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REDISCOVERING LAW STUDENTS AS CITIZENS

Critical thinking and the public value of legal education

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In a series of publications over the last decade, Australian National University Professor Margaret Thornton has documented a disturbing change in the nature of legal education. This body of work culminates in a recently published book based on interviews with 145 legal academics in Australia, the United Kingdom, New Zealand and Canada. In it, Thornton describes a feeling of widespread unease among legal academics that society, government, university administrators and students themselves are moving away from viewing legal education as a public good which benefits both students and society. Instead, legal education is increasingly being viewed as a purely private good, for consumption by the student in the quest for individual career enhancement.

In the closing pages of the book, Thornton makes the following plea to legal academics:

Despite the revolution in the university which has swept the ground from beneath our feet, it is essential that we do not give up. Increasingly difficult though it is, we must cling valiantly to the idea of a university legal education as a public good to overcome the impoverishing imperatives of corporatism, as a few radical thinkers have sought to do. … While it is not easy to see out of the abyss, we must not languish in apathy and despair. … However, academics, scholars and intellectuals have an obligation to speak out in accordance with the university’s role of ‘critic and conscience of society’.

While Thornton’s work thoroughly describes what she calls the ‘neoliberal turn’ in law school education, less is said about appropriate and available strategies that academics might take to reassert the public value of legal education. In this article, we seriously engage with Thornton’s plea to ‘see out of the abyss’ by looking for ways in which this public value might be reasserted. Like Thornton, we believe legal education should not be limited to providing students with only a private career-enhancing good. Legal education should also help create the next generation of citizens able to participate in the public sphere and contribute to the health of Australian democracy.

In this contest between competing visions of legal education, we believe a key debate is over different interpretations of the skills which governments, universities and law schools require legal academics to pass on to graduates — and in particular over interpretations of the skill of critical thinking. Interestingly, institutional support for teaching strategies which assert the public value of legal education can still be found within the list of desired graduate attributes of many Australian law schools, particularly in their reference to developing students’ skills in critical thinking. ‘Critical thinking’ and/or ‘critical analysis’ remain strongly embedded in the attributes which law schools aim to instil in their students. Similarly, the teaching of critical thinking remains entrenched in government policy documents on higher education. It is therefore puzzling that Thornton describes the diminution of law subjects that have a contextual, theoretical and/or feminist perspective in favour of ‘vocationalising the curriculum’. In our view, the answer to this puzzle must, at least partly, lie in how ‘critical thinking’ is being interpreted and implemented by law schools and teachers.

Among educational theorists there are a number of interpretations of the term ‘critical thinking’. Drawing on the work of educational theorist Stephen Brookfield, we argue for an expansive interpretation of critical thinking as a counterweight to the neoliberal turn in legal education identified by Thornton. We also show how several law courses at the University of Newcastle have applied Brookfield’s approach to teaching critical thinking, an approach which encourages students to consider themselves not only as consumers and workers but also as citizens with a role to play in both participating in and critiquing the democratic process. Importantly, students have welcomed this teaching strategy, not only in elective subjects (such as Environmental Law),
which one might expect students with a less credentialist view of legal education would choose, but also in more commercial subjects (such as Company Law).

In the following section we explain in more detail Thornton’s critique of modern legal education.

The neoliberal turn in the modern law school
Thornton argues the increasingly credentialist approach to legal education has been encouraged by a shift in Australia, the UK and Canada toward ‘neoliberal’ higher education policies. Neoliberalism is a political philosophy arguing that decision-making and coordination in a society should, as much as possible, be carried out through the mechanism of a self-regulating market. Hence the goal of neoliberalism is to limit government activities to establishing and maintaining the conditions necessary for markets to flourish (e.g., enforcing contracts and creating private property rights). One of the implications of this neoliberal perspective is that time and energy spent on knowledge and skills which may serve society more generally or the public interest, but which cannot be ‘sold’ to employers, tend to be viewed as unnecessary indulgences.

