

TEACHING FAMILY LAW AS FEMINIST CRITIQUE OF LAW[#]

DR ARCHANA PARASHAR^{*}

I am a legal academic interested in feminist critiques of law. As an academic and researcher I have engaged with feminist literature in both my research and teaching. However, after years of such engagement I am beginning to feel disappointed that feminist ideas are not adequately addressed in the majority of legal education. While the research journals and books about feminist thought have become a common feature of legal literature, it is not yet the practice to convey these ideas to law students in a systematic manner. In legal education in Australia, feminist critiques are at best considered the special interests of some academics (usually women) and it is left up to them to teach about feminist theories of law. For the most part, law courses include an eclectic choice of feminist literature with no, or very little effort at explaining the significance of feminist critiques in the context of other (mainstream) legal literature. I wish to argue that this is an unsatisfactory state of affairs because it fails to acknowledge the fundamental importance of understanding the constructed nature of all legal knowledge. A systematic engagement with feminist critiques in legal education can enable law students to question the very foundations of mainstream knowledge.

I will make my argument in the specific context of teaching family law but the ideas presented here are equally applicable to all areas of law. Part of the reason for writing this article is my own experience in trying to teach family law as a feminist critique of the legal concept of family. When I first proposed this particular design for the course on family law, I met with hostile reactions from some of my colleagues and later on from some of the students, and was at a loss to understand this reaction. These were intelligent, thinking and clever people, why were they unable to accept the validity of feminist critiques? The answer, I suggest, must lie in the way legal knowledge is portrayed as objective and neutral, and, despite there being extensive critiques of this view in the literature, it still is the dominant paradigm in the teaching of law. It is therefore necessary to

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^{*} Senior Lecturer, Division of Law, Institute of Legal Studies, Macquarie University, NSW 2109, AUSTRALIA, email: aparashar@law.mq.edu.au, Tel: 61 2 9850 7062, Fax: 61 2 9850 7686.

challenge the assumptions underlying teaching practices and curriculum content in law schools.

This article develops two interrelated arguments. Generally legal education literature focusses either on pedagogy or substantive content. I argue that the teaching methodology and curricular issues can not be separated because how we teach and what we teach mutually reinforce the often unarticulated view of legal knowledge. Secondly, I argue for all legal education to incorporate interdisciplinary analysis of law in order to change the very fundamentals of legal knowledge. In the first section, a brief history of legal education provides the context for my argument. The second section deals with the rationales and details of the design of the family law unit I teach.¹

I. HISTORY AND SCOPE OF LEGAL EDUCATION

Legal education has long suffered the tension between the claims of what is proper for training for a profession, and the education or training of scholars in the academy.² In keeping with the professional connection of legal education, a persistent stream of thought is that effective learning in the profession amounts to good lawyering skills. In this view, the students ought to learn the technical aspects of law, and the scope of legal education should focus primarily on teaching legal doctrine. In common law countries, courts function as the interpreters of the uncodified common law (as well as of statutes) and are the primary source of legal doctrine. For a long time, lawyers were primarily trained to read and interpret case law, and this training was in the form of apprenticeship at the Inns of Courts in London.³ However, under the influence of continental systems legal education was eventually made part of the academy, but tension remained about the content of this discipline.⁴

1 I teach in the undergraduate program in law at a law school in Sydney. The brief context of Family Law, LAW 402, is that it is an optional unit offered to students in the fourth and fifth year of their LLB studies. It is a 4 credit point unit (students take 74 credit points to complete the degree requirements) and is offered as a one semester unit. I am the convener and the only tutor of the unit and I have designed the course. It is offered to day students as well as to distance students.

2 For a review of arguments, see A Pirie, "Objectives In Legal Education: The Case For Systematic Instructional Design" (1987) 37 *Journal Of Legal Education* 576. See also C Sunstein, "On Legal Theory And Legal Practice" in I Shapiro and J DeCew (eds), *Nomos XXXVIII: Theory And Practice*, New York University Press (1995) 267.

3 For a brief history of legal education in Britain see W Twining, *Blackstone's Tower: The English Law School*, Sweet and Maxwell (1994); see also P Kavanagh, "Legal Education And The Functionalisation Of The University" (1988-89) 5 *Australian Journal Of Law And Society* 11.

4 P Carrington, "The Revolutionary Idea Of University Legal Education" (1990) 31 *William And Mary Law Review* 527; P Carrington, "Hail! Langdell" (1995) 20 *Law And Social Inquiry* 691; See also for a discussion of present legal theories and their moral and ethical significance for legal education, F DeCoste, "From Formalism To Feminism: Seventy Five Years Of Theory In The Legal Academy" (1996) 35(1) *Alberta Law Review* 189.

A. History

Historically, legal education, even in the universities, has focussed on legal doctrine available by the study of case books - a compilation of relevant cases on a specific area like criminal law or contracts. In the case method, the methodology of teaching may have changed but the content still is predominantly legal doctrine.⁵ It is of course true that in Commonwealth countries many contemporary law schools and universities have sought to broaden the framework of legal education by emphasising sociological or historical or other aspects of law. But systematic attempts at presenting law programs with specifically interdisciplinary bases have not proliferated. Part of the reason for this narrow focus of legal education may be the control exercised by professional bodies on legal curricula. My main reason for writing this article is to make an effort to translate the extensive interdisciplinary literature and scholarship into actual practice at the level of basic legal education.

B. Traditional Separation of Practice and Theory in Law Teaching

As a preliminary issue I want to briefly counter the often unarticulated assumption that a clear division between professional training and academic training is viable. The distinction between professional training versus liberal education is misleading, meaningless and a red herring. As Carrie Menkel Meadow argues, legal education understood as a compromise between theory and vocational practice is based on a misconceived idea that one cannot simultaneously learn the theory of law and learn to practice law, or that attempting to do so is counterproductive.⁶ There are at least two counter arguments against restricting the focus of legal education to merely professional training: that not every one will become a solicitor, and that even practising lawyers need wider education. In contemporary societies knowledge of law is relevant not only in 'lawyering' but in a wide range of areas. It is commonly said that less than half of law students even plan to become practicing lawyers. Therefore legal education ought not to be merely technical in its scope. This is a reasonable enough argument for broadening the scope of legal education but it is unnecessarily restrictive, as it concedes that professional lawyers can get by with technical training only. I argue that even when the main focus of legal education is to train professionals, it should be emphasised that rather than perpetuating the artificial divide between vocational/work and academic education, it is more useful to reconceptualise the two as integrally connected. There is increasing

5 In the USA legal education was, and to a large extent is, structured on the so called case method using the Socratic method with the professor asking questions in the hope of leading the students to arrive at the correct answer. See R Steven, *Law School: Legal Education In America From the 1850s To The 1980s*, University Of North Carolina Press (1983).

6 C Menkel Meadow, "Too Little Theory, Too Little Practice? Steven's Law School: Review Essay" (1985) *American Bar Foundation Research Journal* 675 at 676 and 686; C Menkel Meadow, "Narrowing The Gap By Narrowing The Field: What's Missing From The MacCrate Report - Of Skills, Legal Science And Being A Human Being" (1994) 69 *Washington Law Review* 593. See also J Kincheloe, *Toil And Trouble: Good Work, Smart Workers, And The Integration Of Academic And Vocational Education*, Peter Lang (1995).

recognition of the need to make professional education much wider and Schon argues that all kinds of knowledge, rather than only codified, propositional knowledge, is necessary for good professional performance.⁷ Therefore, the scope of legal education has to be broader than just training lawyers in technical aspects of legal doctrine.

Those who argue for legal education to primarily focus on skills training unfortunately conceptualise training very narrowly and, therefore, do not even serve well the interests of the profession. For someone to be only a competent practitioner (and nothing more) it is still necessary to have critical judgment, capacity to analyse, relate one's own position to others' opinions. Therefore, even for lawyers it is important to emphasise that their every day activities of interpreting laws have wider implications and influences. The apparent tension between intellectual goals and technical professional training overlooks the fact that the generation of critical abilities, while an intrinsic essence of education, also has practical benefits as lawyers with such abilities can assist in bringing about changes through reinterpretations of law, as well as accomplish change in the case of individual clients who are not served well by current practices or solutions.⁸ Thus, how to determine what may be relevant information, and to research and access such information, and the skill to construct new arguments are the more enduring and invaluable skills.

Alan Hunt points out that it is necessary to make theory part of legal education for at least two reasons: to combat naive empiricism which assumes that both the materials and methods are self evidently given and to show that concepts employed in legal analysis are not pre-given but chosen, and have definite repercussions for the directions of inquiry and the method employed.⁹ But legal theory can be narrowly defined as is evident from the fact that Jurisprudence as the philosophy of law was generally the only non-practice related component of legal education.¹⁰

C. Interdisciplinary Approach

In the literature on approaches to learning, it is well accepted that there are two broad categories of deep and surface learning, and generally it is accepted that

7 D Schon, *The Reflective Practitioner: How Professionals Think In Action*, Basic Books (1983); see also M Eraut, "Developing The Knowledge Base: A Process Perspective On Professional Education" in Barnett (ed), *Learning To Effect* (1992) 98.

8 Report by The Consultative Group On Research And Education, *In Law, Law And Learning: Report To The Social Sciences And Humanities Research Council Of Canada*, 1983 at 49.

