

# CRITIQUE IN LEGAL EDUCATION: ANOTHER JOURNEY

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## I INTRODUCTION

For over a decade my enthusiasm for the mandatory course *Property Law 1* at Griffith Law School was shared by the vast majority of my students. *Property Law 1* is a deeply critical course, rich in theory and interdisciplinarity<sup>1</sup> and covering compulsory doctrine. Lately it is increasingly difficult for me to teach and enjoy this course because student attitudes have changed, as measured by Student Evaluations of Course ('SECs'). I was baffled as to why student attitudes were changing until I read three pieces of scholarship that provided some answers after a lot of deeply personal reflection. The three pieces of scholarship were Thornton's book<sup>2</sup> and the follow-up articles in a special issue of this journal,<sup>3</sup> several articles written by James,<sup>4</sup> and an article called 'Marx in Miami'.<sup>5</sup> Collectively this body of research, together with my reflection on over a decade teaching legal critique, has led me to the conclusion that teaching deep critique in a mandatory law course today is doomed without at least one of two measures. Firstly, and ideally, critique must be embedded throughout the curriculum with a proper introduction during first year and then appropriately reinforced for the duration of the degree. Secondly, where critique is not embedded throughout the curriculum, students will expect critique to be justified as relevant to them at a personal level otherwise they will regard it as irrelevant and increasingly with hostility.

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<sup>1</sup> See, eg, Tobias Kelly, *Sociolegal Studies* (2015) University of Edinburgh <[http://www.sps.ed.ac.uk/staff/social\\_anthropology/kelly\\_tobias/sociolegalstudies](http://www.sps.ed.ac.uk/staff/social_anthropology/kelly_tobias/sociolegalstudies)>.

<sup>2</sup> Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2011).

<sup>3</sup> See generally the articles in Volume 23 Issue 2 of the *Legal Education Review*, titled 'The Past, Present and Future of Critical Legal Education in Australia'.

<sup>4</sup> James has contributed several articles as the footnotes below reveal. See especially Nickolas J James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965; Nickolas John James, 'Australian Legal Education and the Instability of Critique' (2004) 28 *Melbourne University Law Review* 375; Nickolas John James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 16 *Legal Education Review* 55.

<sup>5</sup> Bryant W Sculos and Sean N Walsh, 'Marx in Miami: Reflections on Teaching and the Confrontation with Ideology' (2015) 3(2) *Class, Race and Corporate Power* Article 4 <<http://digitalcommons.fiu.edu/classracecorporatpower/vol13/iss2/4>>.

These measures might seem obvious, but as is often the case it is the journey to this conclusion that is just as important. These two measures cannot be taken for granted in a period of time so far removed from the heights immediately before and after the Pearce Report<sup>6</sup> when legal critique featured prominently in some Australian law schools.<sup>7</sup> This is not to suggest that the Pearce Report was ideal<sup>8</sup> or was entirely embraced by Griffith Law School. Rather, the pendulum has swung so far away from Pearce that genuine critique is not the only casualty. Along with a decline in critique there has been the stripping away of interdisciplinarity and the theorisation of law. While there is some scope for optimism as expressed in some of the literature for sustaining legal critique, the future is bleak.<sup>9</sup> It may be correct that no legal education discourse can entirely exclude others,<sup>10</sup> structure never forecloses agency, and power comes with resistance,<sup>11</sup> so that there is always some space left for legal critique. However, when there is only one deeply critical core course left in the curriculum at a law school, legal critique is as close to irrelevance as it is ever likely to be. This is the story outlined here — a story of the demise and survival of legal critique at an Australian university.

What this story tells is that deep legal critique can be sustained provided a significant proportion of faculty share the belief that students should be taught to critically assess the law and to reflect on their discretion as professionals, otherwise they are more likely than not to maintain and reproduce hierarchy.<sup>12</sup> When this vision is no longer shared by a significant minority of faculty, the capacity of law graduates to critically assess our legal system will inevitably suffer from an

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<sup>6</sup> Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission' (Report, Commonwealth Tertiary Education Commission, 1987) ('*Pearce Report*').

<sup>7</sup> See generally Frank Carrigan, 'They Make a Desert and Call It Peace' (2013) 23 *Legal Education Review* 313.

<sup>8</sup> Eugene Clark, 'Australian Legal Education a Decade after the Pearce Report' (1997) 8 *Legal Education Review* 213. At 214 and quoting David Weisbrot, *Australian Lawyers* (Longman Cheshire, 1990) 129, Clark writes: 'Although aspects of the Report were severely criticised by many legal academics, most commentators would agree with Weisbrot's conclusion that "it is nevertheless true that the Pearce Report is the first important review, and comprehensive compilation of data on, Australian legal education, and will be the point of departure for all debate on legal education for some time"'; see also James, 'The Marginalisation of Radical Discourses in Australian Legal Education', above n 4, 71-2. These views of Pearce are shared by David Barker, 'The Pearce Report: Does it Still Influence Australian Legal Education?' (2014) 7 *Journal of the Australasian Law Teachers Association* 77, 79.

<sup>9</sup> Margaret Thornton and Lucinda Shannon, "'Selling the Dream": Law School Branding and the Illusion of Choice' (2013) 23 *Legal Education Review* 249, 271; see generally Gabrielle Appleby, Peter Burdon and Alexander Reilly, 'Critical Thinking in Legal Education: Our Journey' (2013) 23 *Legal Education Review* 345; Mary Heath and Peter D Burdon, 'Academic Resistance to the Neoliberal University' (2013) 23 *Legal Education Review* 379; Sculos and Walsh, above n 5.

<sup>10</sup> James, 'Australian Legal Education and the Instability of Critique', above n 4, 404.

<sup>11</sup> Heath and Burdon, above n 9, 381.

<sup>12</sup> Appleby, Burdon and Reilly, above n 9, 360.

education that is fundamentally more about reproducing capitalism than it is about justice.<sup>13</sup>

This argument is developed by firstly defining what is meant by deep critique and then secondly providing the history of the emergence of a deeply critical core course between 2002 and 2016. This history includes an outline of the enabling and constraining factors that have driven changes to this course. The article ends with reflection on the significance of teaching deep critique within what is an increasingly hostile context.

The article does not necessarily justify the need for deep critique to be included in an LLB, as this is assumed here based on the scholarship of Thornton, James, and many other articles, and in reports referred to in what follows and that I have summarised elsewhere.<sup>14</sup> Here the intention is to engage with and corroborate the scholarship of Thornton, James, and the special issue on this topic published in the *Legal Education Review*, by reflecting on 15 years of experience teaching legal critique in a mandatory property law course between 2002 and 2016.

## II WHAT IS DEEP CRITIQUE?

What is meant by deep critique? Deep critique can be differentiated from technical epistemological forms of legal critique like ‘critical thinking’ because the latter is merely a part of the former.<sup>15</sup> That is to say, critical thinking<sup>16</sup> is a crucial vocational, liberal and academic skill necessary for conducting deep critique.<sup>17</sup> In other words, deep critique moves beyond the form of the argument to incorporate a concern with power and its effect on reproducing hierarchy and/or inequality. It is also possible to differentiate deep critique and radical critique because, unlike the former, radical critique does not always include critical thinking skills. For example Marxists can treat Marxism as doctrine, and first wave feminists may have universalised white middle-class feminism — common challenges found when teaching these to students. For this reason James, Hughes and Cappa distinguish mere criticism from critique.<sup>18</sup> Therefore deep critique needs radical critiques and critical thinking skills.

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<sup>13</sup> Paula Baron, ‘A Dangerous Cult: Response to “The Effect of the Market on Legal Education”’ (2013) 23 *Legal Education Review* 273, 289; Carrigan, above n 7, 319.

<sup>14</sup> Allan Ardill, ‘Marx at the Gold Coast: Reflections on Teaching and the Confrontation with Ideology’ (2016) 4(1) *Class, Race and Corporate Power* Article 4 <<http://digitalcommons.fiu.edu/classracecorporatepower/vol4/iss1/4>>.

