

## THE GOOD LAW TEACHER: THE PROPAGATION OF PEDAGOGICALISM IN AUSTRALIAN LEGAL EDUCATION

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### I INTRODUCTION

What makes a law teacher a *good* law teacher? The answer to that question traditionally depended upon one's preferred approach to the teaching of law. If one favoured a doctrinal approach – privileging legal doctrine by locating it at the core of the legal curriculum and by emphasising its intellectual rigour, academic value and social importance – the good law teacher was the brilliant legal specialist, the scholar with the international reputation and comprehensive knowledge of the subject matter. If one favoured a vocational approach – prioritising the teaching of legal skills and emphasising the importance of employability as an outcome of legal education – the good law teacher was the lecturer who was also a practitioner and who knew how the law 'really' worked. If one favoured a liberal approach – endorsing the liberalising of traditional legal education by emphasising individual freedom, social responsibility and informed rationality – the good law teacher was the teacher who inspired a student's interest in lifelong learning, in becoming a better citizen, and in seeking social justice. If one favoured a critical or feminist approach – undermining the status quo within the law school and within the legal system by exposing and questioning the undisclosed political positions, gender biases, cultural biases and power relations within legal education and within law – the good law teacher was the passionate critic or the charismatic rebel who inspired insubordination and subversion.

A new understanding of the good law teacher has emerged within Australian law schools in the last 15 years, which has replaced this variety and inconsistency with stability and certainty, and which has sought to quantify that which was thought to be largely unquantifiable. The good law teacher is now one who teaches in a manner consistent with the ideas and insights developed within orthodox education scholarship, and the quality of law teaching is measured in

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terms of compliance with a range of clearly defined pedagogical criteria. The promotion of this notion of good law teaching is referred to in this paper as 'pedagogicalism'.

Pedagogicalism has successfully influenced discussion about the teaching of law in most Australian law schools. Many law teachers appear to have accepted the idea that good law teaching is about facilitating student learning. Consistent with orthodox education theory, many law teachers claim to have moved away from the traditional approach to teaching involving lectures, tutorials, final examinations and little else, and to have experimented with self-directed learning, flexible delivery, computer-mediated group work and continuous assessment strategies.<sup>1</sup> Most law schools now have teaching and learning policies which require teaching practices to comply with clearly specified pedagogical criteria.

This paper seeks to determine how and why the pedagogical notion of good teaching has been propagated so successfully in Australian law schools. In doing so, it does not seek to either prove or disprove pedagogicalism's claims. Nor does it suggest that law schools and law teachers are either right or wrong to recognise orthodox education theory and its ideas about effective teaching and student learning. It is, rather, an analysis of pedagogicalism as a particular vector of power-knowledge.

Michel Foucault coined the term 'power-knowledge' to indicate the close relationship between knowledge and power.<sup>2</sup> He insisted that the production and dissemination of knowledge is always an expression of power, and that the expression of power always involves the production and dissemination of knowledge. Discourses designate the conjunction of power and knowledge: it is through discourses that the production of knowledge takes place and through which power is exercised and power relations are maintained.<sup>3</sup> Discourses seek to both inform and influence, to both educate and dominate. Discourses tell subjects about themselves and about the world; they also construct that world and determine who the subjects are. A legal education discourse such as pedagogicalism is both a form of knowledge about the teaching of law and an expression of power seeking to regulate and discipline law teachers, law students and others within a law school.

The first part of this paper is an analysis of pedagogical legal education discourse as a form of knowledge. Pedagogicalism, as a body of statements about the teaching of law, is located within certain works of legal education scholarship and law school policies. The emergence of the pedagogical notion of good teaching within the discursive field of legal education was initially the result of efforts by liberal legal scholars and the influence of a large body of orthodox

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1 Ralph Simmonds, 'Growth, Diversity and Accountability' in John Goldring, Charles Sampford, and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 63.

2 Foucault did not suggest, however, that power and knowledge are the same thing. Many believe that Foucault insisted that 'power is knowledge' or that 'knowledge is power' but, as Foucault remarked, if they were the same thing it would have been a waste of most of his scholarly life to analyse their relation. See Gavin Kendall and Gary Wickham, *Using Foucault's Methods* (1999) 51.

3 Michel Foucault, *The Will to Knowledge: The History of Sexuality 1* (1998) 101.

educational scholarship. The propagation of this notion was discouraged, however, by the reluctance of many legal scholars to identify themselves as teachers and a preference by many legal scholars to invest their time in research rather than teaching. The recent success of the discourse has been a result of – and largely limited to – its consistency with corporatist ideals, a growing expectation by law students that law teachers appear to take their teaching responsibilities seriously, university teaching and learning policies drafted in accordance with orthodox education theory and the insistence by government agencies that teaching within law schools be of a high quality.

The second part of this paper is an analysis of pedagogicalism as an expression of power within the law school. Pedagogicalism-as-power was traditionally a means by which the ‘good teacher’ was accorded status within the law school in relation to students and other academics, as well as privilege and autonomy within the law school administrative hierarchy. Today, pedagogicalism-as-power has been largely appropriated by law school and university administrators and has become one of the means by which the administrative objectives of accountability, efficiency, marketability and consistency are achieved. The increasingly compelling strategies deployed in the achievement of these objectives include the normalisation of the pedagogical notion of good teaching, the compulsory use of teaching evaluations, the attachment of particular conditions to applications by legal scholars for tenure and promotion, the promotion of teaching awards, teacher training courses, and the work by teaching and learning committees. These strategies have ensured that ‘good teaching’ is consistently defined and measurable, and that teaching which is inconsistent with orthodox education theory – no matter how rigorous or practical or inspirational – is no longer likely to be recognised as ‘good teaching’.

## II PEDAGOGICALISM AS KNOWLEDGE

### A The Nature of Pedagogicalism

Pedagogicalism-as-knowledge is the set of legal education texts produced by law schools and legal education scholars which emphasise the importance of effective teaching and student learning, and which insist that law be taught in a manner consistent with orthodox education scholarship.

Orthodox education scholarship generally defines teaching as the facilitation of learning. As Paul Ramsden told Australian law teachers,

teaching means more than instructing and performing and extends more broadly to providing a context in which students engage productively with subject matter. There is now a widespread view in academic development circles, derived directly from the student learning research, that we should concentrate on learning, on what the learner does and why the learner thinks he or she is doing it, rather than what the teacher does.<sup>4</sup>

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4 Paul Ramsden, ‘Improving the Quality of Higher Education: Lessons from Research on Student Learning and Educational Leadership’ (1995) 6 *Legal Education Review* 3, 3.

Orthodox education scholarship also emphasises the distinction between approaches to learning that was recognised by Marton and Saljo. Marton and Saljo created the distinction between ‘surface’ and ‘deep’ approaches to learning. Students who adopt a ‘surface’ approach to learning tend to learn by rote and not to question the assumptions underpinning the material, or to relate it to context. Students who adopt a ‘deep’ approach to learning tend to examine arguments critically, to question the assumptions on which they are based, and to relate them to previous knowledge and understanding.<sup>5</sup> It is the role of the teacher to inculcate in students a ‘deep’ approach to learning.

The distinction between ‘surface’ and ‘deep’ approaches to learning is one which has been accepted by a number of Australian legal education scholars. John Goldring, for example, criticised traditional legal education as little more than training to pass final exams, and complained that law students are encouraged to take a superficial approach to learning rather than to understand the subject matter: ‘If law students developed a deep approach to learning, it was in spite of, rather than because of, their education.’<sup>6</sup> Work by LeBrun, Johnstone, Marchetti and others also refers to the distinction.<sup>7</sup>

Australian legal education scholarship has also embraced the orthodox notion of ‘effective teaching’. The Johnstone Report summarised the various aspects of effective teaching which have been promulgated by pedagogical legal education scholarship in recent years. The effective teacher is enthusiastic about sharing a love of the law subject with others; motivates students to feel the need to learn the law subject material; makes the material of the law subject genuinely interesting; shows concern and respect for students, recognising the diversity within the student body; is available to students; makes it clear to students what they are expected to be able to do; provides clear explanations, using a variety of appropriate techniques; focuses on key concepts and students’ misunderstanding of them, rather than on trying to cover a lot of ground; uses a variety of valid

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5 Ference Marton and Roger Saljo, ‘On Qualitative Differences in Learning–2: Outcomes as a Function of the Learner’s Conception of the Risk’ (1976) 46 *British Journal of Educational Psychology* 115.

