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Legal Research, the Law Schools and the Profession

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Abstract

This paper addresses the gulf that is said to exist between the law schools and the profession in legal research. It examines the causes and extent of the divide. It argues that some measure of divergence is appropriate, for the mission of the law schools is substantially different from that of the profession. The law schools speak to a broader range of legal phenomena and a more extensive professional and non-professional audience. They must take a critical approach to law and law reform. They have an obligation to explore not only the requirements of legal practice, but also the intersections between law and other social phenomena, and law's relationship to philosophical arguments. The law schools are therefore best conceived as a parallel branch of the profession, with their own standards of excellence and their own purposes. Interaction between academia and the profession is an indispensable source of insight for both, but in this interaction the law schools must remain true to their distinctive role, a role that only they can fulfil.

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1. Introduction

In February 2002, at the Canberra launch of *The Oxford Companion to the High Court of Australia*,[1] the Hon Chief Justice A Murray Gleeson referred to a 'gulf that exists between the view of the legal institutions and of the Court from within the universities, and the view from within the practising legal profession.' This suggested, he added, 'the need for some bridge-building.'[2]

The Chief Justice was giving voice to concerns often raised by barristers and judges informally but also, from time to time, in print.[3] Although the strongest concerns are by no means universally shared, they include a sense that the law schools have turned away from the profession, no longer providing the assistance they once did; that academics and practitioners have divergent understandings of law; that they are drifting towards profoundly different, perhaps even mutually unrecognisable, standards of interpretation and evaluation; and even amongst those practitioners most critical of the separation between academia and practice, that academics have lost touch with the law and no longer truly understand its practical operation.

In this paper I take up the Chief Justice's invitation to build bridges. I do so from the perspective of one engaged in legal academia for close to two decades, in Australia and Canada, including four-and-a-half years as Dean of Law at the University of Sydney. My purpose is to explore why there appears to be a gulf between the law schools and the profession and to suggest how we might better understand that relationship. I will advance a vision of the contemporary role of law schools that is both descriptive (attempting to provide a picture of what law schools are doing today) and normative (describing what they should aim to do). I will focus especially on one dimension of law schools' activity, namely research. That, of course, is the subject of this issue of the *Sydney Law Review*. But more importantly, research is the area of greatest divergence between the law schools and the profession; it is the area least understood outside the law schools, including amongst the public at large; it speaks most directly to the interests, sense of calling, and passions of legal academics; and it has been the focus of most suggestions that a disquieting gulf has emerged.

I will also draw heavily on my experience at the University of Sydney. That means that my account will be partial, drawing its examples disproportionately from Sydney (and for that, I apologise to my colleagues at other universities). But this has the benefit of grounding these reflections in a comprehensive understanding of one institution, its strengths and weaknesses, its relationship with the profession, its challenges. That institution has, moreover, played an

1 Tony Blackshield, Michael Coper & George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001).

2 Hon Chief Justice A M Gleeson, 'The Launch of the Companion' *Bar News* (Winter 2002) at 57.

3 See, for example, Hon Justice Michael Kirby, 'Retreat to Relevance', paper presented at the 2001 Retreat of the Faculty of Law, Australian National University, 27 July 2001 at 16; interview with Rene Sofroniou, 'The Compleat Judge: Justice Peter Young' *Bar News* (Winter 2002) at 39.

unparalleled role in the law in Australia. It is the law school of three of the seven members of today's High Court, including the Chief Justice (a fourth is a former Dean at Sydney; a fifth attended the lectures of the Law Extension Committee, provided by Sydney University). It is the law school of the vast majority of NSW judges. To the extent that there is a perception of a gulf between academia and the profession, there is a fair chance that the implicit point of comparison is the past of the Sydney Law School.[4]

Now, the gist of my argument is that there has been a separation between the Bar and the law schools, but that on the whole that separation has been beneficial. It has enabled law schools to speak to a broader range of legal phenomena, including those of most concern to solicitors and government lawyers, not only those with which the Bar is chiefly concerned. It has fostered more extensive and balanced reflection on the practical import of law, as well as more profound reflection on legal theory. These have in turn generated very substantial improvements in the education of lawyers, in law reform, in regulatory efficacy, in our general knowledge of law's role within society and, I hope, ultimately in the quality of the assistance provided to practitioners and judges. I am not arguing that we in the universities should be complacent. The Chief Justice's challenge reminds us to reflect on how what is done in law schools relates to law in action. The tension between theory and practice is a crucial spur to understanding. But the mere fact of divergence is not a sign that the law schools are failing to do their job. On the contrary.

The law schools and the profession have complementary but different functions. The law schools are not mere appendages to the profession, their purposes entirely defined by the latter's needs and aspirations. The law faculties have a responsibility to bring the kind of investigation to law that other disciplines bring to their areas of study. In the late 1980s, I attended an informal seminar by a visiting English academic in the offices of the Law Reform Commission of Canada. It was a dispiriting event. The visitor, who had once been an innovator in English legal academia, was reflecting on the purposes to which law schools should aspire in what was still Thatcher's Britain. His principal argument, when pressed, was that they should do precisely the same kind of research that law firms did, only with more countries and a longer timeframe.[5] What an impoverished aspiration! Legal academics have a responsibility to do more than act as the extended research departments of law firms (although they should not shirk their obligations to the profession, obligations to which I will return at a number of points). They should include within their purview law's broader themes — themes that are present in professional practice, but that tend to be submerged by the demands of the moment, and the effects of which are evident only in the long term. They should provide insight and reflection on the broader nature and determinants

4 This is not the result of any special virtue of the Sydney Law School (although it is a very fine school). Sydney was the only law school in NSW until 1971.

