

(2003) 6 *Law Text Culture* 165-83.

From oxymoron to intersection: an epidemiology of legal research

I Diagnosis: The disjunction of law and research

The foregoing articles about research in and around law reflect a broad conception of what it is to be a legal scholar. The views and experiences of the authors gathered here are probably no more radical or heterodox than those to be found in any of the earlier editions of this journal or the many others devoted to themes of law, society, culture and contemporary legal theory. Having brought these people together to reflect on what it is that they think and do when researching in law, we have raised 'the legal research question'.¹ In these closing remarks we would like to reflect on the practical implications of the epistemologies which emerge from the views of these authors.

We begin by noting a strange disjunction between, on the one hand, the limited notion of 'legal research' as it is understood in textbooks and, on the other, the rich and complex world of research presented in this edition, in graduate seminar rooms, and the academy. When 'legal research' presents itself, as in the former case, as an oxymoron, it is tempting to draw the conclusion that law is antithetical to scholarship. On further probing that relationship we find that an expanded view of law as an ethical activity focused on practical matters is entirely compatible with the non-positivist scholarship we identify. We want to rethink these relationships by seeing how legal scholarship transgresses the orthodox boundaries which understand law as a practice marked by a style of advocacy, a desire for closure, and a rigid resistance to other disciplines. At the same time we want to draw our reader's attention to the fact that law could not exist as such a practice unless it were also legitimated in society as a phenomenon necessarily committed to the ethical pursuit of justice. From this *broader* perspective law itself, no less than the legal research we support, is not in fact hostile at all to openness, change, flexibility, or multi-vocality. The apparent disjunction – and tension – between 'law' and 'research' comes about from too narrow a way of thinking about each. In conclusion we look to the practical implications of this expanded vision of legal research, in the hope of encouraging recognition and support for these activities in universities and other sites of scholarship.

Even if the views of contributors to this volume are not particularly extraordinary in the context of a certain sort of scholarly practice, they are difficult to reconcile with the typical textbook view of 'legal research'. Publishers' representatives are ever-helpful in pointing out the latest titles which may be recommended to students wishing to learn how to do 'legal research'. To supplement our long-standing interest in sampling their wares, one of us searched out where the

¹ Paraphrasing Margaret Davies' title, *Asking the Law Question* (2002), the legal research question asks what legal research is.

books on 'legal research' are kept in our Australian university law library. We also asked colleagues for suggested readings on the subject.

Our discoveries were hardly surprising. Legal research means finding the law. It already presumes an object, 'the law', which exists in a parallel universe, which is to say, a searchable database. Research so conceived has little to do with an enquiry as to how things get to be called law, or how they are experienced as such, and with what effects. We make so bold as to suggest that the current collection is unlikely to find its way into the section of the library called 'legal research'.

Legal research emerged from our study, we are sorry to say, as an oxymoron. The legal research textbooks contain elaborate descriptions of how to look up cases and statutes. Some of these include a small chapter on 'journal articles' or 'secondary sources'. Most have a chapter on citation. One or two include a little section on how to write up the results of your research. Our favourite in this category was the one which suggested that a good clear writing style is something that you, or your secretary, should cultivate.

There were one or two interesting exceptions. Enright's books (*Legal Research and Interpretation*, 1988 and *Studying Law*, 1995) have sections on legal reasoning, which give some idea of how to think about and interpret law. *Laying Down the Law*, which is more of an overall introductory textbook about law than a 'how to do legal research' text, also has useful sections on the origins of law, legal institutions and legal reasoning (Morris *et al* 1996). At the furthest extreme, where he is most comfortable, is Goodrich's *Reading the Law* (1986) which is a theoretical critique of the methods of the common law from a linguistic viewpoint. This does not purport to tell people how to do 'legal research' and is unlikely to be included as a textbook on that subject. (Although we may find out more about legal research from *Reading the Law* than from many of the other 'real' textbooks) Indeed, only Enright's 1988 book purports to be about 'legal research' *per se*, and as seen by later editions, this work was on its way to becoming a more general text about a range of aspects of the law.²

We may conclude that 'legal research' is the method of finding cases and statutes relevant to other cases or statutes. If that is an accurate and inclusive definition of legal research, then the work described by the contributors to this volume is something else. But our contributors are not in fact from some other planet, and we will show below that most of our research students – academics in the making, many of them – likewise appear to be spending most of their time doing something other than 'legal research'.

Faced with such a *reductio ad absurdum*, it will be necessary for us to consider afresh the actual connection between law and research, and it is to this task that we turn in Part II. Our argument there will be that the current perceived tension between law and research – which does so much to impoverish the former and to delegitimize the latter – stems from a profoundly short term and limited understanding of the actual nature and principles of 'law'. A better understanding of law itself (which is, incidentally, one of the main functions of 'legal research') would do much to render coherent the connection between research, as it is currently and increasingly being practised, and law. There are important implications of a reconfiguration that would make the research that our students and scholars are actually engaged upon, at last intelligible and relevant to the language and enterprise of law. These implications are philosophical, but they are also practical and impact upon the status and funding of research, and the teaching law at all levels. We turn to these practical implications in Part III.