In the context of efforts to expand access to tertiary education, the Dawkins reforms brought a much greater focus on market values to a section of society previously operating under social relations of government provision. From the mid-1970s until 1989, Australian university education had been funded through the taxation system with only minimal general services fees charged directly to students. The first privately owned university, Bond University, was only formed in 1987. Since that time, further private universities have emerged, including Notre Dame and Torrens University Australia. Aside from this opening of university education to private provision, the Dawkins reforms of the mid-1980s also introduced tuition fees for students. The Dawkins reforms set the scene for an opening up of university education to market values through encouraging private provision and a contract-like relationship between student, teacher and university. This is consistent with the neoliberal project of expanding the reach of market-based social relations to areas of society that were not previously organised around market exchange.

Thornton argues that Australian law schools have been significantly affected by this wider neoliberal turn in higher education policy. She contrasts the market-based or neoliberal turn in legal education with the traditional humanist ideas about the study of law. She explains that the humanist perspective on legal education:

- does not have a precise denotation, but encompasses a profusion of perspectives, theoretical positions and critical methods that transcend a narrow, rules-oriented pedagogy. Rather than rote learning, the focus is on learning for understanding, with regard to the ought, not just the is, of law. Given the diverse roles that lawyers play in a globalised world, they need to be educated… not simply trained as technicians of law'. Reason, logical thinking and effective communication, all valuable skills for the legal practitioner, are enhanced by a liberal education, which encourages students to think for themselves. 

As discussed above, Thornton argues that neoliberalism has become manifest in law school curricula and student attitudes in opposition to this humanistic idea of the university. Thornton describes a narrowing of legal education to topics that unreflectively arm students with knowledge to compete as knowledge workers in a new globalised economy. She argues that the retreat from the humanist legal school has led to a ‘learning a rule book’ approach to legal education that focuses narrowly on the learning of legal doctrine. This is at the expense of perspectives on how and why legal rules are formed and the effect they have on society. As Thornton explains, ‘Legal doctrine is privileged because it is functional and knowledge of the rules is a prerequisite for admission to practice. This approach is almost exclusively concerned with what the law is, with little regard for critique, reflective analysis or what the law ought to be.’

Whilst there may not be universal agreement that legal education has gone as far down the neoliberal path as Thornton’s research suggests, her study still offers the most extensive empirical evidence on current views of legal academics about the state of legal education in the English-speaking world. Thornton’s account also largely accords with anecdotal evidence we have gathered in discussions with law school colleagues at our home institution and beyond. Further, Thornton’s conclusions are consistent with and build upon a wider educational literature that describes an expansion of market values in higher education in recent decades.
Not all legal academics will be concerned by Thornton’s findings on the ‘vocationalising’ of legal education through the neoliberal turn. However, for academics holding a wider, more humanistic view of legal education, Thornton’s work is an unpleasant wake up call. In the next section we provide our view on how concerned academics might ‘see out of the abyss’ by taking practical steps to re-enliven the humanistic view of legal education.

**How might concerned legal academics respond?**

By 2015 all Australian law schools will be required to ensure their LLB programs comply with the federal governments’ Australian Qualifications Framework (‘AQF’) specifications for a Bachelor Degree. Among other things, the AQF requires that graduates have ‘cognitive and creative skills to exercise critical thinking and judgement in identifying and solving problems with intellectual independence’.  

Although institutions of higher education commonly aspire to build students’ skills in critical thinking, there is by no means a settled understanding of what this entails. Brookfield argues that among educational theorists and practitioners there are in fact five critical thinking traditions:

First, a tradition associated with analytic philosophy, which encourages students to identify and evaluate the evidential basis for assumptions, identify logical fallacies and develop skills in using various forms of reasoning (inductive, deductive and so on);

Second, the hypothetico-deductive tradition commonly employed in the Natural Sciences;

Third, a tradition associated with pragmatist constructivism, which rejects the idea of generalisable truths and encourages students to instead focus their attention on the different ways in which people can interpret and respond to their experiences;

Fourth, a tradition associated with psychoanalytic approaches which encourages students to consider the way in which childhood socialisation shapes people’s personalities and perceptions;

Fifth, a critical theory tradition which has its roots in the Frankfurt School of critical social theory.