6 John Goldring, ‘Coping with the Virtual Campus: Some Hints and Opportunities for Legal Education’ in John Goldring, Charles Sampford, and Ralph Simmonds (eds), *New Foundations in Legal Education* (1998) 87.

7 See, eg, Judy Allen and Paula Baron, ‘Of Caterpillars and Butterflies: The Introduction of Metamorphosis at the UWA Law School’ (2001) 35 *The Law Teacher* 346; Carol Bond and Marlene LeBrun, ‘Promoting Learning in Law’ (1996) 7 *Legal Education Review* 1; Tracey Booth, ‘Learning Environments, Economic Rationalism and Criminal Law: Towards Quality Teaching and Learning Outcomes’ (2001) 3 *The University of Technology Sydney Law Review* 17; Beth Campbell, ‘Professional Legal Education, Deep Learning and Dispute Resolution’ (1997) 15 *The Journal of Professional Legal Education* 1; Penny Crofts, ‘Crossing the Theory/Practice Divide: Community-Based Problem Solving’ (2001) 3 *The University of Technology Sydney Law Review* 40; John Goldring, ‘Thinking About First Year Law Teaching’ (1995) 2 *Canberra Law Review* 137; Marlene LeBrun, ‘Curriculum Planning and Development in Law: Why Is Innovation So Rare?’ (1991) 9 *Law in Context* 27; Marlene LeBrun and Richard Johnstone, *The Quiet (R)Evolution: Improving Student Learning in Law* (1994); Elena Marchetti, ‘The Influence of Assessment in a Law Program on the Adoption of a Deep Approach to Learning’ (1997) 15 *The Journal of Professional Legal Education* 203; Stephen Nathanson, ‘Changing Culture to Teach Problem-Solving Skills’ (1996) 14 *The Journal of Professional Legal Education* 143; Nicolette Rogers, ‘Improving the Quality of Learning in Law Schools by Improving Student Assessment’ (1993) 4 *Legal Education Review* 113.

methods for assessment that focus on the key areas that students need to master; encourages students to engage deeply with the task; avoids forcing students to rote learn or merely reproduce detail, and avoids unnecessary anxiety; enables students to work collaboratively; engages in a dialogue with the learner and seeks evidence of student understanding and misunderstanding; gives timely and high quality feedback on student work; engages with students at their level of understanding; ensures that student workload is appropriate to allow students to explore the main ideas in the law subject; encourages student independence; uses methods that demand student activity, problem solving and cooperative learning; is aware that good learning and teaching are dependent on the context within which learning is to take place; constantly monitors what students are experiencing in their learning situations; and tries to find out about the effects of teaching on student learning, modifying their approach to teaching in the light of the evidence collected.<sup>8</sup> Today, the ‘good teacher’ is one who endeavours to ensure that their teaching is consistent with most or all of these characteristics, and these characteristics inform the criteria by which the teaching performances of many law teachers are now judged.

### **B The Sources of Pedagogicalism**

Australian pedagogical texts include those works of legal education scholarship primarily concerned with the description and analysis of teaching and assessment methods. Some of these texts simply describe the authors’ own

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8 Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A Report Commissioned by the Australian Universities Teaching Committee* (2003) 278–81 (‘The Johnstone Report’).

experiences in teaching or designing a particular course,<sup>9</sup> some describe alternative approaches to teaching such as problem-based learning<sup>10</sup> and some suggest ways in which a particular skill or subject matter – such as dispute

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- 9 See, eg. Allen and Baron, above n 7; Hilary Astor and Christine Chinkin, 'Teaching Dispute Resolution: A Reflection and Analysis' (1990) 2 *Legal Education Review* 1; Bruce Bott, 'Law Library Research Skills Instruction for Undergraduates at Bond University: The Development of a Program' (1994) 5 *Legal Education Review* 117; Des Butler and Leanne Wiseman, 'Viva the Viva: Oral Examinations in Contract Law' (1993) 4 *Legal Education Review* 331; B Dick et al, 'A Case Study of the 'Offices' Project (Teacher-Less, Cooperative Learning Groups) at Griffith University: Implementing Educational Theory' (1993) 4 *Legal Education Review* 273; Bruce Dyer et al, 'Creating a Corporations Law Case Study' (1997) 8 *Legal Education Review* 161; Lee Godden and Pat Dale, 'Interdisciplinary Teaching in Law and Environmental Science: Jurisprudence and Environment' (2000) 11 *Legal Education Review* 239; Mark Israel, 'Teaching Criminology through Interview-Based Assignments' (1997) 8 *Legal Education Review* 141; Penny Jones, 'Teaching Legal Research Skills at the University of Western Australia' (2002) 9 *Murdoch University Electronic Journal of Law* 1; Kathy Laster, 'Design-a-Court: An Introductory Socio-Legal Assessment Exercise' (1998) 9 *Legal Education Review* 193; Marlene LeBrun, 'Law at Griffith University: The First Year of Study' (1992) 1 *Griffith Law Review* 15; Marlene LeBrun et al, 'Producing Multi-Media Teaching/Learning Materials for Teaching Legal Ethics and Professional Responsibility in Australian Law Schools: And the Lesson Is ... Soldier On' (2001) 12 *Legal Education Review* 157; Jacqueline D Lipton, 'Role Playing Exercises in First Year Legal Process Classes' (1998) 16 *The Journal of Professional Legal Education* 97; Peter Macfarlane and Gordon Joughin, 'An Integrated Approach to Teaching and Learning Law: The Use of Student Peer Mentor Groups to Improve the Quality of Student Learning in Contracts' (1994) 5 *Legal Education Review* 153; Timothy McCormack and Gerry Simpson, 'Simulating Multilateral Treaty Making in the Teaching of International Law' (1999) 10 *Legal Education Review* 61; Helen Saenger et al, 'Evaluation of an Innovative Model for Teaching an LLB Program' (1998) 9 *Legal Education Review* 59; Esther Stern, 'Analytical Versus Integrated: Two Approaches to Organising Lecturing Material in the Context of Interdisciplinary Law-Related Teaching' (1998) 116 *The Journal of Professional Legal Education* 123; Maria Tzannes and Phillip King, 'Meeting Procedure: A Vehicle to Better Teach Corporations Law and a Professional Legal Skill' (1997) 15 *The Journal of Professional Legal Education* 123.
- 10 See, eg. Audrey Blunden, 'Problem-Based Learning and Its Application to In-House Law Firm Training' (1990) 8 *The Journal of Professional Legal Education* 115; Bruce Dyer, 'Making Company Law More Practical and More Theoretical: Curriculum Design' (1995) 5 *Australian Journal of Corporate Law* 281; Julie Macfarlane and John Manwaring, 'Using Problem-Based Learning to Teach First Year Contracts' (1998) 16 *The Journal of Professional Legal Education* 271; Jos H C Moust and Herman J P Nuy, 'Preparing Teachers for a Problem-Based, Student-Centred Law Course' (1987) 5 *The Journal of Professional Legal Education* 16; Vijaya Nagarajan, 'Designing Learning Strategies for Competition Law – Finding a Place for Context and Problem Based Learning' (2002) 13 *Legal Education Review* 1; Stephen Nathanson, 'Creating Problems for Law Students: The Key to Teaching Legal Problem-Solving?' (1992) 10 *The Journal of Professional Legal Education* 1; Herman J P Nuy and Jos H C Moust, 'Students and Problem-Based Learning: How Well Do They Fit In?' (1990) 8 *The Journal of Professional Legal Education* 97; Don Peters, 'Using Simulation Approaches in Large Enrolment Law Classes' (1988) 6 *The Journal of Professional Legal Education* 36; Keith Winsor, 'Toe in the Bathwater: Testing the Temperature with Problem-Based Learning' (1989) 7 *The Journal of Professional Legal Education* 1.