² It seems odd that 'legal research' should actually be more limited in scope and inherently less interesting than 'studying law'.

Before reporting on the sort of research done by postgraduate students in law, we would like to approach the question of how legal research came to be identified with the textbook definition.

The answer lies partly in the history and self-understanding of legal education itself. Until comparatively recently, law in the English common law tradition was an apprenticeship not an education, accompanied by more eating than thinking (Goodrich, 1991). Since law has long been thought to be useful but uninteresting, scholarship has seemed at worst a perversion, at best an irrelevance. In 1336, a law of Edward III's was to be enforced 'without addition, or fraud, by covin, evasion, art, or contrivance, or by the interpretation of the words.' Interpretation was fraud. (*10 Edw. III, stat. 3*; Plucknett, 1922: 164-7). Somewhat later, James I, speaking for those positivists before and since who believe that the question of law is simply a question of clarity, declared

And though the Laws be in many places obscure, and not so well known to the multitude as to you; and that there are many parts that come not into ordinary practice, which are known to you, because you can find out the reason thereof by books and presidents; yet know this, that your interpretations must be always subject to common sense and reason.

For I will never trust any Interpretation, that agreeth not with my common sense and reason, and true Logic: *for Ratio est anima Legis* in all human Laws, without exception; it must not by Sophistry or strains of wit that must interpret but either clear Law, or solid reason. (James I, 1616 in Kenyon, 1975)

For James I, then, the study of law required common sense and reason and not, perish the thought, scholarship. Thomas Hobbes thought scholarly legal education even less necessary.

If I pretend within a Month, or two to make my self able to perform the Office of a Judge, you are not to think it Arrogance; for you are to allow to me, as well as to other Men, my pretence to Reason, which is the Common Law (remember this that I may not need again to put you in mind, that Reason is the Common Law) and for Statute Law, seeing it is Printed, and that there be Indexes to point me to every matter contained in them, I think a Man may profit in them very much in two Months. (Hobbes, 1971: 73)

Against 'common sense' stood Sir Edward Coke, who argued, in a celebrated passage, for the unique and difficult challenges of legal study.

His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it. (Coke, 1607 in Kenyon, 1975)

But notice the limited nature of Coke's defence. It is the very antiquity of law, its static and unbending nature, which justifies the specialised knowledge of lawyers. 'Long study and experience' is a means of *discovering* this knowledge, not of contributing to it. The tradition of doctrinal scholarship to which this argument led has therefore been closer to theology than to any

of the social sciences, both in terms of its exegetical cast, its faith in authority, and its devotion to untangling the intricacies of canonical texts.

This extraordinarily confined approach to the meaning and purpose of legal scholarship has had a tenacious hold on legal minds. It runs like a refrain through the great works of jurisprudence. Ronald Dworkin, for example, insists that courts are the capitals of 'law's empire', and theorists its 'seers and prophets' (Dworkin, 1986: 407), while Ernest Weinrib defends 'legal formalism' against the pollution of any discipline outside the 'immanent rationality' of the hallowed texts themselves (Weinrib, 1988 and 1992). Ultimately the argument finds its imprimatur in a philosopher like Stanley Fish, who maintains that theory and practice are entirely unrelated—according to Fish, theories about law cannot affect the interpretive community of legal practitioners any more than theories about physics will affect baseball (Fish, 1987 and 1989).

To ask what legal research entails in a law faculty, is rather like inquiring into the teaching of evolution at a fundamentalist Christian academy. The ideology itself will severely constrain what counts as relevant knowledge. Yet, against the odds in some ways, research understood as a genuine and far reaching inquiry into the nature and experience of law is taking place in our universities, and it is increasing. Our diagnosis is this: the rhetoric of law's proper province and provenance, and the reality of its study, are drifting further and further apart.

II Prognosis: The intersection of law and research

We have already noted that this volume contains work which is atypical of a textbook view of legal research, but it is not so out of step with the bulk of research which is actually being done in law schools. According to a survey of postgraduate research in Australian law schools recently undertaken by one of us,³ only 20% of all doctoral research projects might happily be described as 'doctrinal'. A further 20% were characterised as 'law reform' work, which might embody, from a more socially normative perspective, a similar approach to the exegetical 'intricacies' of legal scholarship. On the other hand, reflecting the great burgeoning of work in the law and society movement, on post-colonialism, human rights, and globalisation, and drawing on legal realist, critical legal, and post-structural studies in law (Manderson, 2001; Goldring, 1998: 168-71) 17% were said to be 'theoretical' in orientation, and a further 17% 'interdisciplinary'. The remaining 26% were described as 'international or comparative'.⁴

There is more postgraduate research being done in Australian law schools than ever before, and in more diverse ways. It is not being done just for lawyers. In part, it reflects the undoubted growth of a distinctly academic career path in law. But this research is valuable in its own right and not merely as a means to establish academic credentials. It represents a broad range of scholarship aware of the importance of law to society on many different levels.