9 A Hunt, "Jurisprudence, Philosophy And Legal Education" (1986) 6 *Legal Studies* 292.

10 There is considerable debate about the subject matter of jurisprudence, whether it includes only legal philosophy or legal theory. See for example, W Twining, *Law In Context: Enlarging A Discipline*, Clarendon Press (1997) p 113. Twining makes a distinction between legal philosophy and legal theory and describes legal theory as much broader in scope. See also N MacCormick, "The Democratic Intellect And The Law" (1985) 5 *Legal Studies* 172.

deep learning is desirable.¹¹ But what may constitute a deep approach to learning in law is a debatable issue, as it is linked to the wider issue of what must the law student learn - technical details of the legal doctrine, or embeddedness of legal knowledge in its social and historical contexts. Within legal education discourse, it is not universally accepted that law students need to develop their critical skills in an interdisciplinary manner. I wish to argue that adequate legal education can only ever be achieved through an interdisciplinary study of law, and that deep learning in law must be interpreted to mean that students learn how legal knowledge is constructed and defined in the wider context of society.

Ample literature in the interdisciplinary analyses of law already exists,¹² although it is far from settled whether interdisciplinary study of law must always take the form of 'law and ...' studies¹³ as otherwise we run the risk of making law one among many other aspects of the study of sociology or anthropology or any other discipline. Debates continue as to whether legal scholars can be truly interdisciplinary because they are caught in the paradigm of their discipline and as a result, legal analysts have never thrown up questions about law as sociologists have done.¹⁴ In contrast, Kalman is of the view that academic lawyers need not remotely resemble historians, economists, literary theorists or philosophers.¹⁵ In a similar vein, arguments are raised as to whether the sociology of law is a legal or social science subject,¹⁶ or whether interdisciplinary studies of law will only be successful if they address the professional mission of legal education, including the training of lawyers.¹⁷

I believe that these disagreements about the exact shape of the interdisciplinary study of law do not detract from the fact that major challenges to the doctrinal focus of legal analyses have been presented by the critical legal

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- 11 P Ramsden argues that both deep and surface learning are approaches to learning. Approaches to learning are not something students have but represent what the learning task is for a student. In changing the approaches to learning one is not changing the student but the aim is to change the student's experiences, perceptions or conceptions of something. P Ramsden, *Learning To Teach In Higher Education*, Routledge (1992) pp 44-45.
- 12 See L Kalman, *The Strange Career Of Legal Liberalism*, Yale University Press (1996) for an optimistic outlook on the further development of interdisciplinary studies in law. Cf P Leighton, T Mortimer, N Whatley, *Today's Law Teachers: Lawyers Or Academics*, Cavendish Publishing (1995) for an empirical finding that very few law teachers subscribe to or read non-law journals.
- 13 A Leff, "Law And" (1978) 87 *Yale Law Journal* 989. For an argument that interdisciplinary study of law should happen in a separate law discipline rather than as a sub-discipline of philosophy, economics or anthropology see Report by The Consultative Group On Research And Education, note 8 *supra* at 137.
- 14 W Murphy and S Roberts, "An Anniversary Preface" (1987) 50 *Modern Law Review* 673 at 683.
- 15 L Kalman, "Garbage Mouth" (1996) 21(4) *Law and Social Inquiry* 1001 at 1005.
- 16 D Black, *Sociological Justice*, Oxford University Press (1989); A Sarat, "Donald Black Discovers Legal Realism: From Pure Science To Policy Science In The Sociology Of Law" (1989) 14 *Law And Social Inquiry* 765. See also N Fielding and J Fielding, "Teaching The Sociology Of Law: An Empirical Study" (1983) 10 *Journal Of Law And Society* 181.
- 17 D Ernst, "The Lost Law Professor: Review of John Henry Schelegel, *American Legal Realism and Empirical Social Science*, Chapel Hill, University Of North Carolina Press" (1996) 21(4) *Law and Social Inquiry* 967 at 979. See also W Twining, *Law In Context: Enlarging A Discipline*, Clarendon Press (1997) pp 198-221, where he argues that the scope of legal education should be more than a study of appellate court judgments but still remains focused on the process of adjudication and all he wants is to look at the disputed questions of fact, to pre-trial and post-trial events. He thus restricts legal inquiry to the process of adjudication.

studies, feminist and other interdisciplinary movements. Very briefly, these critiques in various forms challenge the claim that law is autonomous, objective, neutral or principled.¹⁸ But not much of this literature gets translated into teaching programs in any systematic manner. Why is this so? A possible reason is that legal education scholarship and critiques of legal knowledge do not sufficiently interconnect.¹⁹

Of course, there is ample legal scholarship on various aspects of legal education. And I do not wish to suggest that there is no analysis of what ought to be taught. All that I want to say is that a systematic connection between pedagogy and substance must become the focus of analysis. Twining's work is an apt example of the primacy of legal doctrine as the content of legal curricula. Twining describes his efforts at teaching law students about non-court aspects of legal practice, but the focus of his argument still remains the technicalities of legal practice. On the other hand, many of the writings on teaching law in feminist classrooms focus attention on the class dynamics - teacher/student and student/student interactions.²⁰

The consequences of this under emphasis on the interdependence of substance and pedagogy can be illustrated by an example. The famous case method assumes that students must know the legal doctrine. The innovativeness of this method lies in the assumption that it is best to access the doctrine in the original form rather than studying it from secondary sources. So instead of reading text books, it is desirable that students learn to read the court judgements. Socratic method can shift the responsibility for learning to the students, but it does not challenge the view of legal knowledge as objective knowledge. Law teachers using the Socratic method can be complacent that they are in step with the contemporary education idea that students should be enabled to learn for

18 For a brief overview see, A Hunt, "The Critique Of Law: What Is Critical About Critical Legal Studies" in P Fitzpatrick and A Hunt (eds), *Critical Legal Studies* (1987) 5; M Tushnet, "Critical Legal Studies: A Political History" (1991) 100 *Yale Law Journal* 1515; for a discussion of the relation between American realism and the CLS movement see R Gordon, "Critical Legal Studies As A Teaching Method, Against The Background Of The Intellectual Politics Of Modern Legal Education In The United States" (1989) 1(1) *Legal Education Review* 59.

19 There is ample literature focusing on the curricular issues or on teaching but not that much emphasis is placed on a systematic connection between pedagogy and substance in legal education. See, for example, J Goldring, "Cultural Cringe Or Lessons For Australian Legal Education" (1996) 7(1) *Legal Education Review* 125. Goldring reviews two English books on legal education and his main criticism is that they focus primarily on curricular issues rather than on teaching methods. The books reviewed are: W Twining, *Blackstone's Tower: The English Law School*, Sweet & Maxwell (1994); G. Wilson, *Frontiers Of Legal Scholarship*, John Wiles & Sons (1995). Cf R Johnstone, "Rethinking The Teaching Of Law" (1992) 3(1) *Legal Education Review* at 17-60. While I have not conducted an exhaustive survey of all that is written in legal education I venture to make the following comments on the strength of the literature I have come across. For a collection of representative literature see M Levine (ed), *Legal Education*, Dartmouth (1993).

20 I do not wish to suggest that most of these authors are not concerned with the substantive content but perhaps the enormity of the task dictates that they focus on pedagogical issues before arguing about the substantive content. See for example, C Menkel-Meadow, "Feminist Legal Theory, Critical Legal Studies and Legal Education Or The Fem-Crits Go To The Law School" (1988) 38 *Journal Of Legal Education* 61; S Wildman, "The Question Of Silence: Techniques To Ensure Full Class Participation" (1988) 38 *Journal Of Legal Education* 147; S Wildman, "The Classroom Climate: Encouraging Student Involvement" (1989-1990) 4 *Berkeley Women's Law Journal* 326.

themselves. What it is that the students should learn can, and often does, get left out of consideration. At the same time, the Socratic method can also result in classroom dynamics that are intimidating to some. It can thus establish hierarchies which silence women. Extensive evidence now exists that many women do not feel comfortable with the combative style of the Socratic method and remain silent in the classroom.²¹ Various feminist critiques of law rely on interdisciplinary analyses to show the embeddedness of law in the prevailing economic, political and sociological paradigms, and how law helps in maintaining hierarchies of wider society. But such ideas cannot be effectively communicated in such an atmosphere. Therefore, teaching methodologies must shift the focus from teachers as the authoritative knowers of law, as well as simultaneously incorporate a broader range of substantive content - and not only in feminist classrooms.

I am interested in feminist studies of law. However, it is not merely a personal preference but my emphatic assertion that post structural feminist analyses can deconstruct claims about neutrality, objectivity and universality of law.²² I wish to distinguish post structural feminists from other post structural theorists, many of whom have been criticised for being indifferent, if not hostile, to feminist concerns about inclusiveness and diversity. The debate about relativism and lack of political agenda amongst post structural theorists is relevant for my purposes, but without going into the details I just want to indicate here that at least some post structural feminist theorists are conscious of avoiding these pitfalls. The point I wish to emphasise is that merely radical critique does not ensure a commitment to social justice for all sections of society. Post structural feminism has the potential to specifically fulfil the objective of social justice while also accommodating diversity. Thus, adequate legal education must therefore take into account post structural feminist analyses. The students will thereby learn how to take responsibility for their own views of the nature of law.

Therefore, my argument is that what you teach and how you teach are linked together. What the links are and why they are significant is the subject matter of the following discussion of the unit on family law that I have designed and teach at my institution. I will explain the aims and objectives of the unit Family law; the content and the structure of the unit; the teaching methodology and the assessment patterns used. But before that I would like to make a few points about family law courses in undergraduate law programs.