resolution,<sup>11</sup> legal research,<sup>12</sup> legal reasoning,<sup>13</sup> legal writing,<sup>14</sup> or legal literacy<sup>15</sup> – can be taught. Other texts focus upon the analysis of a particular aspect of the learning process, such as language barriers,<sup>16</sup> motivation,<sup>17</sup> the use of

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- 11 See, eg, Campbell, above n 7; Jennifer David, 'Training Issues in Dispute Resolution: Three Perspectives, Part 1: Integrating Alternative Dispute Resolution (ADR) in Law Schools' (1991) 2 *Australian Dispute Resolution Journal* 5; J E Effron, 'Training Issues in Dispute Resolution: Three Perspectives, Part 3: Breaking Adjudication's Monopoly: Alternatives to Litigation Come to Law School' (1991) 2 *Australian Dispute Resolution Journal* 21; Kathy Mack, 'Integrating Procedure, ADR and Skills: New Teaching and Learning for New Dispute Resolution Processes' (1998) 9 *Legal Education Review* 83; Margot Taylor, 'Teaching Negotiation: Changing the Focus from Strategy to Substance' (1998) 16 *The Journal of Professional Legal Education* 23.
  - 12 See, eg, Terry Hutchinson, 'Taking up the Discourse: Theory or Practice' (1995) *Queensland University of Technology Law Journal* 33; Terry Hutchinson and Fiona Martin, 'Multi-Modal Delivery Approaches in Teaching Postgraduate Legal Research Courses' (1997) 15 *The Journal of Professional Legal Education* 137.
  - 13 See, eg, Duncan Bentley, 'Using Structures to Teach Legal Reasoning' (1994) 5 *Legal Education Review* 129; John Wade, 'Meet MIRAT: Legal Reasoning Fragmented into Learnable Chunks' (1990-91) 2 *Legal Education Review* 283.
  - 14 See, eg, Annette Hasche, 'Teaching Writing in Law: A Model to Improve Student Learning' (1992) 3 *Legal Education Review* 267.
  - 15 See, eg, Dean Bell and Penelope Pether, 'Re/Writing Skills Training in Law Schools: Legal Literacy Revisited' (1998) 9 *Legal Education Review* 113; Paul Havemann and Jacquelin Mackinnon, 'Synergistic Literacies: Fostering Critical and Technological Literacies in Teaching a Legal Research Methods Course' (2002) 12 *Legal Education Review* 65; Barbara Kamler and Rod Maclean, "'You Can't Just Go to Court and Move Your Body": First-Year Students Learn to Write and Speak the Law' (1997) *Law Text Culture* 176; Lyndal Taylor et al, 'Reading Is Critical' (2001) 3 *The University of Technology Sydney Law Review* 126.
  - 16 See, eg, Alison Marriott and James O'Connell, 'A Language Teaching Perspective on Professional Legal Education' (1995) 13 *The Journal of Professional Legal Education* 147.
  - 17 See, eg, Paula Baron, 'Demand and Desire: A Psychoanalytic Contribution to Understanding the Problems of Student Motivation' (2002) 11 *Griffith Law Review* 332; Helen Brown, 'The Cult of Individualism in Law School' (2000) 25 *Alternative Law Journal* 279.

technology,<sup>18</sup> assessment,<sup>19</sup> peer mentoring<sup>20</sup> or thesis supervision.<sup>21</sup> Description and analysis of distance learning, online learning and flexible delivery are also common topics.<sup>22</sup> Many pedagogical texts propose ways in which the process of teaching within the law school might generally be improved; some of these texts

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- 18 See, eg, Maree Chetwin and Cally Edgar, 'Legal Education in the Technology Revolution: The Evolutionary Nature of Computer-Assisted Learning' (1999) 10 *Legal Education Review* 163; Peter Egri, 'Computer Assisted Learning, Legal Expert Systems and Practical Legal Training' (1990) 8 *The Journal of Professional Legal Education* 1; Fokke Fernhout et al, 'Obligatio: A Client Interviewing Simulation Computer Program' (1987) 5 *The Journal of Professional Legal Education* 161; Lee Godden et al, 'The "Offices" Project at Griffith University Law School and the Use of Video as a Tool for Evaluation' (1994) 12 *Journal of Professional Legal Education* 149; Mary Holmes and Judith Maxwell, 'The Use of Role-Play and Video in Teaching Communication Skills to Law Students' (1987) 5 *The Journal of Professional Legal Education* 151; Marlene LeBrun, 'Learning Interviewing with Video: Creating Multi-Media Packages for Skills Teaching' (1998) 16 *The Journal of Professional Legal Education* 187; Marlene LeBrun, 'Gaming Contract Law: Creating Pleasurable Ways to Learn the Law of Contract' (2003) 10 *Murdoch University Electronic Journal of Law* 1; Heather Park and Myles McGregor-Lowndes, 'A Computer Aided Strategy for Teaching Corporate Law' (1992) 2 *Australian Journal of Corporate Law* 128; Sarah Nield, 'Computer Assisted Learning Coming of Age' (1997) 15 *Journal of Professional Legal Education* 31; Deborah Richards and Joanne Stagg-Taylor, 'Preparing Advocates for the Courtroom of the Future' (2003) 92 *Commonwealth Legal Education* 18; Ian Wilson, 'Computer Assisted Legal Instruction and Continuing Legal Education: A Conspectus' (1989) 7 *The Journal of Professional Legal Education* 170.
- 19 See, eg, Jeffrey Barnes, 'The Functions of Assessment: A Re-Examination' (1990-91) 2 *Legal Education Review* 177; Andrew Finlay, 'The Construction of Tests and Their Application in Practical Legal Training' (1993) 11 *The Journal of Professional Legal Education* 173; John Goldring, 'Student Assessment and "Quality" in Legal Education' (1997) 1 *Macarthur Law Review* 41; Richard Johnstone, 'Improving Criteria and Feedback in Student Assessment in Law' (1996) 7 *Legal Education Review* 267; Marchetti, above n 7; Shirley Rawson and Alan Tyree, 'Self and Peer Assessment in Legal Education' (1989) 1 *Legal Education Review* 135; Rogers, above n 7.
- 20 See, eg, Frances McGlone, 'Student Peer Mentors: A Teaching and Learning Strategy Designed to Promote Cooperative Approaches to Learning and the Development of Lifelong Learning Skills' (1996) *Queensland University of Technology Law Journal* 201; Ben White, 'The Student Peer Mentor Program in Its Trial Year: A Mentor's Perspective' (1996) *Queensland University of Technology Law Journal* 221.
- 21 Desmond Manderson, 'FAQ: Initial Questions About Thesis Supervision in Law' (1997) 8 *Legal Education Review* 121.
- 22 See, eg, John Goldring, 'Distance Teaching in Law: Possibilities for Commonwealth Cooperation' (1990) 2 *Legal Education Review* 83; John Goldring, 'Coping with the Virtual Campus: Some Hints and Opportunities for Legal Education' (1995) 6 *Legal Education Review* 91; Dan Hunter, 'Legal Teaching and Learning Over the Web' (2001) *The University Of Technology Sydney Law Review* 124; Richard Johnstone and Gordon Joughin, *Designing Print Materials for Flexible Teaching and Learning in Law* (1997); Lawrence McNamara, 'Lecturing (and Not Lecturing) Using the Web: Developing a Teaching Strategy for Web-Based Lectures (Flexible Delivery in a First Year Law Subject, Part I)' (2000) 11 *Legal Education Review* 149; Lawrence McNamara, 'Why Teaching Matters and Technology Doesn't: An Evaluation and Review of Web-Based Lectures (Flexible Delivery in a First Year Law Subject, Part II)' (2000) 11 *Legal Education Review* 175; Lyndal Taylor, "'You Can Lead a Horse to Water": Introducing On-Line Education' (2001) 3 *The University of Technology Sydney Law Review* 141.