While Brookfield acknowledges that the first of these traditions is currently the most influential in American (and, we submit, Australian) educational institutions, he urges educators to draw on all five traditions of critical thinking. Brookfield particularly champions the educational potential associated with the fifth critical thinking tradition, which is based on uncovering the affects of ideology and power on social practices, like law. He points out that academic analysis which focuses solely on an argument’s logical construction and evidentiary basis can sidestep deeper moral and political questions. Such questions include value judgments as to whether the purpose for which an argument is made is just, whose interests are served by an argument and the political role that an argument can play, particularly in social and economic circumstances marked by significant inequality and prejudice.

Applying this to a law school context, a narrow application of the first critical theory tradition would, for example, involve a teacher asking students to analyse the way a judge has applied a legal doctrine like corporate personality to a particular fact situation. Operating within this tradition, the teacher might ask the students to consider whether the judge’s reasoning is logical, whether it is consistent with precedent and whether it is based on reasonable inferences drawn from careful consideration of available facts.

In teaching Company Law at the University of Newcastle, we incorporate critical theory by also asking students to consider the political and economic history which has shaped the evolution of that particular doctrine; whose interests are served by it and the political and moral implications of other possible legal structures for business. Among other learning activities, we do this by showing students part of *The Corporation* — a provocative documentary by Canadian Law Professor Joel Bakan — which asks ‘What kind of person is a corporation?’ and concludes that the legal rules framing corporate personality produce what might be considered the equivalent of a sociopathic citizen. This leads into an (often vigorously contested) in-class debate regarding the appropriateness of the legal doctrine of corporate personality. We have also framed assignment questions which ask students to reflect on the potential implications for reform to this legal doctrine arising from topical current events in the corporate world, such as the recent Global Financial Crisis and the James Hardie group’s exposure to long-tail tort liabilities from asbestos exposure.
While a narrow application of the approach to critical thinking associated with analytic philosophy might sit reasonably comfortably with the neoliberal trend Thornton describes, we find that an approach based on the critical theory tradition pushes students and teachers in quite a different direction.

Thornton’s research might lead the reader to suspect Brookfield’s ideas about teaching critical thinking are significantly out of step with the direction being set by Australia’s law schools, so that academics who implement this approach might be risking their career — or at least their chances of promotion. This is not necessarily the case. In 2010, as part of its response to other developments in higher education policy, the Council of Australian Law Deans (‘CALD’) endorsed a set of six Threshold Learning Outcomes (‘TLOs’) that law schools are expected to incorporate into the design of their LLB programs. Several of these TLOs resonate with Brookfield’s approach: TLO 1 includes understanding of the ‘broader contexts within which legal issues arise’ and ‘the principles and values of justice’; TLO 2 includes the ability to ‘reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community’; TLO 3 includes ‘critical analysis’ and TLO 4 includes the ability to research policy issues.

While this is heartening, the notes accompanying these TLOs suggest they were deliberately worded in a manner which allows law schools with very different teaching philosophies to interpret them in their own way. This is consistent with the drafting principles which required that the TLOs be ‘not too prescriptive … and consistent with the range of professional contexts for law graduates.’ Consequently, the preamble to the notes emphasises that they provide ‘non-prescriptive guidance’ and although much of that guidance is compatible with a critical theory approach, it is commonly presented in terms of possibilities rather than requirements. For example, when considering the phrase ‘broader contexts’ in TLO 1, the notes mention that the ‘political, social, historical, philosophical, and economic context’ listed in the existing CALD standards:

- can easily be extended to encompass contexts that reflect, for example: social justice; gender-related issues; indigenous perspectives; cultural and linguistic diversity; the commercial or business environment; globalisation; public policy; moral contexts; and issues of sustainability.
- In a similar vein, the notes for TLO 2 state: ‘The inclusion of “justice” in this ethics-oriented TLO is not intended to give ethics a political complexion.’ The TLO thus deliberately leaves open a wide interpretation of ‘justice’ to provide opportunities for diverse curricular responses by different law schools.