21 L Guinier et al, "Becoming Gentleman: Women's Experiences At One Ivy League Law School" (1994) 143 *University Of Pennsylvania Law Review* 1; L Dusky, *Still Unequal: The Shameful Truth About Women And Justice In America*, Crown Publishers (1996) pp 13-14; M Thornton, *Dissonance And Distrust: Women In Legal Profession*, Oxford University Press (1996) p 78.

22 See M Davies, *Delimiting The Law: Postmodernism And The Politics Of Law*, Pluto Press (1996).

II. TEACHING FAMILY LAW

A. Justifying the Choice of Theoretical Perspectives

The following account of my practice and philosophy of teaching is not meant to suggest that no one else has thought about these issues. Nor am I constructing a straw man (sic) in juxtaposing my efforts with black letter teaching of law. Undoubtedly, family law (probably more than any other subject) is compatible with a sociological/historical analysis, and most family law teachers include more than doctrinal analysis in their teaching. However, I have yet to come across an argument for a systematic feminist critique of law so that the arguments made are extendable to the study of all areas of law.²³ I wish to make such an argument and, even at the risk of sounding totalitarian, suggest that a feminist critique of family law is the absolute minimum required in any family law course. Alan Hunt²⁴ has argued that not more than two or three perspectives should be present in a course. I disagree with this prescription because what is more important than specifying the number of different perspectives is that the purposes of including different perspectives should be explicitly articulated. For example, even within feminism there are many different views. I include these in the readings so that students learn to critique others' views and adopt a position that they can defend with conviction. Hunt's stance that different perspectives can inform different areas of curriculum unfortunately leaves most areas of legal curriculum free of feminist critiques. A problem with this outcome is that it ignores the fact that if feminist analysis challenges the nature of legal knowledge, surely it is a critique important for every area. I therefore, suggest that Giroux's argument of taking responsibility for the consequences of one's view (discussed below) is a more appropriate way of justifying the choice of theoretical perspective.

The argument that other perspectives, say for example, economic analysis or alternative dispute resolution methods or historical perspectives, to name a few, are equally legitimate organising foci, misses the point that feminist perspectives challenge the gender neutrality of all knowledge. Once the partial perspective of legal knowledge is exposed, it should no longer be possible for anyone to ignore it as otherwise it amounts to maintaining an oppressive status quo. This is a much broader argument than simply asking for interdisciplinarity. It demands that all law students should be enabled to learn how legal knowledge is constructed and what role they play in legitimising ideas. It at once makes law students and scholars ethically responsible actors as the charade of dealing with objective knowledge is no longer available.

Therefore, I use the understanding of family law as soft law or an optional subject as the starting point for the organisation of the subject. In the folklore of legal scholarship and practice, family law is a 'soft' law. That is, it is not

23 There are probably many individual teachers engaged in such an enterprise but this statement is based on the admittedly limited personal knowledge I have of the printed literature. There is of course extensive critical literature on Family Law but mostly it does not engage with the legal education literature.

24 A Hunt, "The Role And Place Of Theory In Legal Education: Reflections On Foundationalism" (1989) 9 *Legal Studies* 146 at 163.

considered of fundamental importance like Constitutional, Criminal, Property or Contract law. And in the hierarchy of legal curricula it is very often (or possibly always) an optional subject that students can choose or ignore. All this is of course, in plain contradiction to the immediate relevance of family law to every one's life, unparalleled by any other area of law. Every one will come into contact with aspects of family law in forming or dissolving personal relations and in deciding to have (or not have) children. That is, family law has most immediate relevance to our lives yet law students can choose not to study it. The supposed rationale behind this characterisation is that to be adequately educated law students need to know principles of public law and some aspects of private law. These principles in turn can be applied to any specific area like family law. Moreover, family matters are private matters and therefore, not the main concern of the law.

Family law as private or personal law has existed on the fringes of legal curricula for a long time.²⁵ And in keeping with this 'optional' status, the content of what is taught in family law is considered relatively unimportant. At best it means that the individual teacher can decide what to teach and how to teach. As it is not a foundational subject it does not impact on the quality of core education students receive. For example, in my institution, which claims to be a progressive, theoretically oriented and innovative institution the objections to my proposal for teaching family law as a feminist critique of law ranged from "there is no justification for teaching family law from only one (feminist) perspective" to "you are a woman what else can you be expected to do". The point of this example is not to demonstrate the specific antipathy of some colleagues to feminist critiques, but to illustrate the lack of recognition of the truly fundamental importance of feminist analyses for understanding the nature of law.

The students are asked to assess the scope and content of the area designated family law. They are presented with various explanations of the nature of family law and expected to form their own opinions. In this way students are able to focus on the nature of boundary marker concepts used to define the content of family law.²⁶ The students thus develop their capacities for critical thinking and realise their own agency in legitimising ideas about the core and optional classification of various areas of law.

25 See R Graycar and J Morgan, *The Hidden Gender of Law*, Federation Press (1990); K O'Donovan, *Sexual Divisions in Law*, Widenfield and Nicolson (1985). The marginal nature of family law is replicated in the low status accorded to the practice of family law. Even the Family Court judges in Australia (appointed to a specialised court because of their particular expertise in the area) have been enabled to adjudicate disputes other than family disputes supposedly to enable them to broaden their horizons. The *Family Law Act 1975* is a Commonwealth Act and among other things it created the Family Court of Australia (s 21). The Family Court judges were given additional jurisdiction in non-family matters by the *Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988* (Cth). See HA Finlay and RJ Bailey-Harris, *Family Law In Australia*, Butterworths (4th ed, 1989) p 55.

26 C Petersen, "Living Dangerously: Speaking Lesbian, Teaching Family Law" (1994) 7 *Canadian Journal of Women and the Law* 318.

B. The Why, What and How of the Family Law Unit

A substantial part of contemporary higher education literature focuses on the students, and it is now widely accepted that the objective of education or teaching should be to facilitate learning.²⁷ The idea that teaching and learning are connected to each other at the very least makes it difficult to blame the students for not learning.²⁸ However the fact that the students are considered to be the active agents in learning should not absolve the educators from justifying the **why, what** and **how** of their teaching. The aim of good (law) teaching is not merely to generate the ability to reproduce quantities of information, but must be to bring about a change in the students' understanding of law.²⁹ Such a change in students' understanding can be effected only by an interdisciplinary study of law.

(i) *Why an interdisciplinary study of family law*

In designing this course, I have relied on two helpful questions provided by Ramsden:³⁰ what do I want my students to learn? and how can I express my requirements to the students? These questions pin the responsibility for good teaching on the teacher and help in articulating my assumptions and communicating them effectively to the students. By articulating my assumptions I am compelled to make explicit my philosophy of education and my approach to

27 Ramsden argues that learning is best conceptualised as a relation between a person and a phenomenon, that is, the way in which anyone goes about learning is a relation between the person and the material being learned. According to him, learning is a change in understanding, a qualitative change in a person's view of reality. Understanding in turn is the way in which students apprehend or discern phenomena related to the subject. It is not to be confused with what they know about them or how they can manipulate them. The concept of approach to learning draws attention to the qualitative aspect of learning - the what and how of learning rather than how much. See P Ramsden, note 11 *supra*, p 4 and p 40.

28 For a good overview of developments in ideas about student learning see N Entwistle and P Ramsden, *Understanding Student Learning*, Croom Helm (1983). Entwistle has sought to operationalise and investigate the correlates of deep and surface approaches to learning with the operation and comprehension learning styles. He has designed the ASI inventory to assess 16 sub-scales across four domains and according to him this inventory has produced four main factors: deep, surface, organised and strategic. Entwistle says that the most salient correlates of approaches to learning are the contrasting forms of motivation - intrinsic motivation (learning out of interest) facilitates deep and organised learning; extrinsic motivation (learning geared to vocational qualification) compels reliance on surface approach. N Entwistle, "A Model Of The Teaching - Learning Process" in J Richardson, M Eysneck and D Piper (eds), *Student Learning: Research In Education And Cognitive Psychology* (1987) 13; Marton and Saljo however, argue that it is important to make an analytical separation between the referential (what) aspect behind the deep/surface and the organisational (how) aspect of the holistic/surface dichotomies. Only when they are identified separately can the relationship between them be demonstrated, that is, certain meaning orientation leads to a certain way of organising the text and parts of it and the way of organising the text leads to a certain referential meaning being abstracted from it. F Marton and R Saljo, "Approaches To Learning" in F Marton, D Hounsell and N Entwistle (eds), *The Experience Of Learning* (1984) 36 at 44.

29 P Ramsden, note 11 *supra*, p 4 and p 20. Ramsden says that the academics seem to agree on the following educational objectives: to teach students to analyse ideas or issues critically; to develop students' intellectual and thinking skills; to teach students to comprehend principles or generalisations. The capacity to understand and use the techniques of a subject and to remember the details are no doubt necessary but only part of the process.

30 *Ibid*, pp 126-7.

the meaning of the discipline of law.³¹ In other words I am obliged to explain **why** students must study family law in a particular interdisciplinary manner. I am of course operating in the wider context where law is treated as an autonomous, objective knowledge about neutral principles. The content of the course answers the question **what** must students learn. Lastly the teaching methodology and assessment scheme refer to **how** the students may learn.