are by legal scholars,<sup>23</sup> while others are by educational scholars who have been invited to contribute to the legal education debate.<sup>24</sup>

Pedagogical texts also include many of the documents produced by law schools themselves. There is of course the growing number of school and university teaching and learning policies informed by orthodox education theory, but references to teaching and learning quality can also be found within law school promotional texts. The websites of 14 of the 28 Australian law schools include descriptions of the process of teaching and learning and of the benefits that students will enjoy while studying.<sup>25</sup> Some schools, such as the University of Canberra Law School<sup>26</sup> and the Victoria University Law School,<sup>27</sup> emphasise the quality of their teaching facilities. Bond University describes itself as ‘an innovator in legal education in Australia’ and claims that

[a]fter only ten years, the School is renowned for its teaching. Students from all over the world study together in small classes where they receive individual attention from a caring staff committed to helping each student fulfil their own potential.<sup>28</sup>

Deakin University School of Law emphasises the quality of its distance education program, including the extensive personal contact with lecturers.<sup>29</sup> At

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23 See, eg, Ann Black, ‘Student Perceptions of Teaching Methods: An Analysis of How Perceptions Can Impact Upon the Learning Process’ (1996) 14 *The Journal of Professional Legal Education* 203; Bond and LeBrun, above n 7; Ross Buckley, ‘Ten Ways to Enliven Legal Education’ (1993) *Queensland University of Technology Law Journal* 131; Sharon Hunter-Taylor, ‘Professional Legal Education: Pedagogical and Strategic Issues’ (2001) 3 *University of Technology Sydney Law Review* 59; Richard Johnstone, ‘Rethinking the Teaching of Law’ (1992) 3 *Legal Education Review* 17; Gordon Joughin and David Gardiner, *A Framework for Teaching and Learning Law* (1996); LeBrun, above n 7; LeBrun and Johnstone, above n 7; Marlene LeBrun and Carol Bond, ‘Law Teaching Reconceptualised’ (1995) 6 *Legal Education Review* 23; Andrea Rhodes-Little, ‘Life and Death and Law and Art: Why Teaching Is More Important Than Knowledge’ (2000) 26 *Alternative Law Journal* 282; Nadja Spegel, ‘Revamping the Law Tutorial’ (1997) 1 *Southern Cross University Law Review* 208; Lyndal Taylor, ‘Legal Education: A Discipline?’ (2002) 1 *Journal of Commonwealth Law and Legal Education* 127.

24 See, eg, John Biggs, ‘Teaching for Better Learning’ (1990-91) 2 *Legal Education Review* 133; Paul Ramsden, ‘Evaluating and Improving Teaching in Higher Education’ (1990-91) 2 *Legal Education Review* 149; Ramsden, above n 4.

25 Based on a review of the 28 Australian law school websites conducted in 2003.

26 University of Canberra, *School of Law Homepage* <<http://www.dmt.canberra.edu.au/law/default.htm>> at 15 May 2003: ‘[the University of Canberra Law School] boasts one of the best facilities of any law school in Australia. These include: state-of-the-art lecture theatres, excellent seminar rooms, a specialised Moot Court with full taping and viewing facilities, superb student computer laboratory, and ample space for student activities.’

27 Victoria University Law School promotes ‘its modern lecture theatres which are equipped to high standards, with all being able to host multi-media presentations. It also has a number of computer laboratories available for teaching purposes and a Moot Court with videotaping capacity for teaching purposes.’ Victoria University, *School of Law Homepage* <<http://www.business.vu.edu.au/Schools/Law/>> at 2 June 2004.

28 Bond University, *School of Law Homepage* <<http://www.bond.edu.au/law/index.htm>> at 14 May 2003.

29 Professor Mirko Bagaric, *Deakin University School of Law: About the School* <<http://www.law.deakin.edu.au/about/index.htm>> at 2 June 2004: ‘for those who might be contemplating studying by distance education, we have devoted much time, money and energy to ensuring you have the best possible legal education: excellent materials delivered by the best technology available and as much personal contact with lecturers as possible’.

the University of Wollongong Faculty of Law, students are encouraged to become 'self-directed learners'.<sup>30</sup>

### C The Conditions of Possibility

Why does pedagogicalism appear to have been propagated so successfully within the discursive field of legal education? This propagation was initially a consequence of the efforts by some legal scholars to encourage an approach to the teaching of law, more liberal than the doctrinal and vocational approaches which had previously dominated Australian legal education. According to liberal ideology, education is more than mere indoctrination or training for employment, and consequently the teaching of law must involve more than the transmission of legal doctrine or the inculcation of legal skills. Rather, legal education must include the study of legal philosophy and law in context, liberal values must infuse legal education practice, and the law student must learn to think rationally and behave responsibly as a practitioner and as a member of a community. The liberal emphasis upon the individuality of the student, together with the liberal willingness to consider insights and perspectives from other academic disciplines, led to an increasing awareness of the existence and availability of the large body of scholarship produced within the discipline of education concerned with the theory and practice of teaching.<sup>31</sup> Liberal legal scholars began to write about, and to describe to each other, the ways in which orthodox education theory might be incorporated into legal teaching practice.

The efforts of liberal law teachers, however, were not always successful, and the influence of orthodox education scholarship was initially limited. The pedagogical notion of good teaching was resisted by the conservative majority of Australian legal scholars who had for years refused to allow themselves to be categorised as teachers, and who preferred instead to focus primarily upon their role as researchers and scholars. As Marlene LeBrun notes, '[f]ew legal academics describe themselves first and foremost as "teachers"'. Perhaps this is because "lecturer" or "professor" carries greater status.<sup>32</sup> Most legal scholars preferred to invest less energy in their teaching practice than in their research.

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30 University of Wollongong, *Faculty of Law Homepage* <<http://www.uow.edu.au/law/intro.html>> at 2 June 2004: 'The undergraduate law degree courses leading to the LLB and the sequence of subjects in Legal Studies seek to develop the capacity of students to learn on their own. This is consistent with the University's emphasis on teaching as the creation of an environment which assists learning. Students who study law at Wollongong will learn law, rather than be taught law. This may not always be easy - nor may it be what students expect.'

31 Law was not the only discipline within the university to be influenced by orthodox education scholarship. Paul Ramsden, above n 4, described how '... [t]he ideas of a previously little-known group of academics from Britain and Sweden have become accepted into the discourse of quality in higher education. Powerful people and statutory bodies now use phrases from what used to be a comfortable area of educational research as part of their *lingua franca*': at 4.

32 Bond and LeBrun, above n 7, 31. See also H Stanton, 'Why Do Academics Avoid Knowledge About Teaching?' (1987) 11 *University Teacher* 1; John Mitchell, 'Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education' (1989) 39 *Journal of Legal Education* 275.

Fiona Cownie has observed that in this respect, legal scholars do not appear to behave differently to their colleagues in other disciplines:

Anecdotal evidence rather than pedagogical theory often plays a large part in the construction of lectures and tutorials; lecturers turn to their own experience as undergraduates to guide them in designing lectures; and little thought is given to any but the most basic of the pedagogic aspects of teaching.<sup>33</sup>

There was a common perception that the academic reputation of a legal scholar was based primarily upon the quality and extent of their contribution to, and promotion of disciplinary knowledge.<sup>34</sup> Leading legal scholars usually achieved pre-eminence because of their reputation for research and scholarship, and they were not perceived as regarding teaching as a serious intellectual task. Further, teaching was regarded as a private activity; competence as a teacher was not easy to assess, especially in contrast with research. Legal scholars were expected by administrators to teach competently – with ‘competence’ defined in terms of the passing of appropriate numbers of students with a minimum number of complaints – and to direct most of their energies towards research.