Detailed consideration of where each Australian law school sits in relation to this question goes beyond the scope of this article. However, a brief review of the way in which eight Australian law schools from a mixture of ‘sandstone’ and ‘red brick’ universities describe the goals of their LLB programs suggests considerable openness to a broad approach to teaching critical thinking. Our own institution, Newcastle Law School (‘NLS’), aims to produce graduates who can engage in ‘critical thinking and reflective engagement with legal material’ and who are able to:

- act as advocates for the rule of law … accept responsibility to play a constructive role in the maintenance and reform of the legal system … [and are] equipped to understand, evaluate and critically reflect upon the interaction of law and society.

In a similar vein:

- • ANU College of Law promises ‘a commitment to Law Reform & Social Justice that drives our teaching, research, public events and social justice initiatives’.
- • Australian Catholic University Law School aims to teach students to ‘think critically and ethically and be guided by social justice principles’.
- • Griffith Law School aims to deliver ‘research driven, socially engaged teaching’ and to ensure ‘students are enabled to develop critical thinking, research & application skills’. It also claims to be recognised for its ‘strong commitment to social justice’.
- • Macquarie Law School claims its students are provided with ‘critical thinking and analytic skills’ and ‘are taught to think about the law, how it operates, and why — not just what the law is’.
Sydney Law School aims to produce graduates who are ‘able to exercise critical judgment and critical thinking’ and who ‘appreciate that law does not operate in isolation, but rather in a wider social context … [and] are aware of the importance of law to the maintenance of a just and civilized society’.  

UNSW School of Law aims to produce graduates with ‘a strong sense of citizenship, community and social justice’ whose ‘excellent intellectual skills of analysis, synthesis, critical judgment, reflection and evaluation’ include the ability to ‘invoke theory and inter-disciplinary knowledge to develop new and creative solutions to legal problems’ and to ‘critique law and policy to develop new ideas about the law and law reform’.

UTS Law School has critical thinking as one of its ten graduate attributes and explicitly references Brookfield’s approach in its explanation of what critical thinking involves.

Further research is needed to establish the extent to which these kinds of goals are typical of Australian law schools and, just as importantly, whether they are seriously supported by law school executives, or instead represent a kind of lip-service to the goal of a broader legal education. However, what we can report is that our efforts to implement Brookfield’s approach to teaching critical thinking at NLS have been generally supported by our institution and have been welcomed by students themselves.

The following section provides an example of how Australian law schools might implement TLO 3 consistent with Brookfield’s approach to teaching critical thinking in law.

### Critical thinking and student citizenship

There are a number of ways in which NLS encourages students to critically reflect on the interaction between law and its societal context. Here we focus on one of those strategies, which involves implementing Brookfield’s approach to teaching critical thinking in the elective Environmental Law (‘EL’). A similarly broad approach to critical thinking has been adopted in teaching Company Law and Finance Law. We are not claiming these teaching strategies necessarily represent a radical innovation for all Australian law schools. Nevertheless, they demonstrate how Brookfield’s approach to critical thinking can be successfully applied in the modern law school.

**Example: Argumentative discourse analysis in teaching environmental law**

While many environmental law textbooks refer to the benefits of interdisciplinary analysis of environmental law, none provide a systematic framework to allow lawyers to critically understand the assumptions lying beneath environmental law and policy. The EL course at NLS is a semester length course typically taken by students in the fourth or fifth year of a combined undergraduate degree (ie, Arts/Law, Business/Law etc). Over the last four years there has been a deliberate attempt to include an interdisciplinary and critical strain of analysis at the heart of the course. This has been achieved by introducing students to work carried out in the social sciences on argumentative discourse analysis of environmental policy. This work examines the discourses and narratives that are used by societal actors to identify environmental problems and construct the range of policy responses that are considered. In particular, the theoretical work of ANU Professor John Dryzek is used to unpack the assumptions that lie beneath environmental regulation, the way that discourses and narratives shape our understanding of environmental issues and how legal responses are constrained and/or enabled by these discourses.

This approach provides students with a framework to think critically and reflectively about the environmental policy choices that shape the law and its implementation.