The course begins with a collection of extracts, including feminist critiques of the family in various non-law disciplines. I aim to enable the students to relate this understanding to legal discourse about the family. The reason I think this is justifiable or necessary is that it demonstrates to the students the relationship of interdependence between the legal system and the political, economic and social structures. Furthermore, as feminist theory has established the fallacy of claiming gender neutrality for any knowledge or point of view, law students must address the issue of construction of legal knowledge in the specific area of family law. Every theory is based on assumptions, whether articulated or unarticulated, and the consequences of making those assumptions fall unevenly on different sections of society. In family law the assumption of gender neutrality has very different consequences for men and women. The initial task is to expose the students to these uneven consequences for men and women. Students need to understand *how* such uneven consequences are justified and *whether* they, as legal professionals, have a role in challenging and modifying these ideas. Students are thus enabled to become self reflective and responsible agents. Therefore, I specify two formal objectives in this unit: (i) to learn how to access and apply legal rules dealing with family relations; and (ii) to understand the nature of legal regulation and its function.

I treat the first as a necessary but technical and minor objective because that is the very minimum any lawyer must know. White argues that although every discipline is more than a collection of facts to be memorised or techniques to be mastered, generations of students and teachers have given their exclusive or major attention to only the facts and techniques.³² This is generally the case in most areas of legal education but unfortunate because as Birks explains, even though law reports remain the primary sources of legal doctrine, the university jurists are mainly responsible for the systematization and explanation of law which is essential for its understanding and application by practitioners among others.³³

Present day students will be expected to make judgments about the fairness of sexual division of roles in contemporary society in their future roles as family law practitioners (and judges). To enable them to make these judgments they must be exposed to much more than technical interpretations present in earlier judgments of courts (precedents). If they are not to make entirely subjective decisions they must know about sociological, historical and economic literature

31 G Loacker, "Faculty As A Force To Improve Instruction Through Assessment" in J McMillan (ed), *Assessing Students' Learning* (1988) 20.

32 A White, "Process And Environment In Teaching And Learning" in A White (ed), *Interdisciplinary Teaching* (1981) 95 at 100.

33 P Birks, "The Historical Context" in P Birks (ed), *Reviewing Legal Education* (1994) 1 at 3.

on family structures. But more importantly as lawyers they must work out why and how this information forms the bases of their judgments, that as legal actors they draw upon other disciplines to construct legal knowledge.³⁴ For lawyers it is essential to understand the interface between legal rules and social realities. But this can not be merely a personal quest. It has to be an integral part of the education they receive.

The interconnections between the law, society and economy (to name a few) are the stuff of legal scholarship but not necessarily of the legal curricula. Every family law course familiarises the students with the relevant legislation and its interpretation by the courts. But the contemporary text books (with a few notable exceptions) on the whole do not venture much beyond the discussion of legal doctrine.³⁵ The *Family Law Act* 1975 was a radical departure from the previous law of divorce. It is a rigorously gender neutral legislative initiative. It also gave women extensive rights with regard to property on dissolution of marriage. However, students need to learn not only these details but whether these changes affect men and women differently. If they do, are the different outcomes justified? Only then does it become possible to start examining the function of gender neutral law in a society divided by gender hierarchy. Every law student should be able to examine and understand the relevance of the claimed gender neutrality of law. It should not be optional, as otherwise an accurate picture of the nature of law cannot be formed. Therefore, all legal educators must examine the connection between what they teach and how it is used. And this is why legal educators carry the burden for much more than simply training the students in lawyering skills.³⁶

(ii) Understanding the nature of legal education: use of analytical concepts

For achieving the second objective³⁷ of understanding the nature of legal regulation and its function I rely on the following basic concepts: concepts of kinship and of the modern nuclear family; concepts of public and private spheres; concepts of economy and personal sphere; interdependence of various spheres; and the role of law in facilitating such relations. White says that a knowledge of the diverse sources which contribute to fundamental concepts in a discipline

34 This issue is missed in arguments for a wider legal education when the 'breadth' is mostly about better lawyering skills, somehow independent of the necessity to examine the construction of legal knowledge by the very same lawyers. See for an example of this stance G Blasi, "What Lawyers Know: Lawyering, Expertise, Cognitive Science And The Functions Of Theory" (1995) 45(3) *Journal Of Legal Education* 313.

35 See, for example, A Dicley, *Family Law*, Law Book Co (3rd ed, 1997); HA Finlay, Bradbrook and Bailey-Harris, *Family Law, Cases and Commentary*, Butterworths (2nd ed, 1993); HA Finlay, Bailey-Harris and Otlowski, *Family Law In Australia*, Butterworths (1997). The exception of the rule is S Parker, Parkinson and Behrens, *Australian Family Law in Context*, Law Book Co (2nd ed, 1999).

36 See D Tribe and A Tribe, "The Law Teachers' Dilemma" in R Barnett (ed), *Learning to Effect* (1992) 87 at 94.

37 I find support for listing these as the objectives in Ramsden who argues that objectives are not necessarily behavioural changes but concepts a student should understand or is expected to learn, see P Ramsden, note 11 *supra*, p 130.

might give the student an appreciation of the subject as something more than facts or techniques.³⁸ The introduction of these concepts makes it possible to challenge the mainstream view of family law as simply a dispute resolution mechanism. These concepts also bring into view the function of law in maintaining a status quo oppressive to some sections of society.

It is important to challenge conventional knowledge about law in order to expose the students to the constructed nature of all knowledge. But this is something most law teachers already do in one form or another.³⁹ My aim is to find means of making the students understand their own agency in the construction of specific legal knowledge. Students are asked to examine whether the interdisciplinary critiques of law are special interest critiques provided by specific interest groups or are they fundamental to: the issue of how legal knowledge is constructed; how all theoretical ideas are informed by the unstated perspectives of the authors; whether each of us has the responsibility to examine the possible consequences of our theoretical stance; whether each one of us has the power and the responsibility to counter implicit relativism in contemporary post structuralist theories; and explore how legitimization of ideas plays a crucial part in maintaining or transforming social arrangements.

As a starting point I articulate the often unstated sentiment of many students that even though interdisciplinary readings are interesting, they are not relevant for the purposes of practising law. The students typically want to get on with the real thing - the substantive provisions of family law and the relevant court judgments. This sentiment is further legitimised by the core/option classification of the subjects in the curriculum as the students believe that they have learnt the theoretical and philosophical issues in the core subjects such as Jurisprudence or Constitutional law. They can use these concepts, if need be, in the study of family law but mostly they are concerned with learning the substantive provisions.

This is an appropriate point to introduce various concepts used in the family law discourse, as that enables me to demonstrate that the substantive law/theoretical issues division is problematic. I will illustrate this with one example from the family law course. The course begins with a study of the concept of family. A number of extracts trace the development of the heterosexual, nuclear family, but come up with differing explanations of the causes for such changes and the desirability of the modern, nuclear family. Students have before them a number of explanations of the same phenomenon and it is up to them to decide which analysis is more convincing and why. At the

38 A White, note 32 *supra*, p 7.

39 In education literature there is a relatively recent shift from behaviorist to cognitive view of learning. Very briefly the cognitive view is that knowledge is constructed by the individual learner. The meaning of any knowledge does not exist independently of the knower and each knower or learner constructs their own meaning. Most authors seem to be adopting the cognitive theory of learning but the literature is fairly technical, that is, debates between instructional designers and behaviorists. See for example B Wilson and P Cole, "A Review Of Cognitive Teaching Models" (1991) 39(4) *Educational Technology Research & Design* 47. For my purposes the debate between behaviorist and cognitive theorists has a slightly different significance as rather than being an issue of how individuals learn it is about the nature of knowledge.

very least they are no longer able to adopt a simplistic view of the nuclear family as the natural or the most developed form of family structure. In accepting these historical changes they are also enabled to make connections between the changing structures of family and the legal definitions of the same. They are thus in a position to make informed judgments about the legitimacy of the definition of family used in family law discourse. They are also able to judge the desirability or otherwise of the exclusion of indigenous families and same sex families from the legal definition of the family. Similarly, they have the necessary conceptual tools to assess the validity of feminist analyses that portray the nuclear family as oppressive for most women. The students thus learn for themselves that the legal definition of family is not a given, but a considered choice. They also see how the definition disadvantages some sections of the community and privileges others and must decide whether these outcomes are legitimate. The students form their own opinions on the adequacy and justice of the contemporary legal definitions of family in the family law and have to determine for themselves what needs to change. Law reform thus becomes a pertinent issue not only for the law reformers but also for each and every student in the class. In this way I avoid telling the students that family law is oppressive, patriarchal, heterosexualist, racist or whatever else. But I hope to make it obvious that every one needs to inquire whether family law is oppressive in any of these forms.

(iii) Agency and responsibility of each individual student

I aim to make it possible for students to take responsibility for the views they hold and defend their choices as conducive to creating a just social system. It will also be a transformative enterprise in that students will see how they, and every one else, is implicated in creating knowledge and justifying or changing social relations. I rely on Lusted's conception of pedagogy because as a concept it draws attention to the processes through which knowledge is produced. It helps focus attention on not only how knowledge is transmitted, but how it is produced, and thus challenges notions of teaching, knowledge and learning.⁴⁰ Jean Bobcock⁴¹ says that university academics have to be lecturers as well as teachers. The academic has to be a guide or facilitator of learning and surely learning can not be value free. The aim is not to convert the students to my point of view, but to enable them to identify the perspective in any position and its implications. This is especially relevant in legal education because of the easy availability of the opportunity of claiming that we are simply applying the rules already in existence.