In recent years, however, the propagation of pedagogicalism appears to have been much more widespread and much more successful. The Johnstone Report concluded that,

it no longer seems that the dominant approach to teaching in Australian law schools is one based on the assumption that teaching is about transmitting knowledge from the lecturer to students, so that student learning simply involves acquiring new knowledge, and is a process separate from teaching. Rather ... law teachers are increasingly accepting that teaching is concerned with making it possible for students to learn subject matter, and is a complex process of facilitating changes in student understanding.<sup>35</sup>

The recent success of pedagogicalism appears to have been largely contingent upon – and limited to – the consistency of the pedagogical notion of good teaching with the corporatist objectives of efficiency, accountability and marketability. For law school and university decision makers seeking to manage and monitor teaching practices, pedagogicalism and orthodox education theory provide a consistent definition of good teaching and offer a detailed set of criteria by which teaching practices might be judged and compared. University and law school administrators are given a relatively clear and consistent set of benchmarks with which law teachers can be compelled to comply. Administrators have recognised, and become concerned to regulate, the connections between the manner in which a law teacher approaches the teaching of law and the attraction of, and satisfaction experienced by, law students as customers. University teaching and learning policies informed by orthodox education theory are increasingly imposed upon law schools and law teachers. The use and enforcement of these university policies are further encouraged by calls from government and private funding bodies for greater levels of

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33 Fiona Cownie, ‘Searching for Theory in Teaching Law’ in Fiona Cownie (ed), *The Law School – Global Issues, Local Questions* (1999) 44.

34 *Ibid* 41.

35 Johnstone and Vignaendra, above n 8, 286.

accountability. These bodies seek to ensure that universities are providing a 'quality service' to their customers; they therefore scrutinise teaching methods within universities and insist that time and money be invested in their improvement. Orthodox education theory provides a means by which such improvement might be measured and proven.<sup>36</sup>

It is not only pedagogicalism's consistency and measurability that accord with corporatist objectives; there are specific pedagogical innovations that appeal to the desire to minimise cost and maximise efficiency. David Spencer and Geoff Monahan, for example, have explored the notion that minimising, and more efficiently using resources can achieve quality pre-admission legal skills and vocational training. They note:

It is possible to produce high quality law graduates using alternative methods of educational delivery. Potentially, this learning can be achieved in the same time, or even in less time, than traditional face to face methods, and with arguably fewer resources than are currently being expended.<sup>37</sup>

Lawrence McNamara has argued that the adoption by many schools of pedagogical innovations such as 'flexible delivery' is driven by the need of universities and law schools to reduce the cost of running programs and projects and to capture a greater share of the education market.<sup>38</sup> Similarly, in her paper, 'Professional Legal Education: Pedagogical and Strategic Issues', Sharon Hunter-Taylor argued that the pedagogical concept of 'self-directed learning' has been used by those with a corporatist agenda to justify reductions in staff to student ratios. Quoting Taylor<sup>39</sup> and Foley,<sup>40</sup> she argued that,

the basis for adopting teaching and learning strategies that promote self-directed or autonomous learning is 'cost cutting reflective of political struggles rather than a positive choice for change in the interests of the learner and professional education.' If self-directed learning is interpreted as a 'go away and get on with it' strategy that enables greater numbers of students per teacher without stretching and challenging students' conceptions and understandings, the quality of learning will be reduced.<sup>41</sup>

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36 The Australian Universities Teaching Committee, for example, awards various grants and fellowships to individuals and groups practising and promoting pedagogicalism. To successfully obtain a teaching grant, applicants must meet a number of criteria: they must provide details about the aims and outcomes of their projects, locate the goal of the project in current work and applications in the field of inquiry, provide information about the budget and about project time-lines and convince the grant committee that their project will produce long term improvements. Good teaching is encouraged, but it must be quantified. See Marlene LeBrun and Lawry Scull, 'Enhancing Student Learning of Law by Involving Students (and Colleagues) in Developing Multi-Media Teaching and Learning Materials' (2000) 34 *Law Teacher* 40, 40.

37 David Spencer and Geoff Monahan, 'Alternative Learning Strategies for Legal Skills and Professional Training' (2001) 3 *The University of Technology Sydney Law Review* 210, 210–11. See also Tony Tarr, 'The Funding and Sponsorship of Legal Education' (1994) 12 *The Journal of Professional Legal Education* 17; Maria Tzannes, 'Quality Assurance in Practical and Clinical Legal Education: A Brave New World' (1994) 12 *The Journal of Professional Legal Education* 57.

38 McNamara, 'Lecturing (and Not Lecturing) Using the Web: Developing a Teaching Strategy for Web-Based Lectures (Flexible Delivery in a First Year Law Subject, Part I)', above n 22, 150.

39 Imogen Taylor, *Developing Learning in Professional Education, Partnerships for Practice* (1997) 9.

40 Griff Foley (ed), *Understanding Adult Education and Training* (2<sup>nd</sup> ed, 2000) 47.

41 Hunter-Taylor, above n 23, 68.

The propagation of pedagogicalism-as-knowledge has also been facilitated by the increasing expectation amongst many law students that their legal education be of a standard and quality commensurate with the high fees which they are paying. Pedagogical criteria, again, offer students a means by which the 'quality' of legal education, the effort which law teachers expend upon their teaching and the extent to which they appear to take their teaching responsibilities seriously can be measured and compared. The expectations of students now drive pedagogical innovation and classroom practices, and these expectations are gauged and measured using questionnaires and surveys drafted using pedagogical criteria. The expectations of law students are particularly influential in the propagation of pedagogicalism: the Johnstone Report noted that some new law schools recognise that 'the way that we attract students here, and more importantly, the way we keep them, is to emphasise our teaching'.<sup>42</sup> Some schools deliberately seek to employ staff specifically for their teaching ability; ability which is both measured and promoted in terms of compliance with pedagogical criteria.<sup>43</sup>

These historical, social and political contingencies – the efforts by liberal legal scholars, the availability of a large body of orthodox education scholarship, the consistency of pedagogicalism with the corporatist ideals of accountability, efficiency and quality, and the rising expectations of law students – have contributed to the emergence and recent success of pedagogicalism within Australian law schools. They are not, however, the only determinants of pedagogicalism's effectiveness. That effectiveness can also be understood as a consequence of the internal features and characteristics of pedagogicalism as an expression of power.

### III PEDAGOGICALISM AS POWER

The notion of power adopted in this paper is a Foucauldian one. The first point to note about Foucault's notion of power is that it is *non-judgemental*. The word 'power' often has a negative connotation: it is something possessed and used by the powerful at the expense of the powerless, it is used to repress and control, and it distorts truth and knowledge. According to Foucault, however, power is not solely negative; it is also productive. Power produces meaning, it produces subjects and what they do, it produces how subjects see themselves and the world, and it produces resistance to itself. Power leads to dominance and

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42 Johnstone and Vignaendra, above n 8, 291.

43 Ibid. Students' expectations regarding quality of teaching, however, may not be as influential as their expectations regarding employability. According to Vivienne Brand, 'students show less regard for good teaching than for employment prospects; there is evidence that prospective students continue to favour the established law schools, despite their less impressive performance in reforming their curricula': see Vivienne Brand, 'Decline in the Reform of Law Teaching? The Impact of Policy Reforms in Tertiary Education' (1999) 10 *Legal Education Review* 109, 124. Brand quoted the authors of the *Good Universities Guide* as suggesting that 'law makes a good case study for anyone wanting to be gloomy about prospects for educational reform. Legal academics have difficulty in producing it and prospective students don't demand it': Dean Ashenden and Sandra Milligan, 'Law Still in Demand', *The Australian* (Sydney), 27 January 1999, 30.

hegemony, but power also undermines dominance and hegemony.<sup>44</sup> Legal education texts, including the books and articles written by legal scholars, the papers that they present, law school websites and course descriptions, and even classroom and meeting room dialogues, are all expressions of power seeking to achieve particular objectives. This need not be viewed as a controversial assertion if it is understood that designating something as an expression or as a strategy of power is not a criticism. Power exists and is exercised within the law school but it is not necessarily exercised repressively or unjustly. Power is what keeps the engine of legal education working.