5 Some of the flavour of his presentation is found in Geoffrey Wilson, 'English Legal Scholarship' (1987) 50 *MLR* 818.

of law. They should lay the groundwork for the creative solutions of the future. I will say more about this breadth of research below, but for now it is sufficient to note that it involves more than the reproduction of current professionals' practice — more even than the dissemination of their best practice (although it does involve that). Law is an immensely important social institution, making unique normative demands and having enormous impact. Those demands, that impact, deserve concerted attention, in a manner that ultimately goes beyond today's practice.

Most practitioners, of course, fully agree. Indeed it is often precisely that broader perspective that they appreciate most when they think back on their own legal education. That perspective has helped them prepare for, indeed contribute to, a continually changing legal environment. There is, and should be, a creative distance between the law school and the profession. I want to reflect on that relationship, its reasons, and determine whether the current distance is appropriate or requires change.

2. The Nature of the Gulf

What, then, is the gulf between the law schools and the profession?

Its size is easily exaggerated. Indeed, different practitioners will perceive it differently. One should be careful, for example, not to attribute to the Chief Justice the stronger criticisms noted at the beginning of this paper, which imply that there has been a breakdown in respect between the two sides. He made clear that in his view, the law schools and the profession had much to learn from each other.[6] He argued for more communication, not less.

Moreover, I suspect that for some participants, the perception that there is a gulf is the product of rolling together two quite separate arguments: (1) concern for the relationship between the profession and the law schools; and (2) debate over the role of the courts, often expressed as a debate between judicial conservatism and judicial activism. For these individuals, left-leaning politics, judicial activism, rights adjudication and an academic approach to law are conflated on one side, and contrasted to conservatism, judicial restraint, the common law and the traditions of the Bar on the other. That, of course, leads only to confusion. The two issues are separate. For one thing, it is not merely those judges who take a conservative approach to adjudication that have been concerned with the relationship between the courts and the law schools. Few would accuse Justice Michael Kirby of being a judicial conservative, yet he has argued eloquently that legal academics should pay more attention to matters before the court and be more assiduous in providing judges with the benefit of their views.[7] Moreover, many academics argue against 'activist' conceptions of judges' role. This has been an important theme, for example, in the arguments of Tom Campbell, Jeff Goldsworthy, Helen Irving, John Macmillan, Robin Creyke, Greg Craven and others against a constitutionally

6 Gleeson, above n2.

7 Kirby, above n3.

entrenched bill of rights. The point is that the universities contain people who hold a range of views on the judicial role, as indeed does the judiciary.[8]

The law schools may contain proportionately more people who favour an expansive view of the judicial role. Barristers and judges tend to work within the existing order; their attitudes are formed, quite rightly, by an attempt to argue within a framework largely determined by existing practice and past decisions. Legal academics are engaged in a broader assessment of law's justice and efficacy, one that doesn't take so much for granted. The effect of this difference in perspective was abundantly evident, for example, in differing attitudes towards alternative dispute resolution, at least until ADR came to be embraced by the profession. (Interestingly, the roles now seem to be reversing, with academics sounding notes of caution about ADR.)[9] Academics generally have a more sceptical, a more critical opinion of the law than do practitioners. When one firmly believes that the law is wrong, one is more likely to press for change by all available means. Hence, there is a tendency among some academics to push the limits of the judicial role — a tendency which (I and others believe) should be tempered by more careful attention to institutional roles.

And there may be a more fundamental reason for divergence over the judicial role. Academics often engage in the sociological or historical examination of law; at least they pay considerable attention to those modes of analysis. Anyone who does can't help but be struck by the disjuncture that exists between sociological explanations on the one hand, and the forms of argumentation traditionally used by barristers and judges on the other. That disjuncture is important, and I will discuss it at greater length below. But my point here is that the disjuncture leads many academics to distrust the claims often advanced in favour of a restricted view of the judicial role. Are those claims merely a smokescreen for what has always been a more complicated, a more discretionary and ultimately more contestable set of judgements? Do they dress in the guise of 'judicial conservatism' something that is simply conservatism? I have my own answers to those questions, answers to which I avert below. But one can see how an embrace of sociological explanations might lead one to doubt claims that judges simply apply the law.

Still, it is important not to collapse the debates over the judicial role on the one hand and over the profession's relationship with the universities on the other. To a large extent, the former debate occurs in *both* the profession and the law schools.

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8 Indeed although, in his famous attack on judicial activism in *Quadrant,* Justice Dyson Heydon appeared to lay some of the blame for judicial activism at the feet of '*quarante-huitard*' intellectuals who were 'dismissive of what they do not fully understand', he implicitly recognised the distinction made in the text. He strongly argued that judges should not make major changes to the law, but pointedly did not criticise the weighing of legal efficacy, policy and proposals for reform that occurs in the universities and law reform commissions. He clearly separated the two issues: the merits of reform on the one hand, and the appropriate means for achieving it on the other. See: Hon Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' *Quadrant* (January–February 2003) 9 at 14–15.

9 See, for example, Hilary Astor & Christine Chinkin, *Dispute Resolution in Australia* (2d ed, 2002) ch 5.

And even if one screened it out, many practitioners would still perceive that there was a widening gulf between themselves and the law schools.