This is not simply to teach a method but is more importantly a foundation for ethical behaviour as professionals - whether as a practicing lawyer, judge, legislator, academic, policy maker or something else. The law students are the future professionals who will legitimise ideas about the role of law in regulating

40 D Lusted, "Why Pedagogy?" (1986) 7 *Screen 2* at 3-4.

41 J Bobcock, "Curriculum Change And Professional Identity" in J Bobcock and D Watson (eds), *Managing The University Curriculum: Making Common Cause* (1994) 116 at 120.

the personal lives of people. It is therefore imperative that their education helps them learn to be socially responsible as I adopt the philosophy of education that education can be transformative. Unfortunately the role of education in creating a non-oppressive society has been given up prematurely by many in the higher education sector. This may be a gross generalisation but nevertheless a palpable sentiment that general ethos in most higher education institutions rewards research over teaching. The teachers who put their efforts into teaching rather than research⁴² do so against the prevailing professional expectations. The obvious spin off is that the committed teachers also believe in the power of education to be a transformative experience. They can effect a change in the students' understanding of why they are at a higher education institution. I believe this is a lifeline that committed teachers and interested students hang on to in the universities. However, it leaves the greater majority of academics and students 'free' to disregard the transformative aspects and potential of education.⁴³

Giroux and McLaren⁴⁴ combine critical and post structural ideas to argue that every individual is implicated in the construction and legitimation of knowledge. Rather than adopting the reductionism of earlier post structural theories they argue that post structural theory has a transformative potential. Therefore, everyone has the responsibility to be self reflective of their position and acknowledge that certain viewpoints privilege and advance their interests. Thus, arguments about oppression of women are not only the concern of feminists, but everyone interested in social justice. Unless everyone studying family law is able to acknowledge that their relatively privileged position comes at the expense of some one else's disadvantage, justice within the institution of the family will remain elusive. This outcome is only achievable if the substance or pedagogy interrelationship is maintained.

That is, any amount of post structural critique of family law (or any other aspect of law) can be presented to students without showing them what they can do about challenging the prevalent ideas. In fact, one of the common comments I hear from students is that they find out that legal knowledge is constructed, but so what. Therefore, the aim has to be to acquaint students with the 'mechanisms' by which ideas are incorporated, adopted and legitimised in legal discourse. I ask students to question the assumptions of the argument and consider whether they, as individuals, are comfortable with the consequences that flow from a certain view. For example, in property division provisions of family law, usually women get a smaller share of business assets. Instead of giving my assessment of this outcome I ask for their opinions. Usually students divide themselves into two camps, one agreeing that wives do not deserve to share equally and those who

42 The neat distinction between research and teaching is highly problematic and I believe that to be a good teacher one has to be an effective researcher.

43 See also P Gaber, "Just Trying To Be Human In This Place: The Legal Education Of Twenty Women" (1998) 10(2) *Yale Journal Of Law And Feminism* 165 at 203-4; D Rhode, "Perspectives On Professional Women" (1988) 40 *Stanford Law Review* 1163.

44 H Giroux and P McLaren, *Critical Pedagogy, The State, And Cultural Struggle*, SUNY Press (1989); H Giroux, *Teachers As Intellectuals: Toward A Critical Pedagogy Of Learning*, Bergin and Garvey (1988).

wish to give wives an equal share with the husband. I ask the students to articulate their assumptions and get them to listen to different interpretations of the same set of facts. This can only be done in a classroom which has an atmosphere of non-competitiveness and the teacher does not act as the authoritative knower. They are also acquainted with the analyses in non-law disciplines that explain how economic value is only attributed to some kinds of work, how notions of femininity and masculinity steer men and women into making different choices and the relationship between labour market participation and economic dependency of women with children. The major advantage of this process is that students come to see themselves as the engaged subjects, deciding for themselves what is an acceptable outcome. Such an understanding can only lead to ethical conduct by professionals and in my opinion this is a much firmer basis of making ethics an integral part of legal education rather than by tacking on a discreet 'Law And Ethics' unit in the curriculum.

At the very least it means that each student and practicing lawyer must become aware of how they form an opinion, say on the desirability of the nuclear family. Everyone has an opinion on the matter, but very few have a clear idea as to how their opinion is formed, that is, what are the sources of their knowledge, why are certain sources acceptable but not others, and what, if any, gaps exist in their reaching certain conclusions.⁴⁵ Feminist critiques of family provide a suitable starting point as students readily jump to conclusions for or against feminist analyses. It takes me a whole semester to make them aware of how they reach these positions and whether they need to reassess their positions. I do not always succeed but do consider it a worthwhile aim.

The next issue is how do I express my requirements to the students? This is Ramsden's second question: how can I express my requirements to the students?⁴⁶ and it directs us to focus on the content of the course. It is also another way of asking how do I plan to achieve the objectives of the course? The course design is constructed in the context of the wider curriculum, it has to take into account perceived professional requirements and it is meant to be interdisciplinary. These aspects are elaborated in the following section.

C. The What Issue: The Content and Structure of the Unit

Ramsden suggests that the content should be selected to correspond with the list of educational goals and that the learning activities should be connected to the objectives.⁴⁷ As my main emphasis is on developing the critical analysis skills of students, it is towards that end that I have chosen the content (approximately one third of the total) to be interdisciplinary analyses of the family. The course on family law is organised as a set of reading materials which demonstrate the cultural and historical specificity of various family structures and

45 Much legal education is still distinguished from other disciplines of humanities and social sciences in its insistence on separating fact and value, and knowledge from the means of its evaluation, see J Webb, "Why Theory Matters" in J Webb and C Maughan (eds), *Teaching Lawyers' skills* (1996) 23 at 25.

46 P Ramsden, note 11 *supra*, p 127.

47 *Ibid*, p 134.

the changing nature of families. I work on the assumption that by exposing the students to various explanations about family structures I facilitate the development of their critical thinking for they would not only review their own understanding of family but also have to make connections between legal and other definitions of families. In a slightly different context, Perkins⁴⁸ makes a distinction between passive knowledge and active knowledge. According to him, too often students learn facts as passive knowledge without learning creative or critical thinking.

Reconceptualising the issues in family law

In this course students are familiarised with the critiques of family presented by Marxists, feminists, critical race theorists, historians and post-structuralists. The idea is to enable students to examine how various theories manage to justify hierarchies by using concepts like public and private spheres, freedom as autonomy from state regulation, civil society as a sphere of autonomy but different from personal relations and personal relations as not a suitable subject for law. In other words, students are exposed to the processes by which, in the words of Rorty,⁴⁹ legal knowledge is established by the 'normal discourse' of the community of knowledgeable peers.

Students are confronted with their own acceptance of the classification of family law as an optional subject, discretely marked off as the law of personal relations, and not too important in the hierarchy of legal learning and education. By raising this issue I am able to direct their attention to specific concepts used in legal theory, that is, that the public/private division is inevitable and that the sexual division of labour existing in society is unproblematically reflected in family law. The origin of the public/private division, its legitimation in mainstream liberal theory and its critique by different strands of feminism illustrates how specific historical developments during industrialisation of western societies necessitated the concepts of public sphere, economy, and family, as distinct from each other. This conceptual differentiation serves the function of obscuring the prioritisation of the public sphere and the economy as well as the devaluation of the private sphere or personal life. The mechanisms for constructing these hierarchies only become visible when the concepts are deconstructed and the consequences of making certain assumptions are explicitly articulated. Thus, constructing the public sphere as the sphere of rationality, self interest and unmitigated individualism is only possible with the existence of a private sphere. The students are therefore able to make the connection that the public and private spheres are mutually interdependent and equally necessary for the perpetuation of society. If this view is correct, the solution to the problem of the devaluation of the private sphere does not lie in extending the public sphere values to the private sphere, that is, formal equality conceptualised as gender neutrality. It follows that what is required is a reconceptualisation of public and

48 D Perkins, *Knowledge As Design*, Lawrence Erlbaum Associates Hillsdales (1986) p xv.

49 R Rorty, *Philosophy And The Mirror Of Nature*, Oxford University Press (1980).

private. But before such reconceptualisation can take place there must be an articulated purpose or aim for it.

This is where the concepts of gender and the sexual division of labour come into the discussion. For the problem with the devaluation of the private sphere is primarily that women are associated with the private sphere of family and it is their activities and roles that are not adequately valued. The introduction of the concept of gender challenges the idea that a neutral point of view is possible. In the context of family law, the initial question is – how does the law construct and perpetuate notions of femininity? This question, however, needs to be supplemented with an analysis of the gendered aspects of sexual division of labour. That is, why are women the primary caregivers and nurturers in the non wage sector, and the lower paid workers in the wage sector of the economy? The answers take the students beyond the simplistic issue of choice, and illustrate how the ideologies of masculinity and femininity structure the life choices of both men and women. However, the abundance of feminist scholarship explaining the ways in which the sexual division of labour serves to oppress women indicates that it is women who have a higher stake in changing or transforming the status quo.

