moots better prepared as they had to discuss the question in the tutorial immediately after. That students tended to read up on a topic before the tutorial and not the moot was confirmed by one survey response which said, "The Follow Up tutorial is the more valuable part since by this time you have read the relevant materials". Presumably this greater understanding of the area would improve the students' chances of following what was going on in the moot and also their interest level. Secondly, it would make the discussion of the moot problem far easier as it would not be relying on memories of an event occurring a week earlier:

- Analysis should be directly after the moot. There was little retention of the previous moot considering the one week break;
- It would have been better if we could have talked about it straight afterward instead of having to wait until the following week;
- It would have been better though to go through the question straight away.

Student criticism of this aspect of the program is justified. It may now seem incredibly obvious that the moot and tutorial should have been on the same topic in the one week, but at the time that we were redesigning the course, the legacy of 1997's week-by-week approach did not seem so undesirable. It had not been the source of negative feedback and the realisation that the other changes would not be happily accommodated by that earlier style did not come until too late. There was also a lingering fondness for development of a topic across three weeks as it was perceived that it would allow time for deep understanding to develop — but, of course, when it necessarily means there is more than one topic "on the go" at any particular time, it was in fact more likely to overwhelm students. The fact that we didn't get it right in 1998 is unfortunate but is a natural consequence of trial and error. Certainly the reordering and availability of an examination of the question was a vast improvement on what had been done in 1997 and raised the moots from the position of an occasionally baffling postscript to an integral part of a student's experience of a particular topic. Putting the moots before the tutorials was clearly the right approach — in future there needs to be less time between these two so as to compress the coverage of the topic to a two week span.

## Conclusion

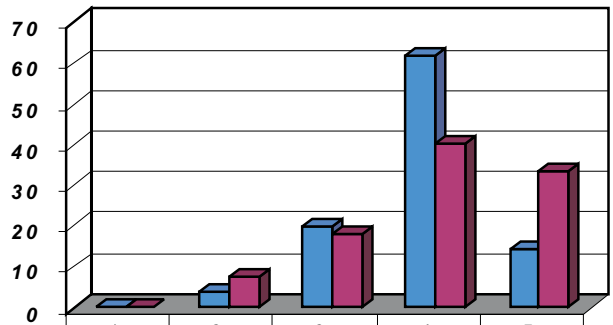
The introduction to this article made it clear that its purpose was really to describe just one attempt to achieve a closer integration between the teaching of substantive law and skills. There are undoubtedly many other stories that could be told. Also as certain, is the room for continual improvement and development. The changes that have occurred in the delivery of this one subject at UWS Macarthur have been fairly significant, yet it is clear that there is so much more that can be done. In particular, stronger efforts should be made to ensure that theory is not lost in a sea of doctrine and skills. At present there is a substantial portion of the

course devoted to an examination of the tenets of Western legal theory which underpin the Westminster system of government, but perhaps this material could be enhanced by a greater connection to the material covered in the moots, or at least the reflection upon them.

Overall, I would suggest that the experience of spectating moots at UWSM has been a valuable one. It is educationally sound and, despite student protestations at the time and the occasional sleeper in the audience, the survey results indicate that there are benefits to be gained by those students who are prepared to devote a little preparation and energy to making the most of their spectating role. A tighter course structure can assist students to do this. The role of feedback can also receive more emphasis. The potential then exists for students to approach their studies in Constitutional Law in a manner which prepares for, and facilitates, learning through a variety of contexts thus enabling a deeper understanding of all facets of the course.

## Appendix 1

*Question 5: The Mooting Program was well organised and the instructions and expectations were made clear.*




| | 1 | 2 | 3 | 4 | 5 |
|---|---|---|---|---|---|
| 1997 | 0 | 3.6 | 20 | 61.8 | 14.5 |
| 1998 | 0 | 7.8 | 17.9 | 40.4 | 33.7 |

[Total Responses: 55 (1997) 89 (1998)]