<sup>15</sup> Appleby, Burdon and Reilly, above n 9, 347-8.

<sup>16</sup> Nick James, ‘Logical, Critical and Creative: Teaching “Thinking Skills” to Law Students’ (2012) 12(1) *Queensland University of Technology Law and Justice Journal* 66, 82.

<sup>17</sup> Nickolas James, Clair Hughes and Clare Cappa, ‘Conceptualising, Developing and Assessing Critical Thinking in Law’ (2010) 15 *Teaching in Higher Education* 285, 286.

<sup>18</sup> *Ibid* 287-8.

It also needs interdisciplinarity.<sup>19</sup> Critical thinking without interdisciplinarity is in the words of Duncanson likely to make the error of assuming that law is merely ‘what court and office lawyers and those people responsible for setting policy agendas do’.<sup>20</sup> This reductionist and positivist view of law affords little scope for deep critique and is one of the key reasons why some students struggle to see anything but legal doctrine as relevant. So law students ‘must be informed about theoretical and ideological standards; they must know about jurisprudence, liberalism, rights theory, justice theory and the like’.<sup>21</sup>

Deep critique also requires an understanding of the knowledge-power nexus.<sup>22</sup> Understanding the knowledge-power nexus is more than an appreciation of ‘the law’s role as an expression of political power by certain groups and cultures, and the law’s exclusion of the perspectives of other cultures, classes and genders’.<sup>23</sup> It requires the academic/student/lawyer/scientist to critically assess their own role in reproducing hierarchy and injustice through the construction of knowledge. This is the hardest aspect of deep critique to practise as an academic and to teach to law students. Critical self-reflection means a commitment to being ‘openminded, flexible, honest in facing [our] biases and prejudices, and willing to reconsider [our] views when change is warranted’, and ‘to see the faults in [our] own arguments and assumptions as well as in those of others, and recognise that their own legal knowledge and beliefs are necessarily subjective and incomplete’.<sup>24</sup>

Deep critique is important because without it lawyers will inevitably reproduce society through their actions. This was a point made by Marx and Engels in relation to liberal economists and philosophers. Marx and Engels showed that capitalist knowledge was a product of its middle-class producers. Known by Marxists as ‘reification’,<sup>25</sup> it is a term widely adopted in social theory, so that Giddens once wrote that the ‘principle mode’ of naturalising social relations as ‘fixed’ and or ‘immutable’ is that of reification.<sup>26</sup> Reification is a concept not just applicable to constructions of class, it also provides an important lesson for lawyers. That lesson is learning about the relationship between vantage/privilege and the way we see the world. Lawyers need to be taught to reflect on and critique their own power, the power and powerlessness of others, and to appreciate the ways this changes according to context. Without this, lawyers will inevitably reproduce

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<sup>19</sup> Ibid 288.

<sup>20</sup> Ian Duncanson, ‘Degrees of Law: Interdisciplinarity in the Law Discipline’ (1996) 5 *Griffith Law Review* 77, 82.

<sup>21</sup> James, Hughes and Cappa, above n 17, 288.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid 289.

<sup>25</sup> Georg Lukacs, *History and Class Consciousness: Studies in Marxist Dialectics*, (Merlin Press, 1971) 93-4, 135.

<sup>26</sup> Anthony Giddens, *Central Problems in Social Theory: Action, Structure, and Contradiction in Social Analysis* (University of California Press, 1979) 195.

and maintain existing power relations. One of the best examples of its application comes from a feminist critique of zoology:

*When scientists look to nature, they usually bring with them their sociopolitical beliefs about what is natural. This self-reinforcing, internally consistent process, then, creates, reflects, and reinscribes often unquestioned assumptions about our world. Within the ubiquitous paradigm of binary gender and male superiority, scientists have, for example, ... misidentified the largest bee in the hive as the King Bee ... Thus, in what is considered scientifically objective biology, the male is clearly held up as the normative sex, with the female as a deviation from the norm. Stereotypic attributes and behaviours (such as aggressive hunting and fighting versus coyness and passivity) are superimposed onto animals often through culturally distorted language (several females with a single male may be called a harem, quite a different connotation from, for example, what is now called the matriarchal organization of elephants).<sup>27</sup>*

Similarly, many legal academics are blissfully ignorant that they too may be doing the same sorts of things:

The Associate Dean called a departmental meeting to look at and discuss how we would introduce issues of gender into the curriculum ... [at 78] One of my male colleagues . . . piped up and said, 'Look, I don't personally teach criminal law from any particular bias but I am perfectly happy that X does'. Other people were saying, 'I don't personally have any political dimension in my courses ...'. (Snr Lecturer fem, NZ)<sup>28</sup>

Deep critique is about teaching students to recognise that the way they approach law will be political and to be able to recognise that their experience of the world shapes how they see a situation.

A further aspect of deep critique concerns what is sometimes referred to as 'intersectional critique'.<sup>29</sup> Intersectional critique attempts to address a common criticism of radical critiques like Marxism and feminisms, which have tended to see injustice by privileging particular marginalised subjectivities.<sup>30</sup> Instead intersectional critique does not presume the fragmentation of radical critiques, as Mohanty explains:

My recurring question is how pedagogies can supplement, consolidate, or resist the dominant logic of globalization. How do students learn about the inequities among women and men around the world? For instance, traditional liberal and liberal feminist pedagogies disallow historical and comparative thinking, radical feminist pedagogies often singularize gender, and Marxist pedagogy silences race and gender in its focus on capitalism. I look to create pedagogies that allow students to see the complexities, singularities, and interconnections between

<sup>27</sup> Bonnie Spanier, 'Lessons from "Nature": Gender Ideology and Sexual Ambiguity in Biology' in Julia Epstein and Kristina Straub (eds), *Body Guards: The Cultural Politics of Gender Ambiguity* (Routledge, 1991) 329 (emphasis added).

<sup>28</sup> Thornton, above n 2, 77-8.

<sup>29</sup> Catharine A MacKinnon, 'Intersectionality as Method: A Note' (2013) 38 *Signs* 1019.

<sup>30</sup> James, 'The Marginalisation of Radical Discourses in Australian Legal Education', above n 4, 68-9.

communities of women such that power, privilege, agency, and dissent can be made visible and engaged with.<sup>31</sup>

Deep critique does not cling to a particular radical discourse and instead recognises the need to harness radical discourse according to both the complexity of a situation and by reading power from at least initially those without it in that situation. So for example a straight white man might be the victim in a situation where his class renders him exploitable by a person not sharing those traits and enjoying the privilege of class.<sup>32</sup> For this reason I approach deep critique through Feminist Standpoint Theory ('FST').<sup>33</sup>

FST is a research strategy aimed at changing society by learning how power works from the standpoint(s) of the less powerful,<sup>34</sup> a strategy 'crucial for designing effective projects of social transformation'.<sup>35</sup> It is a legacy of Marx's view that knowledge is socially constructed:

Marxist theories ... remind us that the categories and criteria that come most immediately to mind for judging truth are likely to be those of the dominant groups.<sup>36</sup>

Marx and Engels pioneered the space for what became FST because they 'used the standpoint of the proletariat to produce their account of class relations from the standpoint of workers'.<sup>37</sup> However, this was also a key reason why feminists and others critiqued Marxism and why

<sup>31</sup> Chandra Talpade Mohanty, "'Under Western Eyes" Revisited: Feminist Solidarity through Anticapitalist Struggles' (2003) 28 *Signs* 499, 523.

<sup>32</sup> Adapted from Shuddhabrata Sengupta, 'I/Me/Mine – Intersectional Identities as Negotiated Minefields' (2006) 31 *Signs* 629, 633.