The common denominator in this perception regards the extent to which the law schools are speaking to practitioners' concerns: Are they producing the textbooks, the analyses of specific questions of legal doctrine, on which practitioners might rely? Sometimes the comments have a more institutional focus: Have academics turned away from professionally oriented venues such as continuing legal education programs or the *Australian Law Journal*? The critics' meaning is often shaped by their conception of professional roles, and this, of course, can vary. Practitioners differ, for example, on what scholarship might assist them. This means that they also differ on whether their comments are meant as a reproach. A few clearly think the law schools are wasting their time on the wrong things; many others — I believe most — simply wish that law schools would do more. But the fact remains that many judges and barristers wish that academics would offer more guidance on matters of professional concern. This, for example, has been the gist of Justice Kirby's comments (who clearly does not mean them as a reproach; he has made clear that he actively values the insights of the academy).[10]

Some critics, however, go much further. These suggest that academics are losing touch with the profession, that they no longer understand law as it works in practice. The question here is not merely whether legal academics are doing useful research, but whether they are capable of doing so. Have they lost their distinctively legal expertise? Have they become so walled up in their ivory tower that they no longer connect with the profession? Have they become so distracted by sociology or theory that specifically legal analysis has been neglected? I want to make clear that I don't think this more far-reaching criticism is dominant, in the sense that I don't think that most practitioners firmly believe it to be true. But I do think that the question exists in the minds of more practitioners than one would like. Any serious attempt at bridge building must try to answer it.

The law schools have sometimes done a singularly poor job of responding. Often the criticism has been expressed in relation to teaching, the most curmudgeonly (and least informed) critics openly wondering whether legal academics know enough about the practice to be training the next generation of legal practitioners. Law-school administrators have sometimes been tempted to respond by noting the large proportion of Australian law graduates — in some estimates approaching 50 per cent nationally (the percentage is much lower at many schools, including Sydney)[11] — who proceed to careers in areas other than the private practice of law. The administrators' argument appears to be that the law schools no longer need to be so concerned with training for practice. This is an utterly self-defeating argument. It may well be that many of our graduates go on to

10 Kirby, above n3. See also, Hon Justice Michael Kirby, 'Foreword: Welcome to Law Reviews' (2002) 26 *MULR* 1; Sofroniou, above n3.

11 Sumitra Vignaendra, *Australian Law Graduates' Career Destinations* (1998). This study reports national data only. Separate institution-specific data were also provided to the law schools.

other careers (indeed some of them always did). It may also be that legal education prepares students for a wide range of careers (as it does). But it remains the case that the vast majority of our students study law in order to satisfy the academic requirements to enter the profession, even if they do not exercise that option. We certify that we have so educated them. Indeed, ours are the only institutions that can so educate them, at least as they should be educated. We have a responsibility, then, to make sure that preparation for practice remains a *sine qua non* of our teaching. And of course it does. The most exasperating aspect of this non-response is that it is so false to law schools' practice. Law schools do seek to educate students, above all, for practice.[12] Indeed, at the same time that law schools have moved to emphasise theoretical and sociological approaches to law, they have sought new ways to prepare students for the profession through better instruction in such skills as legal research, writing, advocacy and ADR; through the expansion of clinical programs; through (at some schools) the integration of the academic programs and professional legal training; through pro bono schemes; and through problem-based learning. Moreover, there is an exceptionally strong argument that a broader approach to legal education — more theory, more sociological analysis and more legal history — makes for better practitioners. That seems to be reflected in the reputations of law schools: those with the highest reputation, both in Australia and abroad, tend to be those that offer an expansive and rigorous education. There is certainly a question as to the success of our educational initiatives, one that needs careful, not merely anecdotal assessment. But for law schools to imply that they are no longer concerned with the practice of law is plainly false.

There is one further reason to be sceptical of the most strident claims that there has been an erosion of legal expertise in the universities: Legal academics remain in great demand in the profession. Many academics have been recruited to work one day a week in solicitors' firms. Some are on fractional appointments, formally dividing their time between practice and the academy. In the last year of my term at Sydney, something like one-quarter of the academic staff were engaged in practice on one or the other of these bases, and it is certain that more could have been, had they been willing to suffer the reduction in their own research that was often (though not always) the result.[13] Indeed, over the years, several such academics have been enticed into full-time practice, especially given the erosion of academic working conditions and the substantial and growing gap between academic and professional salaries. In addition to academics' involvement in solicitors' practice, several fine barristers — among them Margaret Allars of Sydney, Sarah Pritchard and George Williams of UNSW, and Patrick Keyzer of UTS — are (or were) essentially academics in part-time practice. Legal academics are in demand as members of professional or government committees; members of tribunals both within Australia and at the international level; participants in law

12 Of course, there have also been non-professional legal studies programs, which made no pretence of preparing students for legal practice. One prominent example would have been LaTrobe University's Department of Legal Studies, before its conversion to a professional school.

reform; and expert consultants to the International Monetary Fund, law firms, hospital ethics committees and a host of other bodies. Virtually every one of my Sydney colleagues has served at one time or another in such a capacity, and many have long and distinguished service on tribunals, boards and committees. Academics also serve as law reform commissioners: two members of the faculty were appointed to the Australian Law Reform Commission during my time at Sydney: David Weisbrot as Chair, and Brian Opeskin as Commissioner; Reg Graycar and others served on the NSW Law Reform Commission.

This is a remarkable record. It is due, in part, to the impressive quality of the academic staff at Sydney University. But I would be very reluctant to claim that there was a substantial difference between Sydney and the other Group-of-Eight universities[14] in this regard. With respect to the newer law schools, their resources, working conditions and quality are much more variable, but at virtually all of them there are exceptionally fine scholars.