Feminist critiques raise the issue of the objectivity of sociology as well as legal analyses. That is to say, the kinds of questions that get asked and treated as legitimate in any discipline is far from an accidental process. This is a significant issue for legal education in general, but specifically for family law. Notwithstanding ample evidence to the contrary, legal scholars are very prone to the view that law is about neutral principles, and thus family law can be adequately taught by focusing on the doctrinal issues. Feminist critiques of family law are easily delegitimised by labelling them as biased. Unless students understand the idea of the partial nature of all knowledge, and the impossibility of avoiding a point of view, they would be unable to appreciate the significance of feminist critiques. The argument that gender is a relevant factor in understanding the consequences of the sexual division of labour is no more biased than the stance that gender neutral law in family relations is desirable or just.

Once the students accept the relevance of gender differences in any analysis, it becomes possible to explore with them the relevance of other differences – for example, race, sexuality or class. Feminist literature on intersections of race and gender and the interactions between differences of gender, class and sexuality help illustrate the relevance of adopting any theoretical stance.

This brings me to the next major issue in the course, that is, whether justice and equality are relevant values in the organisation of family relations. The ideology of the private sphere as the sphere of altruism, love and affection justifies the idea that justice is not a relevant value for the family. Students are asked to consider whether the original rationale in liberal theory of leaving the private sphere outside legal regulation still holds. If not, and legal regulation is prevalent, legitimate, or inevitable, how can one judge whether it is based on legitimate principles? Thus the idea that gender neutrality is the only model of

equality available is challenged, and students are compelled to form their opinions of what may constitute justice within the family.

The issue of justice within the family becomes obvious in property distribution and child related disputes. Family law discourse tries to disassociate the two into discreet compartments. The question students are asked to consider is: why is property distribution necessary under family law? Is it not as an acknowledgment that sexual division of labour disadvantages women? The rules of conventional property law are unable to redress this disadvantage and that is why family law must step in. If this interpretation of family law is correct, it becomes immediately obvious that putting a financial value on women's work is not a straight forward task. Judges asked to make a just and equitable order under the *Family Law Act 1975* (or in more limited circumstances in state enacted statutes for defacto relationships) must have a very firm grasp of the extensive feminist literature on the position of women in contemporary society. But unfortunately, legal training in the past and to a very large extent in the present, deems such knowledge not essential for adequate legal education. A lawyer who has never read any sociological literature on the significance of gender has very little, if any, reason for considering that 50:50 division of matrimonial property is 'just' or 'unjust'. The point is not about the reading habits of individual lawyers or judges but that the conventional view about law effectively obscures the social construction of legal knowledge. The fiction of law as autonomous of society effectively allows for the conception of legal education as a 'context' or 'situated' knowledge and it only demands that law students know the technicalities of law. It should be obvious that even for practicing lawyers it is important to understand how they form their views about the meanings of legal rules (or that legal knowledge is constructed in a very biased manner) so that they are able to take responsibility for the views they espouse.

Once the relevance of property division is demonstrated, the students are then asked to examine how the law regulates families without much property. The direct relevance of social welfare and child welfare laws thus becomes evident and helps challenge the narrow focus of the conventional meaning of family law. The introduction of social welfare and child welfare laws brings into focus the legal construction of single mothers and unfit mothers as illustrated by the discourses on Aboriginal and lesbian women.

The students are thus encouraged to make a connection between interdisciplinary studies and the construction of legal knowledge. For example, the rationales for property distribution in family law either refer to entitlements or compensation. But it is important to focus on the wider issues of how needs and entitlements are constructed differently for men and women, and further complicated by their race and class membership; how, in a materialistic culture, the non-financial and altruistic work always gets devalued; and how dependency of women within marriage or heterosexual relationships is initially accepted but disapproved of once the relationship has ended. The students are thus in a better position to judge the adequacy of the legislative scheme and the judicial interpretations of the legislation.

The acceptance by the financial provisions of family law that the sexual division of labour has damaging consequences for women, however, sits uncomfortably with a gender neutral stand in child related disputes. Whether family law is able to deal with the true cost of bringing up a child, and if not, why not, are some of the questions that are raised. For example, the emphasis in family law discourse on the two parent family as the most desirable way of bringing up children is contrasted with the availability of divorce on demand, but at the same time a reinforcement of the idea of the primary responsibility of the biological parents to provide for their children. The students engage with the consequences of adopting any position and the responsibility for logical consistency.

The emphasis on the best interests of the child as the only relevant concept virtually denies the social reality that child rearing is still predominantly a women's activity. In response to this analysis it could be argued that child related disputes are about the welfare of the child and as long as that aim is fulfilled it is immaterial whether women are disadvantaged or not. This argument raises the question whether reliance by family law on the principle of the best interests of the child has the function of giving the state ever increasing control over the family. There is not much evidence that the interests of the children can only be safeguarded by exclusive reliance on this principle and there is ample evidence that women are being disadvantaged. Is it any function of family law to resolve disputes in a just manner? In choosing to uphold the principle of the best interests of the child, the law ought not to be able to ignore the impact of that principle on other members of the family. More importantly, this principle legitimises a cultural hegemony of European, middle class conventions of child care and directly disadvantages social practices in traditional and urban Indigenous communities. They similarly devalue the child care practices of various ethnic communities.

This discussion leads to a critical appraisal of the claim that movement in the contemporary family law is from the regulation of the group to the regulation of the individual members of the family. If such a development is taking place the question is whether it is a progressive movement. Who benefits from this development - the man, the woman or the child? As a consequence of this development the state is assuming greater control over all aspects of family life, but the individuals are none the better off for such change. The students next analyse the two seemingly contradictory trends in legal developments related to the family. On the one hand, there is a growing emphasis on privacy and individual rights, that is, law leaves the parties free to decide whom to marry or enter into a *de facto* relationship with, how many children to have, and when, where and why to end a relationship. On the other hand, many aspects of the ongoing relationships/marriages are becoming increasingly regulated, that is, legal regulation of domestic violence and children's welfare rights. Even though these two developments seem contradictory they are firmly connected to each other, for the idea that individuals have distinct rights not reducible to that of family also allows the state to intervene in an ongoing family in the public interest.

Finally, the students are asked to focus on the right to create a family, that is, the right to decide whether to have a child or not. Decisions relating to adoption, abortion, surrogacy, as well as artificial conception techniques, are in various ways decisions regarding the creation of families. Who should have the right to make these decisions and why? What are the justifications for denying a woman the right to choose whether to carry a pregnancy to full term? The right to decide when to have a child, and under what circumstances is increasingly being regulated by the state. For example, abortion is regulated by criminal law provisions and also by the injunctive powers under the *Family Law Act*. Availability of IVF and surrogacy arrangements are increasingly being regulated by the law. So too the regulation of adoption gives the state the authority to decide what constitutes an acceptable form of family. Should adoption or abortion or surrogacy be the concern of family law? In all these aspects the state is exercising control over individuals in families. Is the increase in the sphere of activity of state law justified? By reference to what values can this question be answered? Specifically, the students are asked to formulate their own views on the (mis)handling by the government and media of the stolen generation issues. They are thus enabled to examine the role of a very wide range of policies in regulating Indigenous families. Answers to these questions are also relevant in judging the role of the law in regard to domestic violence. Why should domestic violence be a matter for criminal law or family law? By the end of the course, I hope I have enabled the students to understand family law as one aspect of the wider system of laws that we live under. More importantly, I think I have equipped them to justify a reconceptualisation of family law so that it is one means of ensuring gender justice in contemporary society.

D. How May the Students Learn: The Organisation of Study Materials

As the course content contains many disparate views, students have to take the responsibility of forming their own views and this undermines the depiction of legal knowledge as objective and apersonal. I purposely restrict editorial comments to a minimum in the Study Material compilations. The interdisciplinary part of the course is supplemented with a focus on the specific legislation and its interpretation by the courts. The advantage of this arrangement is that the latter part of the course provides the opportunity for students to apply their interdisciplinary knowledge about 'family' to the doctrine of family law presented in court judgments and conventional legal literature. The students are thus enabled to identify the ideas being expressed by the legislators and judges and they can understand *how* law legitimises certain world views as universal or principled.

(i) Wider context of the course curriculum and structure

The exact course content is affected by external and internal factors. The substantive content of the unit Family law is to an extent determined by the

professional expectation⁵⁰ that students will be familiar with the substantive family law and it is a realistic constraint on the content. Within the curriculum of my institution family law is an optional unit and it does not form a pre-requisite for any further core units. This has positive and negative effects. The Family law course is independent of other courses in the curriculum but in the absence of coordination between various core and optional units and it is not possible to rely on the other units for dealing with some of the basic concepts for interdisciplinary analysis of law.⁵¹ Unfortunately, this is a function of classifying family law as an 'optional' unit.

However, I do think that I can play a significant role in the design of this single unit and believe that this is what Toombs and Tierney refer to as curricular change by modification.⁵² By exposing students to a different way of understanding law I hope to enable them to apply these concepts in their study of all other areas of law. Gibbs provides support for my belief that there is scope for individually initiated improvements even if relatively major changes in course design are not feasible.⁵³ He specifies that the individual teacher can link assessment to testing understanding, make assessment criteria explicit, engage students in discussions and group activities, solving puzzles, encourage reflection through self assessment and discuss at every opportunity what good learning and good teaching is.