<sup>33</sup> Often attributed to Dorothy Smith and Sandra Harding, but see generally Patricia Hill Collins, 'Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Where's the Power?' (1997) 22 *Signs* 375; Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14 *Feminist Studies* 575; Sandra Harding, *The Science Question in Feminism* (Cornell University Press, 1986); Sandra Harding and Kathryn Norberg, 'New Feminist Approaches to Social Science Methodologies: An Introduction' (2005) 30 *Signs* 2009; Nancy C M Hartsock, 'The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism' in Sandra Harding and Merrill B Hintikka (eds), *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology, and Philosophy of Science* (Kluwer, 1983) 283; Dorothy E Smith, *The Everyday World as Problematic: A Feminist Sociology* (Northeastern University Press, 1987).

<sup>34</sup> Patricia Yancey Martin, John R Reynolds and Shelley Keith, 'Gender Bias and Feminist Consciousness among Judges and Attorneys: A Standpoint Theory Analysis' (2002) 27 *Signs* 665, 670; Joey Sprague, 'Comment on Walby's "Against Epistemological Chasms: The Science Question in Feminism Revisited": Structured Knowledge and Strategic Methodology' (2001) 26 *Signs* 527, 534.

<sup>35</sup> Harding and Norberg, above n 33, 2011; Dorothy E Smith, 'Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited"' (1997) 22 *Signs* 392, 396.

<sup>36</sup> Nancy C M Hartsock, 'Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Truth or Justice?' (1997) 22 *Signs* 367, 370–1.

<sup>37</sup> Sandra Harding, 'Comment on Walby's "Against Epistemological Chasms: The Science Question in Feminism Revisited": Can Democratic Values and Interests Ever Play a Rationally Justifiable Role in the Evaluation of Scientific Work?' (2001) 26 *Signs* 511, 516.

white feminism was subsequently critiqued by intersectional feminisms (eg African American, Indigenous, and lesbian women).<sup>38</sup> This fragmentation of radical thought also laid the foundations for what was to become postmodernism.<sup>39</sup> Born from the ashes of postmodernism, FST reclaimed the salience of radical critique based on the voices of the most marginalised/oppresed in a given conflict and rejecting the relativism of postmodernism.<sup>40</sup> In short, FST seeks to be more ethical and accountable to the people most affected by law (Aboriginal people, women, the poor, the sick, the abused and the marginalised) because those people do not have as much legal power as others.<sup>41</sup>

What does this mean for legal education? It means that in addition to the accountability a course convenor has to their university, the legal profession, employers, and to their students among other stake-holders, the convenor is also accountable to those who are likely to be subject to the discretionary power of law graduates. Where FST becomes important for legal education concerns a focus on transforming the relations of power most likely to sustain and reproduce inequality in a particular conflict by looking at relations of power as a whole.<sup>42</sup> Specifically, FST requires a course convenor to make their course accountable to those least likely to gain from the privilege of a legal education and who are likely to be subject to the discretion of those with that education as graduates, leaders, professionals, and decision-makers. As Sprague contends, to do otherwise, and to pretend privilege is not involved 'is, from this perspective, intellectually irresponsible, as well as politically naïve'.<sup>43</sup>

A sceptic might ask at this point whether students should be included in the category of disempowered. Students are disempowered relative to academic managers in terms of education quality and access, and relative to course convenors in terms of the course design, objectives, content and assessment. Students often work long hours in casual work to pay their way through law school. At the same time students are also privileged. Students are privileged because 'the chances of law graduates finding full-time employment has continued to be higher than full-time employment rates for graduates overall';<sup>44</sup> privileged relative to most workers since the 2015 median starting

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<sup>38</sup> Hartssock, above n 36, 368.

<sup>39</sup> Ibid 369.

<sup>40</sup> As MacKinnon, above n 29, 1020, points out, practitioners do not identify as postmodernists.

<sup>41</sup> See, eg, Allan Ardill 'Australian Sovereignty, Indigenous Standpoint Theory and Feminist Standpoint Theory: Why First Peoples Sovereignties Matter' (2013) 22 *Griffith Law Review* 315.

<sup>42</sup> Sandra Harding, 'Comment on Hekman's "Truth and Method: Feminist Standpoint Theory Revisited": Whose Standpoint Needs the Regimes of Truth and Reality?' (1997) 22 *Signs* 382, 384; Smith, above n 35, 396.

<sup>43</sup> Sprague, above n 34, 534.

<sup>44</sup> Angela Melville, 'It is the worst time in living history to be a law graduate: or is it? Does Australia have too many law graduates?' (2017) 51 *Law Teacher* 203, 216 (citations omitted).

salary for an Australian law graduate across all sectors was \$55 000;<sup>45</sup> and despite an increase of students attending law schools from low socio-economic circumstances, ‘Australian law schools have remained the bastions of the white middle-class’.<sup>46</sup> In addition, those who never attend university miss out on all the benefits flowing from education known to enhance life well beyond career and income.<sup>47</sup> Therefore, just as a course convenor must be mindful of their power relative to students, accountability to the marginalised is only possible when students are taught to be mindful of their privilege in relation to those who do not have power.

Deep critique does not risk student prospects for a satisfying or status-based career, nor does it trivialise the fickle career prospects that may result from outsourcing, ‘disruptive technologies’, the increased casualisation of professional work, structural change to the economy, and the wake of the GFC.<sup>48</sup> Rather it is to recognise that at a time of increasing inequality and rapid change, law students have a vested interest in an education that has the potential to address inequality as well as providing scope for grappling with multiple careers during their lifetimes.<sup>49</sup>

Therefore deep critique draws upon jurisprudence and legal theory, interdisciplinarity, radical critique, critical thinking skills, critical self-reflection, and involves a commitment to being accountable to those who might be disadvantaged by the ways we contribute to the reproduction of knowledge and with it law and society. It is about recognising that legal education is political and teaching students to critically assess the ways law reproduces hierarchy as students are taught doctrine, prepared for the workforce, and equipped to participate in the world as lifelong learners.

### III THE GOOD OLD DAYS

I have not always taught deep critique. Deep critique became my teaching focus over time for several reasons. Firstly, it has its antecedents in what I see as a golden age for law at Griffith University following Pearce. Secondly, it emerged with my reaction to neo-liberal corporate imperatives imposed on my teaching. Thirdly it was also a result of the integration of my research and teaching.

From the beginning, Griffith was set up to challenge orthodoxy, with the inaugural Vice-Chancellor declaring that it should not be a ‘slavish handmaid of the status quo, a factory fitting out men and women to serve the community within present values and

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<sup>45</sup> Graeme Bryant and Bruce Guthrie, ‘Graduate Salaries 2015: A report on the earnings of new Australian graduates in their first full-time employment’ (Report, Graduate Careers Australia, 2016) 20, 23.

<sup>46</sup> Melville, above n 44, 226 (citations omitted).

<sup>47</sup> Organisation for Economic Cooperation and Development, *Education at a Glance 2016: OECD Indicators* (OECD Publishing, 2016) 154-9.

<sup>48</sup> See, eg, Chelly Milliken, ‘Future Prospects of Law Graduates’ (Working Group Report, Law Society of New South Wales, 2015) 6.

<sup>49</sup> Melville, above n 44, 226.



organisations'.<sup>50</sup> Griffith was renowned for its commitment to social justice and interdisciplinary scholarship.<sup>51</sup> For this reason I came to Griffith and it changed me. Griffith Law School was established within this culture and on the back of the Pearce Report (1987)<sup>52</sup> which called for, amongst other things:

That all law schools examine the adequacy of their attention to theoretical and critical perspectives, including the study of law in operation and the study of the relations between law and other forces.<sup>53</sup>

As a law student in the 1990s I enjoyed the benefits of 'conglomerate courses'. For example the first year conglomerate course Law and Legal Obligations was worth 60 credit points rather than the standard 10 credit point law course at most universities. Law and Legal Obligations grouped traditional doctrinal elements such as introduction to law and legal process, contract, torts, restitution, and equity and was designed to introduce students to the 'various interpersonal relationships regulated by law' so that students could 'consider the nature of law, legal obligation, and the legal process as well as an area of study in its own right'.<sup>54</sup> Conglomerate courses were taught over a full year, with continuous programmatic assessment, and rich in critique, theory, history, context, interdisciplinarity, legal skills (negotiation, mooting, client interviewing, cross-cultural communication, and team-work) and essential doctrine.<sup>55</sup> I received a legal education and plenty of vocational skills, and benefitted from a solid critique of law and society according to jurisprudence, critical legal scholarship, critical race theories, the environment, feminisms, and postmodernism. For me, this was a golden age of legal education because it transformed me more than the three other undergraduate qualifications I completed in other disciplines put together. Still I accept that

no form of legal education will ever be complete and whole. There is no perfection; there will always be gaps, questions, uncertainty, failure and lack. There was no golden age of university education, nor will there be.<sup>56</sup>

A view of education shared by Thornton<sup>57</sup> and conceded by Carrigan reflecting on the pinnacle of legal critique at Macquarie Law

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<sup>50</sup> Noel Quirke, *Preparing for the Future: A History of Griffith University 1971-1996* (Boolarong Press, 1996) 17.