There appears to be no shortage of respect, then, for individual academics. Law schools are threatened more by the loss of colleagues to the profession than they are by the disrespect of their practising cousins. The gulf between practice and academia does not go to professional ability (or at least, it does so rarely, arising no more frequently than concerns about professional ability within the practice itself). Rather, it goes to professional orientation: whether the law schools are paying sufficient attention to professional concerns; whether their efforts are being directed towards types of inquiry that are the province of other disciplines, neglecting the core of legal analysis; and whether this is creating a regrettable disjuncture between the understanding of law in the courts and that in the academy. It is to those concerns that I now turn.

3. The Causes of the Gulf

In this section I will review the factors that have produced the gulf. But before doing so, it is worth making a few general observations about the state of legal research in the universities.

13 By my count, in 2002 there were something like 14 members of Sydney's academic staff, out of a total of 51 full-time and 9 fractional members, in such arrangements (with casual academic staff and staff on leave without pay not included). The estimate is impressionistic. It is based on my review of the staff list from June 2002, combined with my recollection of individuals' activities. It is difficult to do better without a full-scale survey, given the range of appointments (full-time; fractional; various forms of casual appointment; various forms of leave), and the fact that faculty members are not always obliged to disclose outside activities (for example, if they are employed on a fractional appointment). It is also important to note that of the 51 full-time and 9 fractional members, three were non-lawyers (one economist, two criminologists) and several worked in areas that are not conducive to spending one day a week in a law firm, such as constitutional law or legal philosophy.

14 The 'Group of Eight' is a phrase coined to refer to the following universities, which now form a loose association: Adelaide, ANU, Melbourne, Monash, UNSW, Queensland, Sydney and Western Australia.

First, overall research productivity in the law schools has almost certainly expanded — dramatically — over the past 40 years. It is always difficult to measure research productivity. Methods of reporting are haphazard and have changed over time. Publications can vary greatly in length, complexity and audience. Even the denominator of any measure of research productivity (the number of faculty members) is difficult to pin down, given leaves, fractional appointments, casual appointments, and the like. Those measures that do exist (almost always of recent origin) generally focus only on quantity of publications, not quality. I am reminded of a visiting academic from the United States who on reading a particularly impressive article exclaimed: 'Gosh! This must have at least three MPUs in it!' 'MPUs' were 'minimum publishable units'.[15]

It is difficult, then, to convert one's impression into empirical proof. But a brief review of the research websites of the leading law schools cannot fail to impress with the volume and range of publications.[16] For example, the Sydney Law Faculty's website reports that in 2003 alone, eight authored, two edited, and three subsequent editions of books, 41 chapters in books, 64 refereed articles (ie, articles that were subject to blind academic review) and 51 other articles (including articles in non-refereed professional journals) were published.[17] To give a sense of this accomplishment, in 2003 there would have been, on continuing appointments, no more than 60 full-time-equivalent academic staff at Sydney. The totals given include some publications by part-time lecturers and graduate students, but for reasons indicated in the notes the total figures almost certainly understate the actual production. This rate of publication is representative of the output at most leading Australian law faculties. Moreover, it is fair to say that the length and complexity of the average article — especially those appearing in refereed publications — has expanded in comparison to the average article of the past. This has resulted in part from the attempt to treat questions of empirical context, historical background and the assessment of alternative options with the same rigour that is applied to the strictly legal materials; gone are the days when much of the analysis was hidden in an opaque reference to 'policy'. There is no doubt that this productivity compares very well with — indeed in terms of quantity, almost certainly exceeds — the output of Canadian law schools.

A substantial proportion of this output consists of standard legal analysis directed to the profession. The most characteristic form of professional publication

15 This expression is not apocryphal: at the time of writing, a Google search for 'minimum publishable unit' produced 34 hits.

16 See, for example: <http://www.law.usyd.edu.au/research_publications/> (especially the links under 'Publications'); <http://www.law.unsw.edu.au/research/> (especially under 'Staff Publications'); <http://www.law.unimelb.edu.au/research/> (especially under 'Research Publications'); <http://www.law.monash.edu.au/research/publications.html>; <http://law.anu.edu.au/index.asp> (especially links for the 'Research Quality Review'). Even these sites are not always comparable. Standards of reporting and auditing differ between universities. The Sydney website, for example, appears to include only publications associated with present members of staff, not members of staff of the year in question. It therefore systematically under-reports research productivity in past years (because publications by departed staff are omitted).

17 Ibid.

is the textbook. If one includes only textbooks that were directed to the profession (not merely to students) and omits highly specialised books examining a specific area, during my four-and-a-half years at Sydney at least four new textbooks[18] and six subsequent editions of textbooks[19] were published by Sydney academics. At the time I left, at least three new textbooks and two subsequent editions were under preparation (the latter have since appeared).[20] If one included student texts and casebooks in this total, the number would be even larger. Several Sydney colleagues are also among the authors of *Halsbury's Laws of Australia* and LBC's *Laws of Australia*. It is much more difficult to distinguish between professionally-oriented and purely academic publications when it comes to articles, but when one scans the list of titles on the websites, there is no doubt that a great many, perhaps most, refereed articles are directed at least in part to a professional audience. In addition, in 2003, the faculty members at Sydney published at least 35 articles in non-refereed professional journals.[21] Although some academics specialise in writing exclusively for the profession, a great many combine professionally-oriented publications with work directed towards a more academic audience. Because this paper is concerned primarily with explaining the 'gulf' between the profession and the law schools, the examples given in the remainder of the paper focus on research that is not directed primarily to the courts. But one should not forget that there are a substantial number of talented researchers for whom the profession remains the primary audience.[22]

This record does not suggest profound neglect of the practising profession. Nevertheless, a gulf has emerged between the law schools and the profession. What has produced it?