(ii) Teaching methodology of learning as dialogue

In keeping with the philosophy of education explained above I do not rely on lectures.⁵⁴ The seminar discussion in the class is initiated by me but primarily I expect the students to talk to each other and explore the ideas presented in the readings. The readings provide more than one view point on any issue and the students have at least to be able to understand how different authors arrive at

50 Law is defined as a professional subject and (like many other professional courses) the law curriculum is partially determined by the professional bodies and in New South Wales the most recent development has been the specification of the so called Priestley requirements. In order to practice as solicitors the law graduates must have their degree recognised by the relevant professional body, in this case the Legal Practitioners' Admission Board. The Board with the concurrence of the New South Wales Attorney General's Department has specified the list of subjects which must be completed for the degree of Law to be accredited. This list, informally called the Priestley list, has thus become the minimum number of core or compulsory subjects in the curricula of various law schools. Any other subjects may either be classified as core or optional subjects.

51 Pirie argues that in most cases of legal education reform not much attention is paid to constructing a curriculum that clearly and systematically identifies learning objectives. He does mention some exceptions to this statement in footnote 150 on p 589; A Pirie, note 2 *supra*.

52 W Toombs and W Tierney, *Meeting The Mandate: Renewing The College And Departmental Curriculum*, ASHE-ERIC Higher Education Report No 6, George Washington University, 1991 at 7.

53 G Gibbs, "Improving The Quality Of Student Learning Through Course Design" in R Barnett (ed) *Learning To Effect* (1992) 149 at 163.

54 D Bligh, *What's The Use Of Lectures?*, Penguin (1972). I meet with each group of students for two hours twice a week. The readings for the course are collected in a compilation and the students are expected to read the materials before coming for the two hour sessions. The distance students meet together for two days on campus sessions. These sessions are also conducted as seminar discussions. I take the responsibility to conduct the discussion so that relevant concepts are discussed but beyond that the students' participation steers the discussion.

various positions. Hopefully they would also learn to take positions and substantiate them. I derive much comfort from Vickers' comment that "teaching can only be a guide to learning: it can not be a substitute".⁵⁵

Class participation is integral to the aim of enabling students to take responsibility for learning and it reflects the meaning of learning as dialogue. Diana Laurillard⁵⁶ conceptualizes teaching - learning as a dialogue, a conversation between the tutor and the student. For a successful conversation communication should be possible and that involves more than mere transmission of messages. It also requires carriers of messages/ideas and the receivers of those messages or ideas.⁵⁷ The essential components of learning as conversation are description, adaptation, interaction and reflection. She argues that even though most cognitive scientists would claim that all these components are present in most contexts of experiential learning, academic learning is different from learning at the level of experience or everyday learning or even training programs that teach only skills. The distinctive feature of academic learning is that adaptation and reflection is a conscious process. Academic understanding involves developing a critical perspective that can happen only when conscious reflection is done on the experience. Presumably the reflection of a child on the internal structure of language is not necessarily under its conscious control. Therefore, it is not likely that the processes involved in the particular experience would be accessible to the learner to consider and modify. Critical understanding is important precisely because it allows us, the actors, to talk about the interactions with the world and decide about their value, whether anything needs modifying.

The multiplicity of interpretations makes it imperative that everyone should choose their viewpoint and be able to justify that choice. This forces them to reflect on the assumptions made by various opinion holders and articulate reasons why certain assumptions are acceptable or unacceptable. Resnick⁵⁸ states that psycholinguists are beginning to argue that meaning is established through social negotiation, that is in a dialogue both parties try to ascertain what the others know and then adjust communication to the partner's knowledge status. Study of reasoning now includes the ways in which people argue with each other. In the context of legal education it means students are exposed to the processes by which legal knowledge is established by the 'normal discourse' of the community of knowledgeable peers.⁵⁹ The students are expected to engage with the views of various authors as well as of their co-students.

Instructional theorists have also begun to explore ways of embedding learning in social communities in which elaboration and interpretation are regularly

55 G Vickers, "Three Needs, Two Buckets, One Well" in A White (ed), *Interdisciplinary Teaching* (1981) 11 at 18.

56 D Laurillard, *Rethinking University Teaching*, Routledge (1993) chs 1-4.

57 *Ibid*, p 99, quoting A Romiszowski, *The Selection And Use Of Instructional Media*, Kogan Paul (1988) p 8.

58 L Resnick, *Knowing, Learning, And Instruction: Essays In Honour Of Robert Glaser*, Lawrence Erlbaum Associates Publishers (1989) p 10. He cites H Clarke and D Wilkes-Gibbs, "Referring As A Collaborative Process" (1986) 22 *Cognition* 1.

59 R Rorty, note 49 *supra*.

practiced.⁶⁰ However, it is important to define these 'social communities' very carefully. It is a long standing debate that academia is an ivory tower, distanced from real communities. According to this view, academic knowledge is at best a luxury for the intellectuals or at worst is a waste of time and money. These are certainly the parameters within which most debates about 'good' legal education take place. At this stage I would like to emphasise that Laurillard's argument that academic learning is different from other kinds of learning is important. The purpose of academic learning is more than understanding how things operate, that is, knowledge in context. It is also to be able to develop a critical understanding, that is, whether the processes are desirable, undesirable, should be abandoned or modified. Therefore 'social communities' should be defined so as to preserve the essential feature of academic knowledge, which is generating critical understanding. It is very important not to confine 'legal knowledge in context' to clinical practice.

(iii) *Method of delivery*

The content of curriculum and the method of delivery are intimately connected so far as a questioning of legal doctrine is possible only if the teacher does not act as the expert transmitter of knowledge but gets the students to develop a questioning attitude and the capacity to analyse. I therefore, rely on small group teaching and will try to explain why.

Over the years the automatic link between small groups and good teaching has been questioned within the education literature but sadly very little if any effort has been made to articulate what good law teaching might be.⁶¹ The contemporary conventions of autonomy of the individual teachers in higher education make it very difficult to impose external, uniform standards. But even if individuals are conscientious in their job, mere good intentions are not enough to make one a competent teacher. Small group teaching does not automatically mean good teaching but if the aim is not to simply present information, teaching should be small group based rather than lecture based.⁶²

60 L Resnick, note 58 *supra*, pp 10-11.

61 Julian Webb argues that in debates about legal education, the question of how to teach has taken a poor second place to what we teach. But I would argue that even questions of what we teach are very narrowly focused on legal doctrine. The interdisciplinary literature still does not find ready acceptance in legal curricula. J Webb, note 45 *supra*, p 27.

62 There is a need for institutional articulation of the aims and objectives in law schools and other disciplines. Jaques makes the point that even though it is perfectly logical to set objectives they may not be entirely suitable for learning in groups. That is, since teaching and learning in groups is more in the nature of conversation a conscious pursuit of specified objectives might destroy the possibility of spontaneity and autonomous learning. However, he goes on to accept that objectives can be useful in group work if used imaginatively, especially where students take personal responsibility for learning. D Jaques, *Learning In Groups*, Gulf Publishing Co (2nd ed, 1984) pp 64-6.

Lectures have a place in higher education,⁶³ but as the only means of teaching, lectures suffer from a number of disadvantages. They are not particularly designed for active participation by the students. It is true that lectures can be designed to be interactive but the pedagogical significance of the lecturer as the expert underpins the exercise. It does not generate an atmosphere where true dialogue may take place and the role of the student stops short of being an active agent.

The literature on student learning suggests that effective teaching is not only about teaching but also dependent on how well the students learn.⁶⁴ To enable the students to learn, the role of the tutor is to map out the area, to direct students' reading, to initiate discussions in order to identify the relevant concepts and understand their function in legitimising certain world views. The tutor must also be able to motivate the students to take the responsibility to learn. Motivation to learn at the very least requires active student participation. Perry⁶⁵ has argued that from a motivational standpoint students are most likely to be engaged and interested when they are challenged by thinking that is beyond their current viewpoints. I wish to suggest that this is best done in a small group setting, whether as a tutorial or a seminar style discussion group.

Research indicates that small group teaching is as effective as other methods at presenting information but usually better than other methods at promoting intellectual skills including problem solving and changing attitudes.⁶⁶ It is obvious that the goals of small group teaching are not achieved simply because of the size of the class. Small group teaching would be successful only if the tutors are trained in managing small groups⁶⁷ but more importantly if they understand and subscribe to the philosophy behind student learning. The legal feminist scholarship has engaged with this issue most extensively and consistently. However, this literature gets marginalised as 'feminist' and presumably of relevance to women who may identify with feminist ideas. It is a sad indictment on mainstream legal education that twenty years down the track

63 Lectures have been the standard method of teaching in the universities for a long time and are usually justified on the basis of limited resources. They are no doubt useful for coverage of an area and thus providing the context for wider learning in a new area for the students. However, this is only the minimum requirement in higher education and a lot more is demanded. Research on lecturing suggests that compared to other methods lecturing is as effective in presenting information and providing explanations. Problem solving skills are better taught in small groups. See G Brown and M Atkins, *Effective Teaching In Higher Education*, Routledge (1988) pp 11-12.

64 F Marton, D Hounsell and N Entwistle, *The Experience Of Learning*, Scottish Academic Press (1984).

65 W Perry, *Forms Of Intellectual And Ethical Development in the College Years*, Holt, Rinehart & Winston (1970). Quoted by J McMillan and D Forsyth, "What Theories Of Motivation Say About Why Learners Learn" in R Menges and M Svinicki (eds), *College Teaching: From Theory To Practice* (1991) 39 at 46.

66 G Brown and M Atkins, note 63 *supra*, p 52. They cite the following studies: J Kulik and C Kulik, "A Meta Analysis Of Outcome Studies Of Keller's Personalized System Of Instructions" (1979) 34(2) *American Psychologist* 307; D Bligh, "Methods And Techniques in Post Secondary Education" (1980) 3 *Educational Studies And Documents*; D Jaques, note 60 *supra*.