<sup>51</sup> Dale Franks et al, 'Interdisciplinary foundations: reflecting on interdisciplinarity and three decades of teaching and research at Griffith University, Australia' (2007) 32 *Studies in Higher Education* 167.

<sup>52</sup> Pearce Report, above n 6.

<sup>53</sup> Ibid [1.149].

<sup>54</sup> Marlene J Le Brun, 'Law at Griffith University: The First Year of Study' (1992) 1 *Griffith Law Review* 15, 22.

<sup>55</sup> Editorial, 'Appendix One: The Griffith Law Curriculum' (1992) 1 *Griffith Law Review* viii; see also James, 'A Brief History of Critique in Australian Legal Education', above n 4, 978.

<sup>56</sup> Baron, above n 13, 289.

<sup>57</sup> Thornton, above n 2, 62.

School, '[t]he horizon seemed limitless for the proponents of a critical legal education' however, '[i]t was a brief golden age'.<sup>58</sup>

Inspired by the benefits of a Pearce legal education I stayed on following my graduation to pursue a doctoral thesis in law to follow-up on some loose ends I had come across as an interdisciplinary and critical law student. In 1999 I started teaching tutorials to fund my postgraduate study and by 2000 was lecturing, and in 2001 convening core courses. By 2002 I had taught in 11 law courses and ultimately found my place co-convening two property law courses. Those 2002 property courses were the product of a commitment to Pearce and they contained the antecedents of what I teach today as deep critique. Since then the courses have changed considerably in response to the neoliberal turn, and in concert with my development as an academic.

#### IV THE NEOLIBERAL TURN — THE DEMISE OF CRITIQUE

During a time when critique has been marginalised by what is described broadly as a neo-liberal turn,<sup>59</sup> I have nurtured a critical course against the tide. The factors causing the marginalisation of legal critique have been catalogued elsewhere,<sup>60</sup> with some difference of opinion as to the ultimate cause<sup>61</sup> but broad agreement about the factors themselves.<sup>62</sup> Similarly James frames the paradigm shift as one where six competing legal educational discourses have resulted in the dominance of corporatism, doctrinalism, pedagogicalism and vocationalism, at the expense of liberalism and radical critique, which have been marginalised to the periphery.<sup>63</sup>

These factors have been the massive increase in enrolments at a corresponding time of decreasing funding, the corporatisation of universities, the creation of a 'market' for university education, the shifting of funding from the state to the student, and the shift in emphasis away from legal critique to other legal education discourses, identified by James<sup>64</sup> as vocationalism, doctrinalism and corporatism. According to this body of literature, students are now consumers with a focus on choosing an LLB that is quick to complete, flexible so they spend little time on campus, provides a strong chance of employment as an admitted legal practitioner, does not question their understanding of the world, and provides a stimulating experience without too much effort. Academics now endure excessive workloads with unrealistic performance management emphasising less time for teaching and more

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<sup>58</sup> Carrigan, above n 7, 318.

<sup>59</sup> Thornton, above n 2, 1-5.

<sup>60</sup> See *ibid* Chapter 1.

<sup>61</sup> See especially Carrigan's critique of Thornton in Carrigan, above n 7, 334-5.

<sup>62</sup> See generally the articles in Volume 23 Issue 2 of the *Legal Education Review*, titled 'The Past, Present and Future of Critical Legal Education in Australia'; Thornton, above n 2.

<sup>63</sup> James, 'Australian Legal Education and the Instability of Critique', above n 4, 378.

<sup>64</sup> *Ibid* 404.

time producing measurable research outputs.<sup>65</sup> This depiction resonates with my experience too. In particular, the changes that have curtailed the scope for deep critique at my law school can be briefly mentioned.

First is the disaggregation of conglomerate core courses. When related doctrine is taught in a combined conglomerate course with an appropriate increase in credit points and taught over a full year, then it is possible to teach deep critique.<sup>66</sup> During the 1990s, Griffith not only combined law courses, it also combined degrees which were taught as interdisciplinary courses. This provided scope for teaching doctrine with context, critique, skills and theory.<sup>67</sup> Over the previous decade, however, the conglomerate courses were broken up and replaced with single semester courses. With shorter teaching semesters, this has meant very limited scope for teaching anything but doctrine, and at best doctrine with some vocationalism.

Another negative change was the reduction of courses devoted to legal theory and jurisprudence. In the 1990s, legal critique was embedded across the LLB in all core courses plus concentrated in 40 credit points of core courses specifically devoted to legal theory, jurisprudence, and interdisciplinarity. So, for example, legal critique was built into the majority of the 400 credit points necessary to qualify for a combined degree in law and accounting. Today students might be taught some form of critique in a core course depending on the course convenor, and students have just 20 credit points in dedicated core courses related in a broad sense to legal theory. The two dedicated core courses are *Foundations of Law* (first year)<sup>68</sup> and *Theories of Law* (final year).<sup>69</sup> Otherwise core courses have limited capacity to teach anything

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<sup>65</sup> Emmaline Bexley, Richard James and Sophie Arkoudis, 'The Australian academic profession in transition: Addressing the challenge of reconceptualising academic work and regenerating the academic workforce' (Report, Department of Education, Employment and Workplace Relations, September 2011) 32-3; Yvonne Hartman and Sandy Darab, 'A Call for Slow Scholarship: A Case Study on the Intensification of Academic Life and Its Implications for Pedagogy' (2012) 34 *Review of Education, Pedagogy, and Cultural Studies* 49, 53-6; Yancey Orr and Raymond Orr, 'The Death of Socrates: Managerialism, metrics and bureaucratisation in universities' (2016) 58(2) *Australian Universities' Review* 15; Thornton, above n 2, 108.

<sup>66</sup> Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 718.

<sup>67</sup> *Ibid.*

<sup>68</sup> The 2016 *Foundations of Law* (1031LAW) Course Profile describes the course: 'Foundations of Law introduces key concepts and ways of understanding that are fundamental to the entire law program. Throughout the semester, you will develop your awareness of the key principles and institutions that underpin the operation of Australia's legal systems, including the separation of powers, the rule of law and legal ethics. We examine the roles played by lawyers in Australian society and provide you with frameworks for effectively accessing state and national laws and conducting other forms of legal research. Building on that knowledge, we examine how lawyers engage with the law through interpreting statutes and analysing cases. You will be introduced to various forms of academic writing including summarising key features of pieces of legislation, analysing judgments and addressing legal problems. You will also be introduced to the basic tenets of working with clients, advocacy and dispute resolution'. Griffith University, *Foundations of Law* (1031LAW) <<https://degrees.griffith.edu.au/Course/1031LAW>>.

<sup>69</sup> The 2015 *Theories of Law* (5195LAW) Course Profile describes the course: 'This capstone course recalls and extends main traditions and themes in Western

but mandatory doctrine and vocational skills due to the short teaching semester, which will be 12 weeks from 2017 and was once 14 weeks in the 1990s. Clearly legal critique has suffered and so too a conventional liberal education.