A. Change in the Teaching Complement

In the last 40 years, there has been a substantial change in law-school staff, especially at Sydney University. This alone has driven a wedge between the law schools and the profession — or, more accurately, between the law schools and one branch of the profession to which it was once extremely close: the Bar.

18 Mary Crock, *Immigration and Refugee Law in Australia* (1998); Irene Nemes & Graeme Coss, *Effective Legal Research* (1998); John Carter, *Carter on Contract* (2002); Rosemary Lyster & C Hoexter, *The New Constitutional and Administrative Law* Vol 2 (2002).

19 David Farrier, Rosemary Lyster & Linda Pearson, *The Environmental Law Handbook* (3d ed, 1999); Peter Butt, *Land Law* (4th ed, 2001); Irene Nemes & Graeme Coss, *Effective Legal Research* (2nd ed, 2001); Les McCrimmon & Thomas Mauet, *Fundamentals of Trial Techniques* (2nd ed, 2001); Hilary Astor & Christine Chinkin, *Dispute Resolution in Australia* (2d ed, 2002); John Carter & David Harland, *Contract Law in Australia* (4th ed, 2002).

20 Patrick Parkinson (ed), *The Principles of Equity* (2nd ed, 2003); Peter Butt & J K Aitke, *Piesse's Elements of Drafting* (10th ed, 2004).

21 See the Sydney University website, above, n16.

22 I reiterate that the examples given below do not represent all researchers, or indeed all prolific researchers, in the faculty. Rather, they provide examples of specific types of scholarship, especially scholarship that might otherwise escape the notice of the profession. There are a number of very fine researchers whose work is not mentioned.

It is perhaps an exaggeration (although not much of one) to say that the teaching program at the Sydney Law School was once a joint venture between a small number of professors and the Bar, assisted by a cohort of junior-academic tutors. Many core undergraduate courses were taught by barristers.[23]

Over time this presence has waned. The process started earlier than in many jurisdictions. The controversy over the appointment of Julius Stone as Challis Professor of Jurisprudence and International Law in 1941 involved, amongst other things, a fierce battle over an academic versus a predominantly professional approach to law. These conflicts were more severe than anything we have seen in recent years. The appointment of Stone led to the resignations of the Chancellor of the University, the Dean of Law, and Fellow of University Senate, Justice Colin Davidson.[24] But as with many fights, the battle-lines came to be exaggerated, compounded with personal disputes, and crystallised into institutional structures that long outlived the forces that gave rise to them. In fact, an evolution toward more academic approaches to law was occurring across the faculty. Many of the most respected practitioner-lecturers were those who took an academic approach to their subject. The philosophy department at the University of Sydney, and especially the disenchanted empiricist rigour of John Anderson (Challis Professor of Philosophy from 1927 to 1958), exercised a decisive influence over many who were in the conservative camp on law-school affairs, including some members of the Bar who taught in the program.

The evolution towards an increasingly academic approach accelerated from the 1970s on. The permanent academic staff expanded. The faculty was integrated increasingly into university structures of appointment and promotion. Postgraduate training in law became a prerequisite for a permanent academic position. There was, in short, a gradual extension of the view that university teaching and scholarship had their own standards of professionalism, their own standards of excellence, which diverged from those of the Bar. This led to a gradual reduction in the number of barristers and judges teaching in the undergraduate program until, by the time I was Dean, only one undergraduate unit was fully taught by a barrister or judge: Roman Law, under Justice Arthur Emmett of the Federal Court.

I know that many alumni saw this change as a loss, and look back with nostalgia on the days when they were taught Equity or Evidence by the leaders of the Bar. It was a loss that was even more striking in the new law schools, which lacked Sydney Law School's historical and geographical connection with the Bar. Some of the estrangement between the profession and the law schools is undoubtedly a product of this change. Let me say a few things in response.

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23 For the history of the Law School, see generally Thomas Bavin (ed), *The Jubilee Book of the Law School of the University of Sydney 1890–1940* (1940); John & Judy Mackinolty (eds), *A Century Downtown: Sydney University Law School's First Hundred Years* (1991).

24 A description of the events surrounding Stone's appointment is contained in Leonie Star, *Julius Stone: An Intellectual Life* (1992) at 56–64, and Mackinolty, id at 78–81.

First, the extent of the separation should not be exaggerated. I have already mentioned the number of academic staff who themselves are directly engaged in practice. But more importantly, full-time members of the profession remain highly valued participants in Sydney's and other universities' teaching programs, both as visitors in undergraduate courses and as lecturers in postgraduate programs. There, their specific expertise can be most effectively deployed. In fact, few practitioners would be willing to take on full responsibility for an undergraduate course today, given the increasing demands of both practice and academia. Practitioners also remain actively involved in the research output of the law schools. The Sydney website lists publications by Justices Graham Hill, Robert Austin and Arthur Emmett, and by barristers such as Chris Birch and Stephen Odgers.[25] There has been a shift in the balance of these connections. Often, the contemporary links are as much with the solicitors' profession as with the Bar. This is particularly so in the newer law schools, which began with an expanded sense of their professional constituency. But professional links generally remain highly valued.

Second, there have been real benefits as a result of the move towards full-time academic staff. This is true on the teaching side. While many alumni deeply appreciate many of their practitioner-lecturers, they also realise that not all of them had the time to take their teaching responsibilities as seriously as one would like, or the ability to communicate their expertise. The current apportionment of roles is clearly preferable as long as the universities can secure and retain lecturers of the requisite quality. The effect of the change in personnel has been especially pronounced in the area of research. The volume of research now conducted, its disciplinary range, and the consequent incorporation of broader perspectives into the teaching of law would simply not have been possible without the move to a full-time, postgraduate-trained, academic staff.