This picture of a broadly focused and socially relevant legal research is not only to be found in graduate research programs. Undergraduates selecting topics for a supervised research subject (commonly a prerequisite for an honours degree) choose from a fascinating range of theoretical, practical and relevant topics. Supervising and coordinating these subjects brings a new dimension to reading newspapers and analysing current issues, as our students' legal research on

³ Desmond Manderson conducted the General Information Survey for the Academy of the Social Sciences in Australia. Results and methods are reported more fully in Manderson (2002) where parts of this article have appeared previously.

⁴ There is a small amount of double counting in the figures.

topics ranging from war crimes and international disputes to IVF and environmental issues give depth and background to the headlines we read.

This broad ranging and adventurous approach to legal topics does not necessarily come to a halt when these students graduate. While about half the graduates from Australian law schools go into legal practice, the other half get work in policy, research, administration and consultancy with governments, NGOs, and corporations. Even those going into legal firms may find themselves doing new research in cutting edge policy areas.

While many of their teachers publish in the traditional law reviews others, like our colleagues publishing here, work in a diverse range of social, historical, economic, theoretical, cultural and critical areas. Even those traditional law journals are increasingly publishing empirical and theoretical work which falls outside the textbook version of doctrinal legal research.

Amid this proliferation of styles and topics of legal research we can discern, with the help of the articles in this collection, some underlying epistemological and practical issues. These invite a rethinking of the methodological, social and ethical underpinnings of the practice of legal research. We do not aspire to write a legal research textbook for the twenty-first century. On the other hand, we hope we may be laying some ground work for others who might consider such an enterprise. Our purpose here is to bring the epistemological insights emerging from this collection to bear on the practical worlds where legal research is done.

Among those practical worlds, we have so far mentioned the institutional and vocational sites of legal research – the worlds of the university, law firm, government, NGO and corporation. This gives us an idea of who does legal research, and who pays –or allocates other rewards such as degrees– for doing it. None of this directly addresses the question of who it is done *for*.

Law Beyond Advocacy

A newer approach to the interests underlying legal research may be compared to the established legal tradition, as we did in sketching a textbook definition of doctrinal legal research. The picture here is more complex, however. From earliest times, lawyers have worked for clients. A lot of law is done by representatives hired to promote a client's interests. Lawyers have also worked for–or themselves been–legislators, and they represent the interests of the state, the ruler or the 'people' whether as drafters or prosecutors. As judges, lawyers are required to decide cases and reconcile losing parties to their disappointment,⁵ whether by the force of argument or the exercise of authority.

Legal research is informed by understandings of the question and role of law in society. Advocacy of a particular outcome, come what may, which is the very hallmark of much legal work, undermines the whole project of scholarly reflection (Macdonald 2002). If legal advocacy is based in argument for a foregone (or pre-financed) conclusion, then the training of the advocate cannot be reconciled with that of the legal scholar. No graduate program has yet acknowledged the paradoxical implications of this position. A masters or doctoral program that wishes to take the idea of legal research seriously, as we understand it, must look very different from a law degree which trains outcome-oriented advocates, either at masters' or undergraduate level.

⁵ '*Enttäuschungsabwicklung*', or handling of disappointment, Luhmann (1985).

Nevertheless, if we think more carefully about the actual social purpose of law, it becomes possible to develop, if not an integration, then at least a *rapprochement* between the training of lawyers and the scholarship of law. Law's history and role gives it an unusual place among the human studies, in that it is a means for debating matters of interest and policy. Law narrowly defined as a service for a client involves the promotion of a particular interest. Application of this sort of law is simply that of a technique, neutral between the ultimate values involved, but devoted to a single interest and outcome. But law as a process of debating *between* outcomes offers thereby a language for articulating issues of morality and justice. The technique should not be abstracted from its ends.

We are making two related distinctions here: between interests and between outcomes. Legal practice which serves one interest (or client) cannot consider alternative outcomes, so it is a means to an end, a technique. But at the same time the purpose of that legal advocacy is precisely to multiply perspectives and to balance them. Individual lawyers of course don't do that, but the rhetorical argument of the trial and other structured legal debates have this objective.⁶ So law offers us a model of pluralism and a capacity to *transcend* its own partiality. Like scholarly research, although through quite different methods, that is one of its own normative foundations. A form of legal action which could recognise a diversity of interests may be more than a means, and instead be involved in debates over worthwhile outcomes. The name we give to a practice which is understood and accordingly *limited* by reference to its ultimate social ends, is ethics. An ethics of law comprehends legal argument as a way of helping us to distinguish between alternative outcomes (*phronesis*, or prudence) rather than simply dictate the shortest route to a predetermined goal (*techne*).