The reduction in teaching weeks coincided with the introduction of compulsory lecture capture. Fewer teaching weeks coupled with lecture capture has reduced scope for interaction between teacher and student. Where I would always have more than 90 per cent of students attending my lectures, since the arrival of compulsory lecture capture my lectures average 25 per cent of the cohort but for the first and last lectures, when the numbers bulge. This is an important change because trust is risked when students do not talk with the teacher, and this risk is more profound when the course content asks students to question assumptions and to think critically.<sup>70</sup>

Another key factor impacting on legal critique has been staff turnover. Unless the recruitment of critical scholars is a priority, inevitably the commitment to teaching critique across the curriculum will wane. Teaching deep critique requires a strategic commitment to it by faculty staff so that it is mapped across the curriculum and achieved through programmatic assessment.<sup>71</sup> Staff must share a commitment to lay it down in first year in a dedicated course, reiterate it throughout the curriculum, and then ‘hammer it home’ in a dedicated course in the final year. Although this was never fully realised at Griffith Law School, it came very close for a considerable period of its history. However, with corporate restructuring, collegial recruitment replaced by managerial appointment, staff turnover, and strategic imperatives imposed from above rather than developed within the law school, that shared vision has passed.

Finally, neo-liberalism has led to the corporatisation of universities, and this is also having a negative impact on students. It has constructed

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jurisprudence and the philosophy of law, and integrates signature themes and methods from our law degree. It engages students in critical reflection and analysis of the purpose of law and lawyers, and of the exercise of law-making, law-application, and legal interpretation. Essentially, it investigates, via applied studies and targeted readings in context, the relevance of select theoretical issues to contemporary law. This course, open only to law students, must be completed in students' final LLB year or as they are completing their final LLB compulsory courses (not including Honours compulsory courses). Griffith University, *Theories of Law (5195LAW)* <<https://degrees.griffith.edu.au/Course/5195LAW>>.

<sup>70</sup> Thornton, above n 2, 106-7.

<sup>71</sup> Anthony Niedwiecki, ‘Prepared for Practice? Developing a Comprehensive Assessment Plan for a Law School Professional Skills Program’ (2016) 50 *University of San Francisco Law Review* 245; Molly Townes O’Brien and John Littrich, ‘Using Assessment Practice to Evaluate the Legal Skills Curriculum’ (2008) 5(1) *Journal of University Teaching and Learning Practice* 62; Lambert W T Schuwirth and Cees P M Van der Vleuten, ‘Programmatic assessment: From assessment of learning to assessment for learning’ (2011) 33 *Medical Teacher* 478; Cees P M van der Vleuten, ‘Assessment in the legal and medical domain: two sides of a coin’ (2016) 23(1) *International Journal of Clinical Legal Education* 156; C P M Van Der Vleuten, L W T Schuwirth, E W Driessen, M J B Govaerts and S Heeneman, ‘Twelve Tips for programmatic assessment’ (2015) 37 *Medical Teacher* 641; cf Cath Sylvester, ‘Measuring competence in legal education: a view from the bridge’ (2015) 49 *Law Teacher* 242.

the university as the supplier of educational products (or an educational experience)<sup>72</sup> and rendered students as consumers of educational products. This is largely the result of underfunding universities so that the proportion of the cost of a legal education is shifting from government to the student.<sup>73</sup> Universities also use student income to subsidise the costs of other underfunded university activities including research,<sup>74</sup> and then need to attract more students in higher HECs bands to ameliorate the funding shortfall. University marketing typically deceives by giving the impression the student has agency as a consumer, inflating the extent they have a say over how they are taught, and because it is often silent about 'the fact that intellectual engagement with new ideas requires effort and commitment, or that law students will have to spend hours reading'.<sup>75</sup>

In my experience, deep critique has suffered from a neo-liberal turn that has cut back and homogenised legal education while at the same time constructing students as consumers with an illusion of choice and individual responsibility for their destiny.<sup>76</sup> Under these circumstances, a course convenor must do more with less, and is told by their academic manager that they can always do more,<sup>77</sup> while managers market their law school as the best product a consumer of legal education is likely to buy.

## V THE LAST CRITICAL COURSE STANDING — A REACTION TO THE NEO-LIBERAL TURN

Against the trend outlined above there is one deeply critical Priestley course left standing at my law school: the single semester 10 credit point course *Property Law I* (3014LAW). There are two reasons for this anomaly. The first reason concerns the intellectual depth of colleagues who have worked with me to preserve this course. The second reason concerns the antecedents of the course itself, which were mentioned earlier.

Property law was originally 40 credit points taught over a full year in two 20 credit point courses. It was one of the largest conglomerate courses together with jurisprudence and interdisciplinary theory, also 40 credit points, and a first year introductory course which comprised 60 credit points. When the whole LLB curriculum was reduced in 2005,

<sup>72</sup> Thornton and Shannon, above n 9, 256.

<sup>73</sup> Universities Australia, *Higher Education and Research Facts and Figures* (3 November 2015) <<https://www.universitiesaustralia.edu.au/australias-universities/key-facts-and-data>> 13.

<sup>74</sup> More than half of all university funding in Australia is from private sources: Organisation for Economic Cooperation and Development, above n 47, 199, 201; Stephen King and Rodney Maddock, 'Funding university teaching and research separately could reduce student fees', *The Conversation* (online), 27 March 2015 <<http://theconversation.com/funding-university-teaching-and-research-separately-could-reduce-student-fees-39318>>.

<sup>75</sup> Thornton and Shannon, above n 9, 257.

<sup>76</sup> Ibid 252-3.

<sup>77</sup> See generally Rosalind Gill, 'Breaking the silence: The hidden injuries of neo-liberal academia' (2016) 34 *Feministische Studien* 39.

it was opposed by a small number of academics. At the time I was strongly opposed to the cuts to the LLB as it inevitably meant a shift away from theory and critique, which I had regarded as emblematic of the law school. In particular I opposed the reduction of property law from 40 credit points down to 30 credit points, rejecting the rationale that this was still more than that allocated at other law schools. I was persuaded to drop my resistance to the reduced credit points allocated to property on the advice of a professor who explained to me that this was also an opportunity to redesign courses I had inherited. I reluctantly agreed knowing I was forced to choose to cut doctrine, vocational skills, critique, and theory. While there were constraints on the extent doctrine could be cut from a Priestley course, this was also an opportunity to reconfigure the mix of pedagogies and from my perspective to enhance legal critique.

After a lot of negotiation and discussion, three new 10 credit point property courses were designed and ran for the first time in 2005. *Property Law 1* was foundational and critical, *Property Law 2* doctrinal (Torrens and Land Law) with some theory, and *Property Law 3* was doctrinal with environmental and public interest concerns embedded in the course together with the vocational skill of negotiation. Early on I convened and taught all three courses, but by 2007 I was exclusively convening and teaching *Property Law 1* and *Property Law 2*.

Following a 2010 corporate restructure of the then Faculty of Law, which became a school within a new super Faculty of Arts, Education and Law, the LLB curriculum was once again reduced. We were forced to 'roll out a new curriculum' for 2014 and property law was reduced again, this time from 30 credit points down to 20 credit points. Faced with this situation I reduced doctrine, severed negotiation skills, and the environmental/public interest themes to collapse *Property Law 2* and *Property Law 3* into a single land law course now called 3015 *Property Law 2*. *Property Law 1* was quarantined and remains largely as it was in 2013. In what follows the focus is on 3014LAW *Property Law 1*. What this shows is that legal critique is not the only victim of the neo-liberal turn: a hard decision was made to excise vocational skills, doctrine, and some interdisciplinarity to preserve critique.

The decision to preserve critique cannot be separated from me as a product of Griffith Law School nor from my research as a Feminist Standpoint Theorist. When I commenced teaching property in 2002 the courses were structured around the intellectual strengths of the several academics who had already taught into the course. Each academic would teach the mandatory legal doctrine they were most familiar with and would theorise and critique that doctrine based on their research expertise. Property was thoughtfully contextualised, critiqued, problematised and theorised by my colleagues but it was not themed in any particular way.