B. Change in the Constituencies and Areas of Research

One aspect of the transformation has been an expansion of the constituencies and areas of law to which research is directed. These include areas that are perceived to be of limited relevance — and are therefore of limited visibility — to the Bench and the Bar, although they are crucial nonetheless.

A good example would be international and comparative law. Sydney University has had a long and distinguished tradition in international law, from Pitt Cobbett, AH Charteris and Julius Stone to, in recent years, James Crawford, Ivan Shearer, and now Don Rothwell, David Kinley and a strong group of younger colleagues. The faculty has also had a strong interest in foreign and comparative law, including Asian legal systems (especially through the work of Alice Tay and now Luke Nottage). Those areas were long considered to be of little practical relevance. They were overwhelmingly the preserve of full-time academics and would still have very little presence in the vast majority of practices at the Bar. But few would deny their immense significance in our globalising world. They are now genuinely important to the profession, although that practice tends to be located in

25 Above, n16.

government, solicitors' firms, and international agencies. Although questions of international and foreign law seldom arise in litigation before the domestic courts, they are crucial to diplomacy, to the development of fisheries, environmental protection and migration regimes, to commercial transactions and foreign investments, and to proceedings before commercial arbitration boards, international tribunals, and international commissions. Much of the law school's engagement at the international level would be unknown to members of the domestic profession. Sydney's three leaders in the field of taxation law, for example, Richard Vann, Lee Burns and Graeme Cooper, have done extensive work for such international organisations as the Organisation for Economic Co-operation and Development and the International Monetary Fund, advising post-communist and developing countries on the redesign of their taxation systems. A number of Sydney's environmental lawyers, Ben Boer, Nicola Franklin, Rosemary Lyster and Don Rothwell, are also strongly engaged in international cooperation, especially through the World Conservation Union and other initiatives in the Asia-Pacific region.[26]

A similar phenomenon exists in many areas of domestic law. There too, legal academics devote considerable effort to areas that pass below the radar of most barristers' practices, or, where the courts see only a small and unrepresentative segment of the area. This is true, for example, of many areas where the bulk of the action occurs in regulatory forums or through alternative dispute mechanisms: child protection (in which Patrick Parkinson has made important contributions in research, on governmental task forces and in advice to religious denominations); policing and incarceration (where the Institute of Criminology, including Julie Stubbs, Mark Findlay, Chris Cunneen and Gail Mason, exercises leadership in the field); incapacity and guardianship (which is the domain of one of the most prolific researchers in the faculty, Terry Carney); medical ethics (where Belinda Bennett, Roger Magnusson and Kristin Savell do remarkable work); and environmental regulation (where Sydney's environmental lawyers have long made strong contributions). It is also true of such areas as company and taxation law, which do come before the courts but in which large tracts of the law are essentially the preserve of solicitors, commissions such as the Australian Securities and Investments Commission, government departments, and specialised tribunals. There, much of the best scholarship is of great relevance to those agencies but unlikely to be cited in court proceedings. I think, for example, of Jennifer Hill's fine article on implicit models of shareholders' roles.[27] Even in an area such as constitutional law, much of the writing (such as George Winterton's on the reserve powers of the Governor-General, or work generally on parliamentary privilege, the

26 Here and elsewhere, I will not provide citations to publications when referring to a body of work, but only when singling out a particular article or book. There are generally a large number of publications in each area. Full references would make these notes voluminous indeed. In most cases, references can be obtained by visiting the staff members' pages on the University of Sydney website, above, n16.

27 Jennifer Hill, 'Visions and Revisions of the Shareholder' (2000) 48 *American Journal of Comparative Law* 39.

republican question or the respective merits of different forms of rights protection) is directed towards legislators, governments and the public-at-large.[28]

This expansion in constituencies has distributional consequences. The universities have long worked on issues of critical interest to the disadvantaged — to people who may be the target of legal proceedings and are certainly subject to social or regulatory constraint, but who are seldom in the position of effective legal actors and whose concerns often remain below the notice of the private practice of law: Aboriginal people and Torres Strait Islanders; the poor; recipients of government benefits; asylum seekers; and children. One would not want to romanticise the universities' contribution. The law schools still pay less attention to many of these issues than the groups' share of the population would justify. But they nevertheless do pay proportionately more attention than the profession. Law schools have also long been concerned with issues of gender equality and, more recently, sexual orientation. But beyond this specific focus on social equality, legal academics are able to pursue questions in a manner that is less constrained by the need to sustain a viable practice. That affects how they approach a whole range of issues. To take one example, intellectual property lawyers are naturally disposed to advance the interests of their clients, which generally tend toward the expansion of proprietary rights. Patricia Loughlan's work has, among other things, drawn attention to the cost that certain types of expansion would pose to broader public interests, which are widely dispersed and therefore less clearly represented in judicial proceedings.[29]

C. Expansion of the Forms of Analysis

The expansion of the intended audience of legal scholarship has also led to an expansion of the forms of analysis used in law schools. Legal academics are not concerned solely with making arguments admissible in court. They are concerned with the assessment of the law, with proposals for reform, and with reasoning that melds legal analysis with insights derived from other disciplines.