The second point to note about the Foucauldian notion of power is that it is *non-subjective*. A discourse may privilege or favour certain subjects,<sup>45</sup> and those subjects may appear to cooperate willingly in the achievement of the discourse's objectives, but it is not an exercise of power *by* those subjects. Subjects are not the initiators of discourse; they are simultaneously the products of discourse and the means by which discourses are propagated. According to Foucault, the notion of a subject who exists prior to language and is the origin of all meaning is an illusion.<sup>46</sup> Pedagogicalism, then, is an exercise of power which *favours* both good teachers and corporatist administrators, but it is not a deliberate machination *by* good teachers or corporatist administrators.

The following analysis of pedagogicalism-as-power is conducted in four steps. The first step is the identification of the differentiations established by pedagogicalism which create the space within which power is exercised. The

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44 Michel Foucault, 'Truth and Power' in James Faubion (ed), *Power: Essential Works of Foucault 1954-1984* (2002) vol 3, 120:

But it seems to me now that the notion of repression is quite inadequate for capturing what is precisely the productive aspect of power. In defining the effects of power as repression, one adopts a purely juridical conception of such power; one identifies power with a law which says no – power is taken, above all, as carrying the force of a prohibition. Now I believe that this is a wholly negative, narrow, skeletal conception of power, one which has been curiously widespread. If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network which runs through the whole social body, much more than as a negative instance whose function is repression.

See also Michel Foucault, *Discipline and Punish: The Birth of the Prison* (1991) 194:

We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production.

45 The word 'subject' as used by Foucault has two senses: people are both subjects (self-conscious beings) but they are also subjected (power acts produce subjection). See Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994) 29.

46 Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (1973) 172:

If there is one approach that I do reject [it is the one] which gives absolute priority to the observing subject, which attributes a constituent role to an act, which places its own point of view at the origin of all historicity – which, in short, leads to a transcendental consciousness. It seems to me that the historical analysis of ... discourse, in the last resort, be subject, not to a theory of the knowing subject, but rather to a theory of discursive practice.

second step is the identification of the objectives pursued by pedagogicalism once power relations are brought into existence. The third step is the identification of the strategies employed by pedagogicalism in the achievement of its objectives.<sup>47</sup> The fourth and final step is the identification of the various forms of resistance, which inevitably arise as a result of the exercise of pedagogicalism-as-power.

### A Differentiations

Pedagogicalism creates a distinction between *good teaching* and *poor teaching*. Certain teaching practices are good because they qualify as ‘effective’, they focus upon the perspective and wellbeing of the student, and they facilitate learning. Other teaching practices – usually those practices that are not informed by, or that are inconsistent with, orthodox education theory – are poor because they do not facilitate learning. For example, teaching practices adopted on the assumption that the teacher’s role is to transmit knowledge to passive learners are poor. Teaching practices which are stimulating and which encourage self directed learning are good. There are as many possible approaches to the teaching of law as there are teachers; pedagogicalism insists that there are correct ways to teach, and incorrect ways to teach, and categorises law school teaching practices accordingly.

This leads to pedagogicalism’s second distinction, that between *good teachers* and *poor teachers*. The definition of the good teacher is no longer to be left to individual preference; there is now a correct definition. Those teachers who incorporate orthodox education theory into their teaching philosophy and teaching practice, who focus upon facilitating good learning rather than poor learning, and who appear to care as much about the welfare of their students as they do about legal doctrine, legal theory or the legal profession are good teachers, and are superior to those who are not. For example, Paul Ramsden, in his paper ‘Improving the Quality of Higher Education’, distinguished between ‘novice’ teachers and ‘expert’ teachers:<sup>48</sup> the novice, who merely seeks to

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47 See Michel Foucault, ‘The Subject and Power’ in James D Faubion (ed), *Power: Essential Works of Foucault 1954 – 1984* (2002).

48 Ramsden, above n 4, 5–6:

For novice teachers, the immediate reality of class management, lecture notes, teaching materials, and numbers of students looms large. They want to do what I did when I gave my first lecture – to fit into the existing environment. How did my predecessor teach this class? How can I do the same? They see teaching primarily as telling or transmitting knowledge, and organising it so that it can be efficiently transferred from teacher to learner. Events in the classroom are interpreted from the teacher’s point of view alone, and their implications for students’ learning are rarely perceived. Novices typically believe that reflection on the effects of teaching on student learning is ‘only theory’: they sharply distinguish educational theory from ‘reality’. The expert differs not only in terms of strategies and the effectiveness of his or her students’ learning, but also in terms of conceptions and intentions. Naturally the expert teacher often does the things that a novice does. But something like class management, for example, does not usually occupy the foreground of his or her thinking. The expert thinks about teaching as interacting with students and monitoring their learning. This may involve some presentation of information, but that is only a step on the way; it is not what an expert thinks that teaching is. He or she intends to make the educational environment, not simply

transmit legal knowledge and is ignorant of orthodox education theory, is clearly subordinate to the expert, whose effectiveness, alertness and understanding is superior. Similarly, Marlene LeBrun has distinguished between law teachers ignorant of orthodox education theory and teaching methods, and those who have incorporated them into their teaching practice. It is very clear which approach is to be preferred.<sup>49</sup> Pedagogical texts divide the total set of academic lawyers within the law school into ‘good teachers’ and ‘poor teachers’, and privilege the former over the latter.

There is a third distinction, one which pedagogicalism did not create but which it nevertheless continues to recognise and enforce: the distinction between *teacher* and *student*. This is a distinction which has existed within the discursive field of legal education since the beginnings of the law school. The law teacher has always occupied a position of privilege in relation to the student, and while most pedagogical texts call for a greater emphasis upon the student’s learning, the teacher continues to be located within a privileged position. For all the talk of self-directed and lifelong learning, it is still the teacher who determines the content of the curriculum and who assesses the student, and the student is still expected to defer to the teacher’s authority. In maintaining a differentiation that appeals to many law teachers, pedagogicalism seeks to facilitate its propagation within the law school.

On the other hand, recent pedagogical texts have tended to erode this privilege and authority. The teacher, no longer permitted to be idiosyncratic and distinctive, is now a generic ‘facilitator of learning’, a development consistent with corporatism’s categorisation and monitoring of the teacher as service provider and student as paying customer. While the distinction between teacher and student continues to be recognised and enforced, the balance of power has shifted in favour of the student. Law school administrators often feel obliged to cater to student demands at the risk of losing customers to their competitors, and consequently put pressure upon teaching staff to ensure that these customers are satisfied. The student has acquired, at the expense of the teacher, a greater say in the organisation and delivery of law courses.

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respond to it, and sets the ground rules by making explicit what is expected from students as far as he or she is concerned, not by reference to other teachers. The expert is very alert to classroom events, and fully understands the value of reflection on practice as a way of adapting and improving.

49 LeBrun, above n 7, 34:

Some law lecturers might believe that we can describe the rules of law in a lecture to a large group of students and call the process ‘education’. Perhaps this can be done more successfully if we actually do think that law (or a subject in law) is merely a set of rules to be learned, if we ignore differences in learning styles and students’ approaches to learning (eg, deep, surface or strategic) and if we dismiss educational findings about the teaching and learning process. Interactive teaching may seem of little value, for example, to a class lead by a black-letter lawyer teaching a statutory subject. If, however, we consult the literature on education our ideas about what we do in a classroom might change. Similarly if we regard law, or a particular subject in law, differently, as a conversation within a culture for example, we might be less likely to adopt a lecture format and strict didactic approach. Rather we might highlight interactive teaching in which the teacher ‘takes part in the conversation’.



## B Objectives

What is it that pedagogicalism-as-power seeks to achieve? The primary objective of pedagogicalism, as with all discourses, is its own successful propagation. Pedagogicalism wants its proponents to inculcate within others the values and objectives of pedagogicalism, and to create new proponents and advocates. Pedagogicalism also seeks the enhancement of the status, within the law school and within the community, of the 'good teacher'. Pedagogicalism was and is an effort by some legal scholars to distinguish themselves within the law school. This is an effort directed not only towards other legal scholars but also towards the students themselves. While many legal scholars continue to accord good teaching little weight, those law teachers who acquire for themselves a reputation amongst the students as a good teacher are often held in high regard.