Teaching the course this way did not seem to provoke hostility and the only reactions were the occasional student who might balk at the lecture on Marxism, the readings on 'sexually transmitted debt', or the

content about Aboriginal rights to land. When I assumed leadership of *Property Law 1* in 2004, the SEC<sup>78</sup> reported as follows:

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Overall I was satisfied with the quality of the course (percentages)	30	61	7	0	2

Importantly, only two per cent of students strongly objected to the course. On the flip side the course was not a coherent systemic critique of law and the topics were not linked by a theme. The course did not equip students with an understanding of how property had been shaped and how it shapes the lives of people. Virtually no students progressed to write Honours theses or research higher degrees based on the content.<sup>79</sup>

Over time, reflecting on SEC's and developing as a critical scholar, I saw Marxism as a way of linking together the course topics according to a history of the changing ways in which property has been conceived by both western thought and changes to the mode of production, feudalism to capitalism. Marxism also provided a means of connecting the usual indices of critique according to class, race, and gender rather than treating them as isolated aspects of property.<sup>80</sup> Students could critically assess property law to reflect on who was excluded and who benefitted most from particular conceptions of property over time and why.

Today students are invited from the beginning of the course to contemplate the justifications for why the wealthiest nine per cent of people own 85 per cent of the world's wealth, why women own just one per cent of world wealth, and why First Nations Peoples are poorer than their colonisers.<sup>81</sup> To do this the course was organised so that compulsory doctrine was grouped according to class, gender, and race and these three categories were layered with an evolution of western

<sup>78</sup> Response rate 53.6 per cent (class size was 82 and n = 44). SEC on file with author.

<sup>79</sup> Since 2004, each year three to four students have written Honours theses under my supervision on topics from this course and I have had one doctoral thesis completion.

<sup>80</sup> Raju Das, 'The Relevance of Marxist Academics' (2013) 1(1) *Class, Race and Corporate Power* Article 11, 8 <<http://digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=1016&context=classracecorporatpower>>. There Das condemns the opposite view explaining, '[i]dentify politics in academia is based on the idea that it is legitimate to discuss women and similar issues outside of - and in abstraction from - the framework that assigns primacy to class and exploitation of labour'.

<sup>81</sup> For class see Markus Stierli et al, 'Global Wealth Report 2014' (Report, Credit Suisse Research Institute, 19 September 2014) 23-5 <[http://economics.uwo.ca/people/davies\\_docs/credit-suisse-global-wealth-report-2014.pdf](http://economics.uwo.ca/people/davies_docs/credit-suisse-global-wealth-report-2014.pdf)>; for gender see Kenneth G Dau-Schmidt 'Dividing the Surplus: Will Globalization Give Women a Larger or Smaller Share of the Benefits of Cooperative Production?' (1996) 4 *Indiana Journal of Global Legal Studies* 51, 53; for First Nations Peoples see Department of Economic and Social Affairs, *State of the World's Indigenous Peoples* UN Doc ST/ESA/328 (8 September 2009) 21-2 <[http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf)>.

thought from Hobbes to Locke, to Hegel, to Marx, and to radical critiques (feminisms and critical race theories). Marx provides a basis for linking the evolution of western thought because of his contribution to enlightenment and his simultaneous rejection of its bourgeois basis.

After several iterations the sequencing of topics since 2008 has been as follows:

Property as an Historical Construct: Justifications and Boundaries; From Feudalism to Capitalism; Doctrine of Tenure and estates
Justifications for Property: Property in ideas; The literary property debate and <i>Millar v Taylor</i>
Justifications for Property: Hobbes, Locke and the social contract; Property as a natural phenomenon or positive law; Labour Theory
Hegel and Property: Philosophy of knowledge, idealism, dialectics, property and social relations, property as a social construct
Marxism and Property: Historical materialism, commodity fetishism, ideology, and property
Neo-Marxism, Post-modernism and Property: The fragmentation of western thought; The end of history, and property as ideology; The collapse of the public private divide; Feminist Standpoint Theory
Women and Property: Social construction; Property as identity and identity as property; Women as proprietors and possessions; Equality
Colonialism, Sovereignty, and Dispossession: Sovereignty and property; Knowledge construction and perspectives of land; contrasts between the colonisation of the USA and Australia
<i>Mabo</i> and Native Title: Native Title before and after <i>Mabo</i>

Marxism is by no means the majority of the course content, though it is used to link and pivot the history of western thought. It is used to urge students to recognise their role in the reproduction of society and to reflect on their privilege relative to those they may exercise power over in the course of their careers.

In a nutshell, students learn that property is concentrated in the hands of a few on the basis of class, gender and race (among other categories) and that this is not explained by legal doctrine, positive law, merit or equality before the law. Therefore students are invited to critically assess the justifications given for these circumstances and to consider whether it is inevitable and/or desirable. They are expected to be capable of making arguments about the role of law in maintaining and reproducing these circumstances as opposed to other factors. This overall theme is anchored in legal doctrine and contextualised by debates in the history of western thought.

Today the course is enabled by national quality frameworks, and the *Griffith Graduate* (Griffith University's policy 'on the characteristics



that the University seeks to engender in its graduates’).<sup>82</sup> Amongst other qualities, the *Griffith Graduate* expects that graduates are ‘Knowledgeable and Skilled in their Disciplines’, ‘with Critical Judgement’, and are ‘Socially Responsible’. In addition, the Griffith Law School Strategic Plan is

...committed to providing a dynamic and active learning environment that engages a rich diversity of students to think critically and independently about law’s doctrinal, clinical, policy and jurisprudential contexts, thereby enabling them to become socially responsible lawyers committed to professional excellence and the highest ethical standards.<sup>83</sup>

Despite these enabling factors, as the next section explains, 3014 *Property Law 1* is also a matter of survival as much as it is about resistance.<sup>84</sup> It hinges on whether I am prepared to continue to weather a small but growing hostility to the course from students, and whether or not overall student satisfaction remains above the university threshold for an SEC. The minimum threshold set by Griffith for overall student satisfaction is 3.5 on a Likert scale of 1 to 5. If SEC satisfaction falls below that threshold I would be expected to redesign the course to improve student ‘satisfaction’.

## VI REFLECTIONS ON SELLING CRITIQUE TO THE (CONSUMER) STUDENT

The reflections below are based on several sources including my interactions with students and SEC data. I recognise that SEC data is regarded by some as controversial and limited,<sup>85</sup> and should only be used in conjunction with other measures such as peer review. The course in question has been peer reviewed internally and externally and together with the qualitative SEC data this has informed my reflection, although the reports/data are not provided here for privacy reasons. The neo-liberal construction of students as consumers means that SECs afford students a say as to whether deep critique will continue to be taught or whether this course is redesigned to become another doctrinal course tinged with some interdisciplinarity, theory, social justice, and/or vocational skills.

This is significant since anything other than doctrinalism and vocationalism tends to be regarded by students as an add-on to ‘real’

<sup>82</sup> Griffith University, ‘The Griffith Graduate’ (Policy Statement, Griffith University, 23 June 2016) <[http://policies.griffith.edu.au/pdf/The Griffith Graduate.pdf](http://policies.griffith.edu.au/pdf/The%20Griffith%20Graduate.pdf)>.

<sup>83</sup> Griffith University, ‘Griffith Law School Strategic Plan 2013 – 2017’ (Strategic Plan, Griffith University, December 2012) 3 <[https://www.griffith.edu.au/\\_\\_data/assets/pdf\\_file/0007/591712/2013-2017-GLS-Strategic-Plan-Final.pdf](https://www.griffith.edu.au/__data/assets/pdf_file/0007/591712/2013-2017-GLS-Strategic-Plan-Final.pdf)>.

<sup>84</sup> Heath and Burdon, above n 9, 387.

<sup>85</sup> Richard Hil, *Whackademia: An insider’s account of the troubled university* (Newsouth, 2012) 120-1, 123, 127-8; Simon Marginson, ‘Forsyth and Murphy on the University’ (2016) 58(1) *Australian Universities’ Review* 72, 75; Donald Meyers, *Australian Universities: A Portrait of Decline* (Aupod, 2012) 103-8; Thornton, above n 2, 105.

law,<sup>86</sup> whereas in the past students would accept and embrace a pedagogy of legal critique because it was embedded throughout the LLB curriculum. Therefore, in the absence of embedding legal critique throughout the curriculum, the challenge is one of persuading students of the relevance of legal critique.