Much research is now directed to the criticism and revision of the law. This, of course, has always been part of practice. Lawyers have long engaged in the legislative process as elected representatives, legislative counsel, advisers and lobbyists; they have served as members of and represented clients before legislative committees, commissions of inquiry, professional committees, and expert advisory groups; and they have dominated law reform commissions. Even

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28 Indeed, an expanding literature specifically addresses legal topics for a lay audience. See, for example, Ron McCallum, *Employer Controls over Private Life* (1999); Peter Butt, Robert Eagleson & Patricia Lane, *Mabo: What the High Court Said* (4th ed, 2001); Mary Crock & Ben Saul, *Future Seekers: Refugees and the Law in Australia* (2002); Patrick Parkinson, *Child Sexual Abuse and the Churches* (2nd ed, 2003). There is still another audience for legal scholarship: legal scholars themselves. An increasing body of research seeks to assess and improve the teaching of law.

29 Patricia Loughlan, 'Copyright Law, Free Speech and Self-Fulfilment' (2002) 24 *Syd LR* 427; 'Looking at the Matrix: Intellectual Property and Expressive Freedom' (2002) 24 *European Intellectual Property Review* 30.

if one takes a conservative view of the role of the courts, then, lawyers have long been central participants in legal change. Legal academics perform a similar function, examining the law and contributing their own views on its merits and options for reform. Indeed, academics provide an added dimension of rigour, doing the in-depth and often interdisciplinary studies that can improve our understanding of existing and proposed regimes. It is crucial that law schools continue to do this work and do not merely leave it to other disciplines. Proposals for reform often require that one weigh the efficacy of different legal mechanisms, invent new mechanisms, or recognise the limits of legal regulation. Distinctively legal values — procedural fairness, human rights and respect for acquired rights, jurisdictional competence and so on — are frequently implicated. It is important that people who know those institutions be engaged in the solution.

New forms of analysis are also crucial outside the legislative context. Tribunals, commissions and expert committees have often been created precisely so that they can bring rich subject-matter expertise to bear in the making of decisions. These decisions often require that one combine specifically legal insights with knowledge derived from other disciplines, sometimes to such an extent that the boundary between the elements disappears and a new amalgam is formed. The term 'transdisciplinary' has been coined for this amalgam, to differentiate it from collaboration where the disciplines remain separate. Such amalgams are found in medical ethics, competition policy, environmental regulation, telecommunications regulation and a host of other domains. Legal academics are often in the forefront of these developments, sometimes in collaboration with scholars from other disciplines, sometimes developing transdisciplinary expertise themselves.

D. Growth of Sociological Research in Law

All of these developments remain close to the practice of law. They essentially involve a recognition that practice extends beyond the courts. Law schools have adjusted their activity so that they now address that larger set of questions and that broader professional audience.

The next cause of the gulf — the expansion of sociological research on law — departs from the professional's perspective. I have in mind a capacious definition of 'sociological', capturing all research that examines law's impact on society from the outside, as a sociologist or an economist would. This research is less interested in the arguments deployed within legal institutions and more interested in describing and measuring their practical effects. When it seeks to explain legal phenomena, it tends to do so in terms of larger social forces, not in terms of legal doctrine. Its perspective is therefore substantially different from that of a practitioner. It may still be useful to practice. Sociological research is immensely valuable in the reform of legal institutions, providing a rigorous empirical foundation for proposals. Indeed, much sociological research combines detailed investigation with suggestions for change. But law reform tends not to be its primary focus. It is concerned, above all, with describing accurately the social causes and effects of law.

This research has become much more common in law schools, especially as they have become more tightly integrated into the general research culture of universities. Much of the legal history now being written takes this approach.[30] But sociological analysis remains much less common than more professionally oriented work. To do it properly is expensive (if done well, the robustness of its findings fully justifies the expense, with the cost usually being borne by the Australian Research Council or by institutional partners). But more importantly, most legal academics remain committed to a fundamentally professional perspective — giving that perspective a more expansive definition and generally deploying a more critical approach and a broader array of argumentation than many practitioners would use — but nevertheless concentrating on how the law should be interpreted or changed.

Few would argue against the need for more sociological research. Some examples from Sydney University indicate both its relevance and interest (this is a very partial list drawn only from the last four years): in 2002 Roger Magnusson published a remarkable study drawn from interviews with health professionals concerning the actual use of euthanasia and assisted suicide for AIDS sufferers in Australia and California;[31] Reg Graycar, Helen Rhoades and Margaret Harrison, in collaboration with the Family Court of Australia, conducted an extensive review of the incidence and role of parenting orders under the first three years of the *Family Law Reform Act* 1995;[32] Patricia Apps, an economist, has published on the impact of taxation law given different household structures, and on the effects of various taxation rules on household decision-making; Terry Carney has collaborated with researchers in psychology and psychiatry on the management of coercive treatment in the case of anorexia nervosa; and Miranda Kaye, Julie Stubbs and Julia Tolmie have studied the relationship between domestic violence and child contact orders.[33]

Each of these has clear policy implications. Each provides information about law's operation that is essential to the sound evaluation of legal regimes. They are unlikely to be cited in counsel's submissions in court, but this research is clearly part of the central mission of a law faculty.

E. Development of Legal Theory

At the same time, the law schools have seen a striking expansion in theoretical scholarship.

Legal theory is a broad term, encompassing a wide variety of reflection on the organising principles of law. Some theory is sociological, attempting to describe the relationship between law and society. This work is valuable for much the same

30 An excellent example is Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (rev'd ed, 1999).

31 Roger Magnusson, *Angels of Death: Exploring the Euthanasia Underground* (2002).

32 Reg Graycar, Helen Rhoades & Margaret Harrison, *The Family Law Reform Act: The First Three Years*, Final Report (2000), available: <http://www.law.usyd.edu.au/teaching/2001/famlawref95_report/index.htm>.