The connection between clientele or interests and these modes of thought is crucial to distinguishing between modes of research in law. To base an ethics of research upon the recognition of the alternative views of others allows that research to transcend narrow interests and see its 'clientele' in terms of humanity. Even where an interest group or clientele is identified, the ethical researcher is expected – just as the prudent judge is expected – to have weighed up these interests. To identify with an alternative interest group – women, Indigenous people, victims of crime – is to find an alternative standpoint from which to take a fresh look at the social and moral world.

The recent development of these alternative epistemologies owes much to feminism, as can be appreciated from Margaret Davies' and Kerry Carrington's contributions here. (cf Alcoff 1993) The alternative standpoints of the Indigenous and judicial views is illustrated in this collection graphically and eloquently. An ability to see through other eyes identifies alternative positions and recognizes the ethical foundations of research and law alike.

A narrow and client-focused approach to the practice of law assumes that law is just a technique. To transcend this view and move to an ethically prudent approach which recognises alternative outcomes is to recognise alternative reference groups. Accordingly legal research needs to be understood and approached as quite distinct from vocational legal training, but precisely as continuous with the *purposes* of law, which is to say, with legal ethics.⁷

⁶ 'Rhetoric' is of course used here in the classical rather than pejorative sense. Following Perelman's *L'empire rhétorique*, Petrucci (2000) discusses the rhetorical foundations of rational argument, and its practical contribution to moral, political and legal debate.

⁷ We use the term 'legal ethics' in a broad sense (*pace* the legal ethics textbooks). A parallel problem of narrow professional debasement besets legal ethics as legal research. A survey of those text books would be just as depressing.

In considering the outcomes of a revised view of 'legal research' we first recognised that 'discovering the law' was inadequate for any but the most limited view of vocational legal research. Broadening our perspective, we now propose that research is defined not only by its objects of inquiry (statutes or society), but also the interests it serves. To recognise this is not simply to take different sides in a traditional adversarial contest, but to identify new sources guiding our inquiries and their purposes. Legal research must refresh itself not by a divorce from interests (or advocacy) but by a diversification of and problematising of those interests. The positivism of 'finding the law' is overcome by broader inquiries, these in turn guided by an expanded notion of their practical and ethical basis. Legal study is saved from irrelevance by its ethical concerns. And this of course is as true of lawyers as of scholars.

One might ask whether the practical genre of law is itself somehow inimical to ethereal scholarship. But of course all scholarship has *some* goals in view: whether they be to change the world or merely (in Marx's formulation) to interpret it. Naturally, some researchers are in a better position than others to change the world. All of them have to interpret it. Those who have influential positions in government or courts are well placed to apply their research. Undergraduate students may produce coherent critiques of injustice, or come up with ideas to improve the law, and yet have little opportunity for any impact. Others, of course, are simply trying to expand their understanding, and, hopefully, that of some other people. Academic researchers straddle these ethical, intellectual and professional demands.

We looked at a sample of twenty undergraduate and postgraduate research topics. The most common primary purposes were to describe or interpret (12) and to reform or evaluate (8).⁸ Most (17) of the projects had some practical component (often in conjunction with a descriptive or interpretive one): to reform, evaluate, criticise or advocate. Only three were purely interpretive or analytical.

This is not surprising and again sustains our argument that the real tension is not in fact between law and research, but between the rhetoric of law – as partial advocacy and as hermetic doctrine – and its underlying and often obscured ethics – which is neither partial nor hermetic. In fact, law is not and never has been a field of pure inquiry. It derives from a tradition of *practical* decision-making. Gadamer (1989: 20) reintroduces the Greek distinction between *sophia* (wisdom; scientific and intuitive knowledge) and *phronesis* (practical common sense), noting that Late Roman legal science developed against the background of an art and practice of law that is closer to the practical ideal of *phronesis* than the theoretical ideal of *sophia*. We said above that practicality, notably in nineteenth century Britain, reached a point of anti-intellectualism which may even be hostile to reason or theory. But there is nothing inevitable in such a conclusion. For Aristotle (1976: 209), *phronesis* was rational, developed in accordance with a true theory or principle *and* capable of action. This is a concept of reason which is well suited to the law, even though it has been rather submerged by a Cartesian positivism for the past few centuries. (Toulmin, 1996: 206 and 1990, *passim*; cf MacIntyre 1985) So there is clearly an intellectual tradition that is both legal and scholarly and indeed which properly connects the two.

In reinventing law as a scholarly discipline we should recall its origins and continued existence as a practical study; and we should recall the purposes of those practical techniques which mark it. If we recognise the humanist tradition which understands *phronesis* as a practical reason, research into law need be no less intellectually rigorous. The socio-legal scholar operates in a distinct

⁸ These are exclusive categories, counting all the first descriptors (ie the primary purpose) of the projects. The sample, of projects Richard Mohr was involved in from 1997 – 2000, consisted of five PhDs; five research Masters; five research components of coursework Masters, and five undergraduate projects. All were 'legal' in their objects of inquiry; all but two were carried out in a law school.

genre, committed to the sphere of human goods and contingent particulars, not eternal verities and universals. But Aristotle shows us that there is a way of knowing proper to this study: *phronesis* or prudence, as opposed to scientific knowledge (*episteme*) of the eternal. To interpret these terms as Aristotle did, then we may need an *epistemology* with less urgency than a *jurisprudence* as the foundation of our studies.