A third objective is the universalisation of pedagogical knowledge; like all discourses, pedagogicalism seeks to establish and enforce a regime of truth. The notion that good teaching involves the facilitation of learning, that learning is best directed by the student rather than by the teacher, and that the teacher should focus upon the welfare and experience of the student rather than on disciplinary knowledge, expectations of employers or intellectual rigour, are all subjective assertions which pedagogicalism seeks to portray as universal and necessary truths.

Finally, vocationalism seeks the transformation of all law classrooms and all law schools into venues for the practice of the pedagogical notion of good teaching. It is this objective which has facilitated pedagogicalism's recent alliance with corporatism. The detailed methodologies for the achievement of effective teaching and learning, the enhanced uniformity of approach associated with widespread acceptance of the meaning and importance of 'good teaching', and the possible cost savings associated with pedagogical innovations such as self-directed learning and online delivery, all appeal to the corporatist desire for efficiency, accountability and marketability. Of course, while pedagogicalism seeks the transformation of teaching practices within the law school, it is a limited transformation. Pedagogicalism also seeks to ensure that any change in law school practices is not *too* radical; it is concerned to maintain the primary distinctions between law school, law teacher and law student, the influence of the school over the teacher, and the authority of the teacher over the student.

## C Strategies

The strategies deployed by pedagogicalism in achieving the above objectives have changed over the years. Pedagogicalism traditionally relied upon the voluntary acceptance by legal scholars of the principles of good teaching. Pedagogicalism's principal strategies were the word of mouth transmission of these principles from teacher to student and between peers, as well as through the legal education scholarship and law school texts identified in the first part of the paper as pedagogicalism-as-knowledge. These texts and practices sought to propagate pedagogicalism, to enhance the status of the good teacher, to universalise pedagogical knowledge and to transform teaching practice.

However, in allowing legal scholars to decide for themselves whether or not to endeavour to become good teachers, pedagogicalism's efforts to propagate, enhance, universalise and transform were slow and haphazard.

More recently, pedagogicalism has allied itself with, and embraced the strategies of, corporatism, and is now more likely to rely upon the techniques of compulsion rather than desire. The techniques of compulsion are occasionally direct and explicit but they are more likely to be indirect and implicit. They are, however, no less compelling. One example of an indirect technique of compulsion is the technique of normalisation. Normalisation is the practice of ensuring that particular and subjective truths are accepted as universal and hence incontestable. Subjects accept these truths not because they are compelled but because it is normal to do so, and to fail to do so would be abnormal. Pedagogicalism-as-power has appropriated and normalised the concept of 'good teaching'. If anybody today wants to talk about such a thing they must adopt the ideas, assumptions and perspectives of pedagogicalism. Pedagogicalism's construction of good teaching has become the normal construction to the extent that it is almost impossible to conceive of good teaching in law in a way which is not consistent with orthodox education theory. Conceptions of teaching and learning which differ from orthodox education theory do of course exist. Critical pedagogy scholarship, for example, describes and advocates a socio-political approach to teaching and focuses on pedagogy as a power relation.<sup>50</sup> It emphasises 'the ways in which questions of audience, voice, power, and evaluation actively work to construct particular relations between teachers and students, institutions and society, and classrooms and communities'.<sup>51</sup> Such scholarship is, however, largely unknown within the discipline of Australian legal education, and teaching which is inconsistent with the orthodox pedagogical norm is likely to be classified as abnormal and deviant.

A more direct technique of compulsion employed by pedagogicalism is the teaching evaluation. According to the Johnstone Report:

reflecting broader university policies, themselves responses to government calls for more accountability from universities, most law schools now have policies for the student evaluation of teaching and of subjects. In some law schools, this is a voluntary process, with management only becoming aware of evaluation data when teachers apply for confirmation of appointment or a promotion. In other schools, management is informed of poor performers, and will then take action to improve the teacher's performance. Increasingly law schools are making it compulsory for teaching, and subjects, to be evaluated by students, with evaluation data going immediately to management.<sup>52</sup>

Many law teachers are obliged to procure written feedback from their students, every semester, in every law subject. Most law teachers are assessed at least annually by their supervisors on their teaching abilities as a part of an annual review, application for tenure, or promotion process. These evaluations are usually prepared and conducted in accordance with established teaching

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50 Jennifer Gore, *The Struggle for Pedagogies: Critical and Feminist Discourses as Regimes of Truth* (1993) 3.

51 Henry Giroux, *Disturbing Pleasures: Learning Popular Culture* (1994) 30.

52 Johnstone and Vignaendra, above n 8, 439.

assessment principles from the discipline of education.<sup>53</sup> The obligation upon academic lawyers to conduct regular teaching evaluations is one of the most compelling and effective strategies by which pedagogicalism-as-power seeks to achieve its objectives.

The pedagogical construction of good teaching is one of the factors taken into account in tenure and promotion applications, so that an acceptance of pedagogicalism is to a limited degree rewarded by employment. The poor or deviant teacher is less likely to achieve tenure or be promoted.<sup>54</sup> According to one law teacher quoted in the Johnstone Report, 'good teaching' is

culturally supported in the sense that at end of day, teaching is seen as an important activity – and if you are not a good teacher you don't earn the respect of your peers. Certainly you won't get promoted. You are faced with the great pain of the small classroom with a group of students who are highly vocal and with high levels of expectation as to quality teaching. There is not much social distance in that situation, and most students talk ... Most importantly, you have to be a good teacher to get promoted.<sup>55</sup>

'Excellence in teaching' awards have become increasingly common.<sup>56</sup> Part of the process of being nominated for, or applying for, such an award is the presentation by the academic of a description of their teaching, and the expectation is that such a description will be consistent with the pedagogical conception of good teaching.

Teacher training programs are another strategy deployed by pedagogicalism-as-power. Traditionally it was not necessary for academic lawyers to possess teaching qualifications before being permitted to teach law; legal qualifications were considered sufficient. While it is still possible for a person to be appointed as a law teacher without teaching qualifications, many law schools now oblige new staff to undertake teacher training courses at which these academic lawyers

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53 Richard Johnstone identified three motivations for conducting an evaluation of an academic lawyer's teaching practices. See Richard Johnstone, 'Evaluating Law Teaching: Towards the Improvement of Teaching or Performance Assessment?' (1990) 2 *Legal Education Review* 101, 102–3:

The first and most important basis is the evaluation of teaching where the individual teacher is concerned to discover areas needing improvement so that he or she can take steps to remedy weaknesses. This process, which is primarily diagnostic, is best seen as a natural part of good teaching. It is concerned with the teacher seeking information on the effects of teaching on students' learning and ways of changing teaching to improve that learning. A second basis is the assessment of teaching performance for the purposes of staff selection, confirmation of tenure and promotion. This is a function concerned with management and seeks to ascertain whether a member of staff has achieved or is maintaining a specified standard. This process is not diagnostic, but rather focuses on reward and punishments. A third basis ... is staff appraisal in which supervisors help teachers improve their performance...

Pedagogicalism is apparent in Johnstone's choice of words to describe the teaching of those teachers who pay insufficient attention to the incorporation of acceptable pedagogical practices: 'needing improvement', 'weaknesses'. Evaluation is also defended as 'a natural part of good teaching'.

54 Janice Gray, 'Teaching Excellence in the New Millenium – Interviews with Professor Michael Adams and Ms Irene Nemes' (2001) 3 *The University of Technology Sydney Law Review* 147, 147–8.