Reflecting on this situation has not been easy. At least two of my colleagues have confessed that they do not read the qualitative comments in their SECs for fear of the personal criticism frequently amongst the helpful feedback. I too share their reservations, often dwelling on the personal attacks of one or two, while underplaying the more abundant positive comments. I choose to read the qualitative feedback so that I can address it the next time I provide the course. Recall that in 2004, when Marxism and other ‘radical critiques’ such as feminism and critical race theory were small parts of what was nevertheless a critical course, 91 per cent of students were satisfied with the quality of the course and only two per cent reported being ‘strongly dissatisfied’ with the course:

	Strongly Agree	Agree	Uncertain	Disagree	Strongly Disagree
Overall I was satisfied with the quality of the course (percentages).	30	61	7	0	2

With the turn to deep critique since 2008 and with it the linking of Marxism with radical feminisms and critical race theories, the extent of quantitative dissatisfaction has increased along with the number of students who are ambivalent. This is clear in the data below despite the change to the scale between 2009 and 2010 (all figures are percentages):

		Excellent	Very Good	Good	Average	Poor	Very Poor	Un-acceptable
2008 <sup>87</sup>	Overall, how would you rate this course?	37	25	38	0	0	0	0
2009 <sup>88</sup>	Overall, how would you rate this course?	4	29	33	27	7	0	0

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<sup>86</sup> See, eg. student perceptions in Richard Johnstone and Sumitra Vignaendra, ‘Learning Outcomes and Curriculum Development in Law’ (Report, Australian Universities Teaching Committee, January 2003) 273.

<sup>87</sup> Response rate 13.86 per cent (class size and n unknown). SEC on file with author.

<sup>88</sup> Response rate 49.47 per cent (class size and n unknown). SEC on file with author.

		Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
2010 <sup>89</sup>	Overall I was satisfied with the quality of the course.	56.4	30.8	10.3	2.6	0
2011 <sup>90</sup>	Overall I was satisfied with the quality of the course	42.6	29.8	14.9	4.3	8.5
2012 <sup>91</sup>	Overall I was satisfied with the quality of the course	30.9	41.8	12.7	7.3	7.3
2013 <sup>92</sup>	Overall I was satisfied with the quality of the course	46.4	39.3	7.1	0	7.1
2014 <sup>93</sup>	Overall I was satisfied with the quality of the course	13.3	46.7	20	6.7	13.3
2015 <sup>94</sup>	Overall I was satisfied with the quality of the course	34.1	29.5	15.9	11.4	9.1

The figures show that in 2010, 87.2 per cent of students were either satisfied or strongly satisfied with the course and only 2.6 per cent dissatisfied with the course. By 2015 the satisfaction had dropped to 63.6 per cent and dissatisfaction had grown to 20.5 per cent.

Initially I assumed that the drop in student satisfaction was a direct response to the increase in Marxist and other radical critique. I considered backing away from emphasising critique each time I read a new year of SECs and saw a growing pocket of anger toward the course and directed at me on a personal level. It could be argued that it was not deep critique centred on Marxist content that has caused this deterioration, given so many other variables affect student satisfaction. However, the quantitative data was supported by a corresponding change in qualitative SEC feedback which showed a growing small number of students were hostile toward the Marxist emphasis in the course. For example, some students were commenting that they were being taught Marxism and communism rather than property law.<sup>95</sup> After a great deal of soul searching I decided to continue teaching the

<sup>89</sup> Response rate 48.8 per cent (class size was 80 and n = 39). SEC on file with author.

<sup>90</sup> Response rate 47 per cent (class size was 100 and n = 47). SEC on file with author.

<sup>91</sup> Response rate 51.9 per cent (class size was 106 and n = 55). SEC on file with author.

<sup>92</sup> Response rate 26.2 per cent (class size was 107 and n = 28). SEC on file with author.

<sup>93</sup> Response rate 35.4 per cent (class size was 130 and n = 46). SEC on file with author.

<sup>94</sup> Response rate 30.0 per cent (class size was 150 and n = 45). SEC on file with author.

<sup>95</sup> SEC 2014.

course as a deeply critical course because of the positive feedback of the majority of students who in some cases were reporting that the course changed their lives. I also turned to the literature on teaching Marxism for help.

Amongst this literature I read and reflected on ‘Marx in Miami’, an article written by two political science scholars who taught Marxism in Florida.<sup>96</sup> We shared similar student demographics notwithstanding a more profound hostility to Marxism in Florida due to Cuban migration. We used similar techniques to pre-empt ideological barriers and we shared similar teaching outcomes. This tended to suggest that teaching Marxism was not necessarily the reason for a growing hostility to the course. Instead, while the vast majority of the students were satisfied with the course, a growing small vocal minority were becoming more hostile to it and this was pulling overall satisfaction down. That small vocal minority could be explained on this thinking as a defence of privilege and the resentment of a course that questions privilege. Otherwise it is ideologically driven. However, this still does not fully explain why some of the satisfied students are becoming indifferent or dissatisfied with the course.

On further reflection, and after discussing the scholarship of Carrigan,<sup>97</sup> James<sup>98</sup> and Thornton<sup>99</sup> with current 2016 students of the course it is clear that this is not the only explanation for the relative decline in satisfaction of this course. Digging deeper and buried within the SEC feedback it was also possible to see that the students are saying ‘give me doctrine and if not then only teach me theory in a pluralistic way’. It also fits with a consumer view of legal education that holds ‘I’m paying for this so it better be relevant’.<sup>100</sup> When students say that they are ‘paying and so it better be relevant’ they are specifically referring to what James calls vocationalism.<sup>101</sup> Students today see doctrine and vocational skills as real law and everything else as extraneous. This view was around when I was a student in the 1990s but has gained momentum in proportion to the neo-liberal turn over the last decade. Vocationalism is all the more important in the post-GFC context because students are fearful of their employment prospects and the extent of the privatised cost of their legal education.

This neo-liberal turn has seen the Griffith LLB turn from golden age excellence to contemporary homogenised LLB — the homogenised LLB Thornton and Baron describe as neo-liberal, bereft of genuine critique or even a classic liberal education, and focused on meeting the

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<sup>96</sup> Sculos and Walsh, above n 5.

<sup>97</sup> Carrigan, above n 7, 316, 319, 335-6.

<sup>98</sup> James, ‘The Marginalisation of Radical Discourses in Australian Legal Education’, above n 4, 60.

<sup>99</sup> Thornton, above n 2, Chapter 3.

<sup>100</sup> Much like the narcissistic individualist consumer culture at the Miami campus of Florida University described by Sculos and Walsh in Sculos and Walsh, above n 5, 7.

<sup>101</sup> Nickolas John James, ‘Why Has Vocationalism Propagated so Successfully Within Australian Law Schools?’ (2004) 6 *University of Notre Dame Australia Law Review* 41.

expectations of student consumers and a corporate legal profession.<sup>102</sup> So in 2015 and 2016 I allocated more teaching time justifying why deep critique is crucial as a vocational skill.

This is similar and different to what Appleby, Burdon and Reilly did at Adelaide Law School. It is similar because like the Adelaide team I am determined ‘to enable students to identify and question their assumptions’ as a crucial aspect of legal critique.<sup>103</sup> For this reason, I introduced an assessable journal allowing students to reflect on their journey through the course by critically assessing their assumptions about the material as well as the material itself. Another similarity concerns the approach taken to radical critique. At Adelaide:

While this process *might* occur with reference to ideas developed in CLS and subsequent critical legal theories, it might occur in a legal education that is very differently focused. We have discovered that clarifying the distinction between critical thinking and critical legal theories has been important for bringing people into the conversation.<sup>104</sup>

Radical critiques are taught in *Property Law I* not as ends in themselves, rather juxtaposed to reveal to students how vantage points — including theirs and mine — shape the construction of knowledge and criticism.