Law Beyond Closure

We have already noted the inherent tension between legal practice and legal scholarship. Law moves towards closure, just as it proceeds from interests, for practical legal purposes. In practice, a decision must be made: these practical and prudent reasons are so called from *praxis*, action. The outcome of this sort of deliberation may not be *certain*, but it will have to do for now. An interpretation must be settled upon, the court case must be concluded, judgment must descend. We consider these to be good reasons for closure. So here is another tension. Law and science both require closure to decide a practical issue. This is a contingent and ends-oriented closure: it allows us to move on when we have to.

Law also moves towards closure for reasons of legitimacy. Legitimacy *may* be necessary for law. (People should obey decisions. It will be better if they obey them because they believe they are right – or were reached the right way – than out of fear or force.) But such arguments would appear to have little place (ideally) in scholarly or scientific discussion. To require a scholarly interpretation to be true or unchallengeable advances nothing but the status of the scholar. When law or science demand closure as certainty ('truth must be thus and not otherwise'), they do so to *justify* themselves, that is to say for purposes of *legitimacy*. In both cases, their conclusions ought to be characterized not as scholarship but as dogma.

Ironically, the practice through which the legal institution seeks closure seems the same as the practice by which scholarship assiduously skirts it: interpretation, and the constant supplement of interpretation. Here too, however, what appears to be a marked difference between the demands of law and of research, actually suggests a continuity and a consistency when looked at more broadly. The natural and inherent ambiguity of words appears to create the legal craving for closure. Many are the lawyers and theorists who have therefore tried to expel ambiguity from the realm of legal meaning altogether, or at least as far as possible (Hart 1961). We are constantly told that law is not literature because literature welcomes – or requires -- interpretative change while law cannot abide it (Posner 1988). But on a larger view, such ambiguity is simply not inimical to the *purposes* of law. It is true that law seeks short term closure – the resolution of this case or that right now. But it is the very flexibility and organic nature of language that allows the law, looked at on broader time frames, to grow and change. This change is necessary to law no less than to literature. Interpretative skill requires in both cases care in reading, reflection on assumptions, and an ability to unpack the assumptions, principles, and language of justification of a text or texts, whether they are black letter legal, or more broadly related to law in its relationship to society. The complexity and uncertainty of interpretation is a problem for the day to day lawyer, but yet the very strength of law as a whole. Law, at its best, is *not* dogmatic. If we deny the importance of this interpretative fluidity, we sacrifice the on-going legitimacy of law on the altar of an artificially enclosed authority that does law little credit.

In keeping with the insights of standpoint epistemology which have been illustrated throughout the current volume, it is all a question of perspective. What may appear to be quite different approaches to language and meaning are, taking account of the ethics of law – its interest not just in stability and formal legitimacy but in change and social legitimacy – in fact the very features that make it continuous with rather than opposed to the ideals and skills of scholarship. So the

training of the legal researcher is not unrelated to that of a lawyer, when this practice is understood in its broader ethical context. Law and legal research can again be seen to intersect (to sustain the keyword of this collection).

Law Beyond Disciplines

The malaise of current legal research is not solely attributable to the British legal tradition. The development of disciplinary structures of thinking within universities in the nineteenth century, largely as a function of the movement towards professionalisation and specialisation described and applauded by Max Weber, produced both “blindness and insight”. Insight, certainly, by encouraging a deeper knowledge of increasingly specific subject matters. But blindness likewise, since this specificity was achieved at the expense of a broadness of vision. There was an increase of expertise but a loss of imagination in this movement. It is now apparent that in many areas the marginal rate of return on increased insight has long since been outweighed by the marginal cost of blindness.

This is so in two ways. First, within particular disciplines, specialisation has become an institutional rather than an intellectual demand. Increasingly it is issues like professional legitimacy, funding models, and career advancement which drive the pressure towards ever greater expertise over ever smaller areas. Secondly, outside the academy, the discourse and field of a discipline have become unintelligible to the wider community, and frankly uninteresting. The compartmentalisation of thinking which has marked the past century or so fails to capture either how human beings relate to the world, or what excites them.

The contributions to this volume and the other examples we have looked at above go some way towards showing us just how legal research might overcome these limitations and emerge from the transitional phase it currently occupies, reinvigorated and transmogrified. One approach might be to examine a particular site or sites of interest without an exclusive disciplinary strategy in mind. It is the site as observed and not the intellectual tradition of the observer which determines the approach. This is perhaps a somewhat naive justification, but nevertheless there is some truth to it. Areas such as the ‘city’, or ‘drugs’, provide places of conjunction between such a variety of disciplinary issues that no disciplinary or interdisciplinary framework can do them justice. Research into ‘rural crime’ led Russell Hogg to the insights published here, which in turn inspired much of the art selection. Art and law? These seem alien practices, but in reality, in relation to the site, for example, of rural towns in Australia, each profoundly illuminates the meaning of the other. It is only by treating every discipline as a relevant but never a hegemonic structure that an understanding of the meaning of that site can really be developed. In this sense, the new fields of cultural studies or semiotics provide the intellectual paradigm of such an approach. Within these ‘schools’ it is the issues or sites which are of interest, and disciplines are drawn on and developed as seems fit.