55 Johnstone and Vignaendra, above n 8, 445.

56 Teaching awards schemes were initially limited to those established and operated by individual universities, but in 1997 the Australian Universities Teaching Committee established a national award scheme with lucrative financial awards for those judged as outstanding. Gray, above n 54, 147–8.

are introduced to and strongly encouraged to embrace a pedagogical approach to teaching.<sup>57</sup>

Teaching and learning committees, often comprised of law teachers sympathetic to a pedagogical approach to legal education, draft policies and create programs to propagate the pedagogical notion of good teaching. At one Australian law school, for example, the ‘teaching interest group’

convenes from time to time, discusses issues in teaching and learning and identifies training needs. A few years ago it identified that people needed to learn to use PowerPoint, so everyone was trained in that. The group discusses things like how you use small groups in big lectures, how would you run tutorials? It also facilitates informal peer review.<sup>58</sup>

Other schools have created administrative positions such as that of Director of Teaching or Associate Dean for Teaching and Learning.<sup>59</sup> Seminars on teaching and learning, often organised by Teaching and Learning Committees or by Directors of Teaching, have become ‘a standard fixture at many law schools’,<sup>60</sup> and provide

a continuous and active focus for discussion about teaching and learning, about the philosophy of teaching, so it’s important that it’s conceived of as a rank-and-file activity. It’s not handed out from on high. It is a meeting of teachers who talk about learning and talk about teaching methods, who talk about the philosophy of teaching and share ideas about addressing problems.<sup>61</sup>

The normalisation of ‘good teaching’ and the pedagogical strategies of teaching awards and teacher training have been so successful that many law teachers now accept the dictates of pedagogicalism willingly. It is important to note, however, that the propagation of pedagogicalism has not gone unquestioned or been unopposed.

## D Resistances

Pedagogicalism has been challenged by those teachers who question the escalating levels of accountability, who resent the perceived infringements upon their academic freedom, or who simply prefer alternative approaches to teaching. Foucault insisted that every exercise of power engenders resistance.<sup>62</sup>

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57 At some law schools, staff are also encouraged to attend Australian Law Teachers Association (‘ALTA’) conferences and workshops. See Johnstone and Vignaendra, above n 8, 440 (citing one of their interviewees):

In my view the best resource for improving teaching is the ALTA Law Teachers Workshops and we finance a couple of people to go to that every year. It’s excellent. It’s a week-long residential course and that’s what I advise all new [teachers] to go to. And it’s that sort of thing that you need that actually introduces you to effective methods of teaching and learning. Also it just keeps you in contact with what other people are doing. You continually get new ideas about what other people are doing.

58 Ibid 440.

59 Ibid.

60 Ibid 441.

61 Ibid.

62 Foucault, *The Will to Knowledge*, above n 3, 96:

Most commonly, resistance to pedagogicalism has taken the form of notional agreement with, but actual disregard for, pedagogicalism and its dictates; law teachers, if pressed, earnestly agree with the importance of effective teaching and student learning, but in the classroom continue to teach in their own preferred manner. Occasionally, however, resistance to pedagogicalism has been more overt, and a handful of Australian legal scholars have taken the time to express their disagreement with pedagogicalism and its explicit and implicit objectives. The Johnstone Report, for example, contained a quote by one law teacher who questioned the closed-mindedness of pedagogicalism, arguing that it was

informed by nothing more than the reading of a handful of basic education theorists ... I'd be much more impressed if I thought that those writing in legal education were publishing also in peer-reviewed education journals, in exactly the same way that you can't become a law and economics specialist by picking up a first-year book in economics, and familiarising yourself with the language. We can all write anecdotal articles on legal education and it's not that they are valueless, but I think it's asking a bit much to expect that credibility should attach to the writings of those who have no data, insight, or familiarity with educational theory. They may have no greater insight into the educational process, necessarily, than anyone else but they purport then to write outside their substantive area of specialty as lawyers, or as people with a law degree or postgraduate law degree, and start writing about education ... I think that to some extent the public debate is being captured by a group who are insufficiently tolerant, but it's not simply that. They are too convinced of their own philosophy, of the correctness of their views. And I'm somewhat sceptical of that.<sup>63</sup>

In 'Bureaucratic Rationalism and "The Quiet (R)Evolution"', William Twining identified, and undermined, some of pedagogicalism's 'deeply embedded assumptions': that most learning takes place in the classroom, that most legal education takes place in law schools, that law schools everywhere have a shared mission, that the core of that mission is primary legal education, and that the term 'law student' refers only to someone taking a first degree in law.<sup>64</sup> Twining also criticised the tendency by pedagogical texts to set up two models of law teaching: the conventional model, which conceives of teaching as the transmission of scientific body of knowledge (and some skills) to passive students, and the facilitative model which conceives of teaching as taking place in a supportive, stimulating, challenging, interdisciplinary learning environment.<sup>65</sup> Twining argued that,

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Where there is power there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power ... These points of resistance are present everywhere in the power network. Hence there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case; resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant or violent; still others that are quick to compromise, interested, or sacrificial; by definition they can only exist in the strategic field of power relations.

63 Johnstone and Vignaendra, above n 8, 289.

64 William Twining, 'Bureaucratic Rationalism and "the Quiet (R)Evolution"' (1996) 7 *Legal Education Review* 291, 294–5.

65 *Ibid* 298–9.

this way of posing the issues is misleading and dangerous. It is misleading because each ideal type contains an uneasy mixture of incompatible elements; it is dangerous because it gives support to an emerging orthodoxy which is not compatible either with the authors' core values nor with a more pluralistic view of a healthy system of legal education.<sup>66</sup>

The conventional model is, according to Twining, merely a caricature of traditional legal education (very few law schools actually adopt such a model), and it confuses the conception of law as black-letter rules with a certain style of teaching (the 'transmission' is not always of legal doctrine, and legal doctrine is not always 'transmitted').<sup>67</sup> Finally, Twining accused the authors of espousing a 'latent authoritarianism'.<sup>68</sup>

Underlying this are what seem to me to be rather extreme forms of teacher control over objectives, subject-matter, source materials, methods and even values. How can one explain this apparent contradiction between concern for student autonomy and self-education on the one hand and an equally strong latent m/paternalism on the other? Possible hypotheses include sheer hypocrisy, Machiavellian subtlety in preserving teacher power, or the confusion of the unreconstructed. While the authors are clearly concerned to reassure teachers that this approach does not really threaten their status, importance or power, they also seem to be genuinely committed to the autonomy of both clients and students. I would hypothesise that the central theme of this book is flawed by a tension between a genuine commitment to the autonomy of learners and a too-ready espousal of an emerging orthodoxy in legal education and training which, despite much of its rhetoric, is essentially a form of homogenising, authoritarian bureaucratic-rationalism.<sup>69</sup>

In citing these observations by Twining and others, it is not intended to suggest that they reveal the 'truth' about pedagogicalism, merely that pedagogicalism, while successful, is inevitably resisted and opposed by alternative discourses and approaches. The dominance of pedagogicalism can never be complete.

#### IV CONCLUSION

It is no longer acceptable for the quality of law teaching to be judged solely in terms of the personality of the teacher, the intellectual rigour or practical relevance of the subject matter, or the student's potential to transform society. The good law teacher is now clearly defined as one who facilitates student learning, and every law teacher is expected to care about the student's wellbeing, to nurture the student's learning, and, most importantly, to comply with the range of pedagogical criteria set out in law school teaching policies and student surveys. The pedagogical notion of the good teacher has become the normal conception, replacing the variety and instability, which existed previously, with certainty and consistency of meaning.

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66 Ibid 299.

67 Ibid 300.

68 Ibid 301 (fn).

69 Ibid 303–4.

The enormous success of pedagogicalism within Australian legal education is a result of the convergence of a range of social and political contingencies which support pedagogicalism-as-knowledge, and of the deployment by pedagogicalism-as-power of a set of compelling disciplinary strategies. Pedagogical discourse may have evolved from the liberal emphasis upon the individuality of the student, but it has become, in many locations, a way for school and university administrators to ensure the accountability of teaching staff, the quality and consistency of teaching practices, and the marketability of the law degree, and the strategies deployed in the achievement of these objectives are often difficult to resist. Will the pedagogical notion of good teaching continue to dominate the discursive field of legal education, or will the inevitable opposition to pedagogicalism prevail? The only certainty is that the dynamic interplay of truths and discourses within the law school will continue.