In being schooled in Dryzek’s discourse analysis, NLS environmental law graduates are provided with the tools to not only understand the assumptions beneath the law they are studying but also how societal actors shape the law that we see. Environmental philosopher Mark Sagoff argues that people hold both public/citizen and private/consumer values when it comes to environmental issues:

> The possibility that people act politically to protect the environment (rather than just individually to satisfy their preferences) presupposes the reality of public values we can recognise together, values that are discussed as shared intentions and are not to be confused with personal wants
or satisfactions. Through public conversation we are able to assess goals we attribute ourselves as a community - as opposed to preferences we might attribute privately. Argumentative discourse analysis encourages students to engage with their public values and citizen identities by entering the public sphere and contributing to environmental policy debates as concerned young citizens, rather than just consumers of legal education for career advancement. Students taking the environmental law course at NLS have generally been receptive to this interdisciplinary, critical approach to teaching, as have students of other subjects where we have employed similar teaching strategies. Students have moved on from the EL course to; act as public advocates writing opinion pieces in newspapers; join environmental activist groups; support environmental NGO’s and choose government environmental policy careers, all roles that Sagoff would see as enlivening of the public or citizen identity of our students.

Conclusion

Thornton’s work identifies an important shift in modern legal education towards market values and a consumerist attitude on the part of students. This turn to market values and individualism has weakened the humanistic public values of the modern law school and led to a narrower, more doctrinally focussed form of legal education. However, during this period of change, government, universities and law schools have continued to support the presence of critical thinking in graduate attributes and teaching outcomes. We argue, with the help of Brookfield’s work, that the conception of critical thinking has been narrowed to be more consistent with the neoliberal turn in education. However, the good news for concerned academics is that Brookfield identifies broader notions of critical thinking that allow for a deeper and more reflective challenge to the assumptions that underlie legal rules and process. We therefore argue that existing graduate attributes and teaching outcomes in most law schools still provide the intellectual resources to re-enliven the humanistic vision of legal education that existed prior to the neoliberal turn.

We have provided an example of the use of wider notions of critical thinking used in the teaching of environmental law at NLS. As noted above, we are not claiming the teaching strategies described are necessarily unique or new. However, we claim that Brookfield’s work provides a valuable resource that teachers concerned about the neoliberal turn in law school education might draw on to resist that trend. What is more, this broader approach to critical thinking skills would appear to have significant institutional support within many, if not all, Australian law schools. We have certainly found support for it at Newcastle, with two of the authors recently receiving either Faculty or University teaching awards for courses in which we have applied this broader approach to teaching critical thinking. Both formal and informal student feedback also suggest most students are receptive of this teaching strategy. Finally, the use of a wider notion of critical thinking is not only a counterweight to the market values of the neoliberal turn but provides students with the ability to re-engage with their citizen identity to enhance contribution to the public debate and the robustness of our democracy.

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4. Ibid 228.
8. Thornton, above n 2, 59.
13. Ibid 30–52. See also Brookfield, above n 5, 12–15.
20. Ibid 13 (emphasis added).
22. In a recent article, James identifies texts which can assist law teachers to ensure their teaching complies with TLO3. A number of these texts advocate teaching strategies broadly consistent with Brookfield’s approach to teaching critical thinking. See Nick James, ‘Logical, Critical and Creative: Teaching “Thinking Skills” to Law Students’ (2012) 12(1) QUT Law & Justice 66, 77–80. See also Nick James, Good Practice Guide (Bachelor of Laws) – Thinking Skills (Threshold Learning Outcome 3) (2011) Australian Learning and Teaching Council.
29. University of Sydney, Faculty of Sydney Law School: Contextualised Graduate Attributes
30. University of New South Wales, *School of Law, Course Outline Appendices* 

31. University of Technology Sydney, Faculty of Law, *Critical Thinking*, 

32. For example, at NLS students can complete their professional training concurrently with their LLB. Most students choose to do this and for the last two years of their LLB program spend a day a week at the law school's legal centre, providing legal advice and assistance to socially and economically disadvantaged members of the public.

33. For example, see Gerry Bates, *Environmental Law in Australia* (LexisNexis, 7th ed, 2010) 14–16.