Another approach might be to treat the different foundational disciplines as verbs rather than nouns. Different disciplines (or ways of approaching a subject) are not reified, but are each treated as being *active in each other*. In this sense, the ‘law and literature’ movement, with which this journal has a long tradition of engagement, provides a good example. As initially constituted, law and literature was a classic interdisciplinary movement, treating ‘law’ and ‘literature’ as two nouns, each embedded in their own methodology, from which insights, as metaphors, could be drawn. But the treatment of law *from the point of view of* literature simply maintains their difference. Recent scholarship, however, drawing on the work of writers like Goodrich and Derrida, for example, has insisted that we treat law *as* literature, as if the forces of meaning and language which work through literature already and always operate within law as a textual and communicative structure (Derrida 1992). The ‘law and discourse’ movement

reflects this change, and uses the word 'and' in an entirely different sense from that implied by 'law and literature'. Law and discourse presumes that law is already discourse, and that discourse is already an operative form of law. The treatment of disciplines—the use of the word “and”—implies a mutual constitution of subjects rather than a conjunction of objects. This is what marks out the territory of the transdisciplinary.

By recognising sites, reference and interest groups and their perspectives we cut through disciplines while drawing on what each of them can know. By multiplying perspectives we maximize insight and minimize blind spots. It is therefore imperative to think of legal research in these expanded senses as disciplinary-critical, site-specific, engaged and constitutive. These are the very features which mark it out as innovative, as interesting, and as illuminating.

The concept of dialogue between different languages – an alien concept in the monologic and authoritarian discourse of law – captures what we see as important in the emerging legal scholarship. To engage in such a dialogue we do not, cannot, abandon our mother tongue—for we have to think in *some* language, think using *some* discipline. There is no choice. The ideal of Esperanto, the dreams of a perfect language (or meta-discipline) which would somehow transcend the particularity of each individual culture's own language—this is a hopeless fantasy (Eco 1995). We live in Babel after the fall of the tower (Steiner 1975). But as this dialogue develops, we each learn new concepts and images through a growing appreciation of the richness and difference of the language of the other. These new words and approaches are then able to be incorporated into our own language. A dialogue between disciplines does not transcend them any more than a dialogue between languages renders each language obsolete. But such a dialogue is a crucial opportunity to learn, and change, and grow. It might be a model for the description of the kind of emerging scholarship we have been indicating (and indeed publishing) here: law *and* research.

To conclude, legal research is ill-suited to be understood merely as an adjunct to legal training. The techniques of analysis, the foundations of legitimacy, and the tools of the trade required are rather different. But at the same time, a proper understanding of the ethics and purposes of law and the ways in which specific legal practices bear upon it, demonstrates the ways in which law is in fact an ideal context in which to develop a distinct form of scholarship – phronetic, engaged, multi-vocal, but nevertheless rigorous for all that. The cultivation of these abilities requires distinct methodologies and skills that our current academic practices, including graduate programs, do little to enhance. But scholarship understood in this way exists as a kind of perspective on rather than divorced from the training of lawyers. Our prognosis is: legal scholarship can be, should be, and might be, the conscience of law.

III Prescription: The implications for legal research

Change in the way in which legal scholarship is actually being accomplished is already underway; reform comes always from within and from below, and is on us before we perceive it. This is how the illusion of author-ity works: writers describe the past but pretend to claim credit for the future. They are historians in the robes of prophets. But in the hope of at least hastening this change we conclude by surveying some of the institutional constraints to be overcome and opportunities which lend themselves to the development of a reconceived legal research.

To reinvigorate a broad, intersectional approach to legal research requires attention to undergraduate, postgraduate and academic research. As ever, the vocational world beyond the university walls exerts its own ever-changing influence.

Undergraduate teaching & research

The double degree program characteristic of the Australian system offers opportunities for cross disciplinary work and insights which are not available in a purely vocational JD program on the US model. This is an enormous and, it should be emphasized, unique strength of the Australian approach to legal education. Yet little is now done to take advantage of the unparalleled opportunities which the system might afford us. Students *do* make connections between their disciplinary bases, but at the moment they do so with little institutional encouragement. Practical proposals in this field must rely on improved collaboration across university faculties and within law itself. But as we have argued this interdisciplinary collaboration is central to the success of the developing model of legal research.

Law faculties should promote the conscious integration of issues of theory and uncertainty into the core curriculum as a key course objective throughout the undergraduate law degree. Within substantive law subjects as well as in theoretical (eg legal philosophy) and empirically oriented (eg criminology) subjects the contingency of law *and its operation* may be emphasised over its determinacy.