My journey is also different to the journey at Adelaide because ‘as a community of educators committed to student development’ they ‘were motivated to strengthen critical thinking across our curriculum’.<sup>105</sup> Unfortunately this has not happened at Griffith. Therefore my approach may not be as effective ‘for bringing [all students] into the conversation’ because students are expected to engage with Marxism, radical feminism, and critical race theory at least to the extent necessary to understand how vantage points inform thought.

While only a small number of students seem hostile to radical critique, it is crucial to justify, or in neo-liberal terms ‘sell’ the importance of deep critique to students. At the start of the 2015 semester I tried to pre-empt this appropriateness/relevance hurdle by discussing with my students some institutional imperatives (amongst others, the Australian TLOs for law I regard as relevant: TLO 1(b) & (c), TLO 2 (a), (c) & (d); TLO 3 (c) & (d))<sup>106</sup> to show how they fit with the course objectives. I explained how the course is aligned in terms of those outcomes and I provided ‘an operational conceptualisation of critical thinking; the development of closely aligned teaching and learning activities; and a coherent and innovative assessment programme’.<sup>107</sup> I

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<sup>102</sup> Baron, above n 13; Thornton and Shannon, above n 9.

<sup>103</sup> Appleby, Burdon and Reilly, above n 9, 351.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid 346.

<sup>106</sup> Sally Kift, Mark Israel and Rachel Field, *Bachelor of Laws Learning and Teaching Academic Standards Statement* (Australian Learning and Teaching Council, 2010) <<http://www.cald.asn.au/assets/lists/ALSSC%20Resources/KiftetalLTASStandardsStatement2010.pdf>>.

<sup>107</sup> James, Hughes and Cappa, above n 17, 286.

reminded students of the Assumed Background from their Course Profile which reads:

There is no assumed background for this course. Instead students are expected to come to this course with a mind open for inquiry appropriate to study at a university level. Students are expected to engage with scholarly debate about the origin, performance, reform, and critique of western property rights.<sup>108</sup>

By linking deep critique to the students' concern for vocationalism I was able to turn around the decline in SEC satisfaction. This is evident in the table below, which shows the worst result in 2014 through to the latest SEC in 2016 (all figures are percentages):

		Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree
2014	Overall I was satisfied with the quality of the course	13.3	46.7	20	6.7	13.3
2015	Overall I was satisfied with the quality of the course	34.1	29.5	15.9	11.4	9.1
2016 <sup>109</sup>	Overall I was satisfied with the quality of the course	38.1	47.6	9.5	4.8	0.0

The 2016 SEC qualitative comments showed that a small number of students remain hostile to Marxism, feminisms, and critical race theories based on a defence of their privilege and or ideological naivety. Otherwise the vast majority of students have engaged with deep critique. What is also apparent is that many students are indifferent to critique and are increasingly sceptical toward anything other than doctrine or vocationalism. By selling deep critique as a vocational skill it was possible to engage indifferent students with critique. However, even if a deeply critical core course can be sustained over time based on SECs, it remains doubtful that the course can make much difference to graduate culture if the remainder of the curriculum is predominately about doctrine.

Therefore based on the literature, my experience and reflection, and SECs, it is not radical critique that makes it hard to justify and teach 3014LAW *Property Law I*; rather it is the students' expectation of 'what is law' or legal positivism that is the biggest barrier. In Carrigan's terms:

<sup>108</sup> Griffith University, *Property I* 3014LAW <[https://courseprofile.secure.griffith.edu.au/student\\_section\\_loader.php?section=1&profileId=93130](https://courseprofile.secure.griffith.edu.au/student_section_loader.php?section=1&profileId=93130)>.

<sup>109</sup> Response rate 32.6 per cent (class size was 132 and n = 43). SEC on file with author.

given the cardinal role legal positivism plays as a legal ideology bolstering a commercial society. The allure of legal positivism is that being a component part of bourgeois ideology and a handmaiden of commodity production, it fits smoothly into a society based on promoting market values. Students who fall under the spell of legal positivism and either consciously or unconsciously absorb its capitalist spirit then move on to become academics who exhibit no qualms about instilling its central tenets in those same terms. As long as capitalist relations of production are in command, legal positivism will be a major force in law schools and unorthodox thinkers in a minority.<sup>110</sup>

It follows from this reflection that unless there is a commitment within the law school itself to teach deep critique in a foundation course like the one detailed by James, Hughes and Cappa at the University of Queensland,<sup>111</sup> and then this is reiterated throughout the LLB curriculum by embedding deep critique into at least one core course each year, deep critique will become harder to teach. As Appleby, Burdon and Reilly say, academics ‘play a pivotal role in shaping the culture of the profession — both in the university and through continued legal education’.<sup>112</sup> Consequently:

This, of course, begs the question what legal culture law schools want to participate in shaping, and whether, within the constraints imposed by external and internal forces, that is achievable.<sup>113</sup>

In my own case I will continue to assert the importance of deep critique to my colleagues and I am in the process of forging connections with like-minded scholars around the world in the spirit of what Heath and Burdon call ‘prefigurative projects’<sup>114</sup> and ‘accompanying’.<sup>115</sup> Both of these concepts aim to reconnect academics, students and people to resist the isolating impacts of neoliberalism and to reframe resistance in positive terms for better ways of doing things. I will also reflect on whether I can sustain the course emotionally, physically and professionally with a close eye on SECs. However, if SECs fall below the Griffith threshold for ‘quality teaching’, 3014LAW *Property Law I* will end as a deeply critical course.

## VII CONCLUSIONS

The consensus in the literature reviewed here seems to be that teaching legal critique has in the past oscillated from obscurity to fashionable at particular moments in time. Whether it was UNSW, Macquarie, La Trobe, or Griffith, serious legal critique has only ever been a moment in time in the longer history of these institutions.<sup>116</sup> Yet, as James points out, most legal academics would see themselves as

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<sup>110</sup> Carrigan, above n 7, 319.

<sup>111</sup> See James, Hughes and Cappa, above n 17.

<sup>112</sup> Appleby, Burdon and Reilly, above n 9, 360.

<sup>113</sup> *Ibid.*

<sup>114</sup> Heath and Burdon, above n 9, 398.

<sup>115</sup> *Ibid.* 399.

<sup>116</sup> Carrigan, above n 7.

critical, analytical, interdisciplinary, theoretical etc, although this is not necessarily reflected in their teaching practice, which has historically been mostly doctrinal and often vocational.<sup>117</sup> That is not to suggest that academics have not regularly engaged with radical critique when they teach their core courses or contextualised their courses with a liberal education.

As someone who was taught at a moment of serious critique during the 1990s at Griffith Law School, and then later taught there, it has been difficult to accept the decline of critique and the deterioration of tertiary education over the last decade or more due to the neo-liberal turn. It is here that contradiction is most profound because the capitalist system:

offloads the burden on to consumer/students to get an education not for their needs, but for capital's needs. Hence, education is no longer life-fulfilling but has been converted into property.<sup>118</sup>

At the same time, I have struggled to maintain a core course dedicated to deep critique and to make that course more coherent and relevant. Yet it seems to me that, precisely because of the neo-liberal turn, my effort to preserve the integrity of deep critique and to benefit students through an education of this kind will now rest on whether I have the strength to sustain it, or whether student consumers end it based on their assessment of its relevance. If that should happen then Baron's depiction of the neoliberal university will result:<sup>119</sup> a situation where 'the structural effects of neo-liberalism are masked as matters of personal choice or inadequacy' and the ideology of choice becomes a mechanism to bind students to the same market that circumscribes their future.<sup>120</sup>

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<sup>117</sup> James, 'A Brief History of Critique in Australian Legal Education', above n 4, 981.

<sup>118</sup> Thomas Klikauer, 'A capital idea?' (2014) 56(2) *Australian Universities' Review* 96.

<sup>119</sup> Baron, above n 13.

<sup>120</sup> *Ibid* 281.