67 Research findings suggest that tutors do most of the talking in small groups. See P Foster, "Clinical Discussion Groups: Verbal Participation And Outcomes" (1981) 56 *Journal Of Medical Education* 831. Quoted by G Brown and M Atkins, *ibid*.

the experiences of marginalisation of women law students are not any different from those of early feminists.⁶⁸

(iv) Assessment scheme and rationales

The assessment scheme used in the unit on Family Law similarly plays a crucial role in achieving these educational criteria. There is increasing recognition that the reasons why we assess are inevitably connected to teaching more effectively.⁶⁹ That is, assessment is a way of teaching more effectively through understanding exactly what students know or do not know.⁷⁰ Therefore, it makes sense to justify the forms of assessment used and explain how they help me achieve my goal of enabling students to learn in this unit.

I agree with Ramsden⁷¹ that summative function of assessment is not linked to its teaching function. Therefore, rather than using exams I have chosen a combination of essay writing and oral discussion as the basis for assessment.⁷² The first essay is on a specified topic designed to enable the students to demonstrate their understanding of the concepts used in the unit. Students can rely on the study materials to write their essays and are expected to show an adequate grasp of various analyses presented in the study materials to construct their own arguments. I emphasise at every available opportunity that there are no correct answers available and that the students have to take a position and be able

68 P Gaber, note 43 *supra*.

69 In the theories of assessment the methods of assessment are usually described as norm referenced and criterion referenced and the schemes of assessment are evaluated by the tests of validity and reliability, see for a good introduction J Heywood, *Assessment In Higher Education*, John Wiley & Sons (1977). In this literature a distinction is made between summative and formative assessment, which according to Brown and Knight refers to the purposes rather than methods of assessment. S Brown and P Knight, *Assessing Learners In Higher Education*, Kogan Page (1994) p 16.

70 P Ramsden, note 11 *supra*, p 182.

71 The assessment scheme for the unit Family Law involves students in writing two essays worth 40 per cent each and class participation worth 20 per cent. The external students have a slightly different scheme but basically write similar essays. The first essay is due one week into the mid semester break (after the on-campus session for the distance education students) and the other essay is due at the end of the semester.

72 For the purpose of assessing class participation I ask students to fill in a self assessment form in the middle of the semester and I return the form with my comments and a provisional mark. I explain that filling in the form is voluntary and that the main purpose is for me to get an idea whether I and the students are more or less on par in our assessment of their performance. It enables me to let the students know whether I think they need to do more. The advantage of students filling the form in is that I can give feed back in a non threatening way. Some students feel uneasy or embarrassed to be told to their face that they need to work harder or differently. The voluntary aspect of the form puts the responsibility on the students to communicate with me but also has the disadvantage that the reticent students remain aloof. Also, there is a tendency for some students to over estimate their performance while others, more often than not women, under estimate their capabilities. I try to correct the obvious misjudgments but am aware that I am also fallible in making necessarily subjective assessments. I am not very comfortable with the neat division between self-assessment and self: S Brown, and P Knight, note 69 *supra*, p 52. As I understand self-assessment as a kind of informal assessment, but assessment all the same, an element of grading is present therein. Assessment of class participation is a debatable issue. My rationale for choosing to assess it is that it puts gentle pressure on students to participate in the class. I try to make the experience as non-threatening as possible. I do not always succeed but derive comfort from White's comment that "we tend to discover what we as individuals have to say by talking with others", A White, note 32 *supra* at 97.

to justify their choice. This essay primarily assesses the level of critical thinking of the students and their grasp of the basic analytical concepts.

The second essay is a research essay and the students take the responsibility of formulating a research topic. They have the option to choose any topic as long as they can examine its family law aspect and are not limited to the topics included in the course. In this way it is possible for individual students to pursue ideas in areas that might be of special interest to them. The freedom to nominate an area for further study is challenging, as it demands an exercise of judgment as to the feasibility of the project. The returns that the student might expect from such an exercise are different from those available in writing an essay on a specified topic. The students have the opportunity to exercise initiative in choosing topics and managing research for the project. This essay primarily assesses how far the students extend and apply their understanding of the concepts they have learnt in the unit Family Law.

I try to provide extensive feedback on the first essay on the basis, as argued by, Brown and Knight⁷³ that if formative assessment is taken seriously, adequate feedback is essential. I usually spend 60-70 minutes on each essay and in addition to general comments about the structure, level of analysis and grasp of the subject, I address how each student constructs (or does not) their arguments. I do not use a form with a list of criteria. Since essay writing is a necessarily individualistic activity it is important to engage with the student on the terms of their particular essay. I think this can be adequately done only by addressing the arguments from within the perspective adopted by the particular student. For example, if a student wishes to argue that contemporary Australian family law is a just system of regulating personal relations, I try to read their argument to evaluate what is their understanding of a just system. In other words, the aim is not to assess the 'correctness' of the view that family law is just or unjust, but to enable the students to take any position they wish to and assess whether they have established what they assert. This is a very time consuming task, but one I feel is crucial if assessment is to serve as a learning tool. I think the value of feedback lies in both pointing out where the student is going astray and also spell out why. Otherwise it is a bit like giving a mark without explaining the reasons for it.

Reading essays also enables me to get some feedback on how the students are understanding or not understanding the central ideas of the unit. Often I find that most students are making the same mistake as to the meaning or significance of some concepts. After I have marked the essays I go back to the students and explain those concepts again. It also alerts me to pay more attention to certain ideas in the next year.⁷⁴

Ideally the assessment should be both reliable and valid. However, reliability of a test is associated with producing consistent results and they are mostly

73 S Brown and P Knight, note 69 *supra*, p 17.

74 For the second essay I do not give as extensive feedback, primarily because the students have finished the course and are presumably not as interested in detailed comments. To some extent the assessment of the final essay is more akin to being summative but it is a resource driven choice. If a student wants to pursue further research in the area I am available for further discussion either on their essay or in general.

available when measuring narrow, conventional outcomes.⁷⁵ Validity has the primary meaning that you measure what you set out to measure. It is not always reliable but better suited to measure creativity, initiative, critical thinking and other amorphous context dependent powers.⁷⁶ I am comfortable with 'sacrificing' reliability if it allows me to test things I want the students to learn, that is, critical thinking. Blaine Carpenter and James Doig⁷⁷ suggest that it is desirable that we articulate what we think critical thinking is. How do the critical thinking skills, processes and strategies work together, and what aspects of them do we wish to assess? I am of the opinion that learning activities that would facilitate critical thinking are, among other things, participating in group discussions, engaging with others' ideas and being able to identify their reasons and assumptions, and to articulate one's own reasons for taking a position. All of these are context dependent and I suspect that no two readers would assess them or grade them in exactly the same manner. Thus I make a considered decision to give up the possibility of reliability in the conventional sense but emphasise that this scheme of assessment is valid.

I am acutely aware of the increasing impracticality of the labour intensive nature of giving extensive feedback. I personally consider it to be the most important function of assessment but am working in an institutional climate where more and more subjects are being assessed through exams. Unless the higher education scholarship on teaching articulates clear policies on generating feedback and acknowledges the effort put in by some teachers only in providing adequate feedback I am afraid self preservation will compel most people to abandon giving feedback.

My aim in assessing class participation is to encourage students to enter into discussions with their peers. By its very nature the discussion is not structured and I consider it to be my job to make sure that every one feels comfortable and secure enough to participate.⁷⁸ Family law is a subject that everyone has some personal experience of and often people have a strong emotional stake in a particular view of family law. In this context the discussions can get very heated and personal. It has advantages and disadvantages in that it provides me with an opportunity to assess how different students construct their argument or respond to others' arguments. But the disadvantage is that in an emotionally charged atmosphere it is difficult to draw attention to the 'educational' point.

The gender dynamics are particularly pronounced as more often than not men and women react very differently to the analyses of sexual division of labor presented in the study materials. Men more frequently feel free to raise their voice, respond rudely or ridicule views that identify male dominance in personal relations. The problem I must grapple with is that such responses are not useful in furthering the discussion but if I clamp down on such a speaker it is read as bias against men. The distinction between personal and objective knowledge is

75 P Ramsden, note 11 *supra*, p 191.

76 S Brown and P Knight, note 69 *supra*, p 17.

77 C Blaine Carpenter and J Doig, "Assessing Critical Thinking Across The Curriculum" in McMillan (ed), *Assessing Students' Learning* (1988) 33.

78 A White, note 32 *supra* at 97.

often blurred and many times I fail to keep the students from reacting in non-productive ways. The assessment problem is that the responses of most of the students are to a large extent structured by the wider cultural climate, where it is appropriate for men to behave aggressively and for women to be reticent. How should I respond to such reactions when ultimately I am trying to sensitise them to these very gender specificities? I do not have an answer and do not think the solution lies in making a list of appropriate ways of responding or trying to measure them objectively. Ultimately I fall back upon my role as a professional and judge whether each student is trying to engage in a discussion, respond to a different point of view, or dominate the group, and do point out occasionally that the idea is to draw out others rather than to hold centre stage.

In conclusion I only wish to say that I have presented this account of my teaching to support my assertion that legal education must address the substantive content and the teaching methodology issues simultaneously. My hope is that this article will serve as a way of initiating dialogue with all teachers of law and inviting them to consider whether feminist perspectives can make legal education truly transformative.