Academics from law and other disciplines could work together in order to develop and teach these sorts of courses. Even at relatively early stages of their degrees students might be encouraged to pursue research for recognition across different degrees (eg criminal law and cultural studies). In addition, encouraging students to do research *and to learn how to do research* throughout their undergraduate programs promotes the recognition and viability of research as an intellectual and vocational option. Thus stimulated, at more advanced stages students should be able to carry out interdisciplinary research projects in pursuit of joint honours degrees. This latter is a perfectly straightforward proposal and yet still almost impossible to achieve, so ossified are the disciplinary and administrative barriers to such projects.

Postgraduate research

'Postgraduate research' might itself become an oxymoron if vocational postgraduate qualifications continue to proliferate at their present rate, along the lines of JD, coursework masters (the MBA model) and SJD programs (Macdonald 2003). On a more positive note the survey of Australian postgraduate research, discussed above, found that current research in law is broader and deeper than that: more students are engaged in it; the variety of scholarship it represents is enormous; and its significance to the community—as both a path to expertise in scholarship, and as a major contribution to how our society understands law and legal issues—will only continue to grow.

It is critical to differentiate and promote specifically research degrees, such as PhDs and research masters.⁹ Alas, postgraduate research programs in law rarely offer students the kind of guided program able to provide them with the knowledge and skills which contemporary legal scholarship demands. The trends in legal research identified in this journal and in this essay have attracted very many students away from orthodox doctrinal categories. In a climate of such fluidity and rapid change, the absence of any compensating intellectual and administrative structures to support their explorations is now keenly felt. Research students require dedicated units and seminars to develop both generic (eg topic development) and specific (eg methodology,

⁹ It may be almost too late to save the research Master of Laws, a generation ago the virtual pinnacle of academic achievement in law, so devalued is the 'masters' degree.

writing) research skills.¹⁰ We would go so far as to suggest that almost all doctoral students would benefit from taking an advanced course or two from another discipline, even if only in order to develop adequate skills and knowledge bases in their own areas. For many students, a genuinely cross-disciplinary supervision is probably desirable, yet here again almost nothing has yet been done to facilitate and encourage these arrangements.

As the General information Survey on graduate education in law suggests (Manderson 2003), the predominant feature of many postgraduate research students' experience is isolation, expressed principally as a lack of 'integration', 'communication' and 'culture'. In order to build a genuine scholarly community, law schools and faculties must look beyond their own borders and work to facilitate student interaction nationally and internationally. Students need to be kept informed of networks, conferences, and mailing lists likely to be of particular interest to them. Their attendance and presentation at conferences has to be promoted by the judicious use of postgraduate research funds. Conferences of postgraduates and postgraduate sessions within mainstream conferences have a place, but not at the cost of corralling students into designated sessions. The contributions of research students are often among the most exciting work presented in these forums, and it is worth showcasing it to potential and current postgraduate students. Other means may be found of promoting postgraduate research experience to undergraduate and graduate audiences, and sharing between universities.

Academic research

Undergraduate and postgraduate research is of course not just the cradle of good academic research, but entirely continuous with it. Such research is proliferating into new and exciting areas. It is doing so within some constraints imposed by old institutional structures and others which are less familiar. Law schools are under pressure to comply more specifically with research models developed by governments and universities with quite different disciplines in mind. It must be said that these external pressures still manage to encourage research as such in ways not seen in the traditional legal education model. Moreover, pressures to compete for research grants militate against the lone theorist and the doctrinal exegete alike. They may promote new strands of empirical and interdisciplinary work. But the inapposite nature of the research models often applied by granting agencies to legal research is discouraging, and many are the academic hours devoted to squeezing round ideas into square funding applications. Pressures to seek funding from whatever source, and programs which match 'industry' funding push academics over the campus fence, but all too often into the arms of plutocracy. If academics can identify government, NGO and advocacy groups which have aims and values compatible with the thrust of their own research, so much the better. Ultimately, however, these programs favour the interests of the moneyed against the destitute, and limit opportunities to develop perspectives based in alternative views of the law and its place in the social world. All too often they only reconstitute the problems inherent in legal advocacy, at the level of scholarly research.

The strength of recent developments in legal scholarship has been its *independence* from established disciplinary structures, institutional constraints, and paradoxes of funding. But in the long run, this is its besetting weakness too. Without institutional recognition it will be difficult to move legal scholarship in the kinds of directions we have been arguing for – research as the conscience of law. This work will continue to look like something other than 'legal research'. Students will not recognize research as a continuing option and interest throughout all their studies; and the community itself will not recognize this work as something which actually speaks to their understanding of that phenomenon, 'law'. Outlets for intersectional research are

¹⁰ A range of such skills, with an emphasis on generic skills, is illustrated on the University of Wollongong's website Postgraduate Research in Law <http://www.uow.edu.au/law/postgraduate>

less numerous and sometimes more tenuous than those for doctrinal research. Universities have law reviews; nations have journals of socio-legal research, and some of these do not survive. Publishing opportunities, whether through journals or monograph series must be cultivated and supported, and we hope that this is not taken as a note of special pleading in our analysis. In the long run, if this work is not recognized as 'legal research' – institutionally, socially – then it will not have those practical effects that render it relevant to our best understanding of the project of law and the nature of research about it.

The irony is that our understanding of what law really 'is', is *itself* constituted by a body of knowledge that withholds or bestows recognition according to a complex matrix of embedded social and institutional demands and presumptions (Foucault 1980). Our prescription is this: if we are to properly accommodate the changing model of legal research, we will have to change our understanding of law itself, as it is taught and as it is understood in the wider society. To change the textbook definition of legal research would therefore be a profound event, but it is a project made all the more difficult by the mutually constitutive body of structures and assumptions that already depend on such definitions. A different legal research will create, even as it is birthed by, a new society with differently articulated understandings and expectations of law. Without this dual process, the recognition of the one by the other is simply not possible. History and prophecy, it turns out, are not really contradictory at all, but mutually implicated. The task of transformation might seem beyond us. The assumptions and textbooks of the present – what is law? what is justice? what is research? – seem irrefutable, or rather alternative assumptions and textbooks remain almost invisible. But the *almost* is the point. Here they are, right here, right now. Ultimately, our studies and this volume have proven to us that Galileo was right. "And yet," as he said, "it *does* move."

References

- Alcoff L & E Potter eds 1993 *Feminist Epistemologies* Routledge London
Aristotle 1976 *Ethics* (trans by J A K Thomson) Penguin Harmondsworth
Davies M 2002 *Asking the Law Question* Second edition Sydney Law Book Company
Derrida J 1992 *Acts of Literature* Routledge New York
Dworkin R 1986 *Law's Empire* Belknap Press Harvard
Eco U 1995 *The Search for the Perfect Language* Blackwells Oxford
Enright C 1988 *Legal Research and Interpretation* College of Law Sydney
Enright C 1995 *Studying Law* Federation Press Sydney
Fish S 1987 'Dennis Martinez and the Uses of Theory' *Yale Law Journal* 96: 1773
Fish S 1989 *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* Duke University Press Durham NC
Foucault M 1980 *Power/Knowledge* Pantheon Books New York
Gadamer H-G 1989 *Truth and Method* Second (revised) edition Continuum New York
Goldring J 1998 'Law' in *Academy of the Social Sciences in Australia Challenges for the Social Sciences and Australia* 1:165-72 AGPS Canberra
Goodrich P 1991 'Eating the Law' *Journal of Legal History* 12: 246-67
Goodrich P 1986 *Reading the Law: A Critical Introduction to Legal Method and Techniques* Basil Blackwell Oxford
Hart HLA 1961 *The Concept of Law* Clarendon Press Oxford

- Hobbes T 1971 *A Dialogue Between a Philosopher and a Student of the Common Laws of England* University of Chicago Press Chicago
- Kenyon N 1975 *The Stuart Constitution* Cambridge University Press Cambridge
- Luhmann N 1985 *A Sociological Theory of Law* Routledge and Kegan Paul London
- Macdonald G 2002 'Ethnography, Advocacy and Feminism: A Volative Mix: A View from a Reading of Diane Bell's Ngarrindjeri Wurruwarrin', *The Australian Journal of Anthropology*, 13(1), 88-110
- Macdonald R 2003 'Still Law and Still Learning' forthcoming paper on file with the authors.
- MacIntyre A 1985 *After Virtue. A Study in Moral Theory* Second edition Duckworth London
- Manderson D 2001 "Apocryphal Jurisprudence," 23 *Studies in Law, Politics and Society* 81-111.
- Manderson, D 2002 "Law: The search for community" in S. Marginson, ed., *Investing in Social Capital (Journal of Australian Studies, No. 74):*147-60 University of Queensland Press St Lucia
- Morris G et al 1996 *Laying Down the Law The foundations of legal reasoning, research and writing in Australia* Fourth edition Butterworths Sydney
- Petrucci V 2000 "Retorica, Diritto e Scienza Sociale" *Sociologia del Diritto* 27 (2): 35-45.
- Plucknett T 1922 *Statutes and Their Interpretation in the First Half of the Fourteenth Century* Cambridge University Press Cambridge
- Posner R 1988 *Law and Literature: A Misunderstood Relation* Harvard University Press Cambridge
- Steiner G 1975 *After Babel: Aspects of Language and Translation* Oxford University Press Oxford
- Toulmin S 1990 *Cosmopolis: The Hidden Agenda of Modernity* The Free Press New York
- Toulmin S & B Gustavsen eds 1996 *Beyond Theory: Changing organizations through participation* John Benjamins Amsterdam
- Weinrib E 1988 'Legal Formalism: On the Immanent Rationality of Law' *Yale Law Journal* 97: 984
- Weinrib E 1992 'Corrective Justice' *Iowa Law Review* 77: 403-25