33 Once again, detailed references are omitted when referring to a body of work. See above, n26.

reason that empirical research is valuable: it helps us to understand the forces that shape the law and determine its efficacy. But there is another kind of theory that is profoundly important. This work probes beneath legal arguments to analyse the nature of legal reasoning, the requirements of the interpretive process, the justification (or lack thereof) for legal principles on the basis of moral principle, the implications of political theory for the role of courts, lawyers and legislatures, and the lessons to be derived from law for moral and political philosophy (because of course the direction of influence is not one-way; indeed, at its deepest level, legal theory runs together with moral and political philosophy). This theory too occupies a crucial place in the law schools. It serves as an extension of the systematising and rationalising that has always been part of their role — although in this case it leads beyond the surface of the authorities to test the underlying premises and justifications of legal doctrine. It takes issues of legal concern and subjects them to searching evaluation.

Its practical importance was brought home to me in 1990, when I was still in Canada. The Meech Lake Accord (a bundle of constitutional amendments designed to reconcile the people of Quebec to the Canadian constitution) was then going through the process of ratification. It was abundantly clear that the process might fail. In the last months before the deadline, I became involved in an effort to provide a reasoned justification for the Accord in the popular arena. In that struggle, it became evident that our efforts were hobbled by the lack of careful, systematically developed justifications for the positions we were asserting. Most political theory paid no attention to cultural difference and offered no useful concepts for understanding culturally divided societies. The theory that did exist applied a non-discrimination model derived from the United States, a model that was pernicious when applied to questions of language and political community in a society with two principal languages of public debate. It was impossible to remedy that defect in mid-discussion, through talk back shows and opinion columns. As a result, in English Canada the arguments of justice appeared to be wholly on the side of the opponents of the Accord. Principles that had been essential to Canadian political life went largely unacknowledged, and the Accord itself was largely dismissed, in English-speaking Canada, as a mere political compromise.

Predictably, the Accord failed. In the aftermath of the defeat, with a very real prospect of Quebec's secession, many conferences, commissions, task forces and parliamentary committees were established to find a solution. It was extremely tempting for a young constitutional scholar (as I was) to commit his energies to those hearings. But the void resulting from the lack of theory had been all too evident. Instead of participating in that process, I returned to my study and began writing. Now, I claim no great impact for the book that resulted.[34] But I do know that at that juncture, the decision to write it was the most effectual thing I could

34 Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (1994).

have done. The published body of reflection in society shapes what is conceivable and, as a result, what it is possible to achieve. Because of theoretical work along similar lines by many scholars — Charles Taylor, Jim Tully and Will Kymlicka chief among them[35] — the Canadian constitutional debate was transformed, and with it, the analysis of culturally diverse polities worldwide.

Similar stories could be told in other areas: the recognition of restitution as an autonomous ground for recovery;[36] the emergence of the concept of restorative justice;[37] both the development of corporate personality and current efforts to conceive it in more limited terms. Theoretical writing is the lawyer's equivalent of basic research: the mathematical formulae, conceptual models and bold hypotheses that permit real advances in knowledge and striking practical innovations. It lays the foundation for the creative solutions of the future. It provides the critical purchase for the evaluation of the present. Nor is it necessarily anti-conservative. It can provide better understanding of existing practices, revealing what is most valuable about them and rendering their justification explicit, so that they too can be refined and extended. That is what occurred in the aftermath of the Meech Lake debate. Where will that systematic theoretical reflection on law occur, if not in the universities?[38]

Theory is so important to the academic enterprise that all scholars have an obligation to grapple with it. I cannot see, for example, how one can be a first-rate corporations-law scholar today without coming to grips with the scholarship inspired by the law-and-economics movement in the United States. One need not embrace it. One can define one's position in opposition to it. But one needs to read it and understand its analytical power. Theory is not a blueprint that one must rigidly follow. It is a provocation to think more deeply. This does not mean that all legal academics must become theoreticians (God forbid!). But they do need to reflect on why they are asking the questions they do and how those questions are best answered.

35 See, for example, Charles Taylor, *Multiculturalism and 'The Politics of Recognition': An Essay* (1992); Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (1993); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995); Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (1998).

36 Lord Goff of Chieveley and Gareth Jones, *The Law of Restitution* (6th ed, 2002).

37 See, for example, John Braithwaite, *Restorative Justice and Responsive Regulation* (2001).

38 I do not suggest that there is no theoretical reflection outside the academy. There are remarkable exceptions to the rule, and indeed barristers and judges have made valuable contributions to jurisprudential discussion and teaching at Sydney (in my time, Chris Birch and Justice Bill Priestley would be good examples). But the existence of a privileged space, where reflection is valued for its own sake and where scholars have the time – indeed the obligation – to develop their ideas fully and systematically, communicating those ideas to their peers and subjecting them to criticism and refinement, is irreplaceable.

F. The Emergence of Differing Readings of Legal Phenomena

To this point, my argument has suggested that the gulf between the profession and the law schools is a result of the expansion of the latter's role, so that the law schools speak to new audiences and engage in more profound analysis of legal phenomena. But while these developments are important, I do not believe that they yet address the nugget of the Chief Justice's concerns.

A clue to those concerns is provided by their context. They were made at the launch of *The Oxford Companion to the High Court*, and although the Chief Justice did not elaborate, I suspect that his principal concern was that in the *Companion's* entries, events, personalities and cases that were familiar to the Chief Justice and others at the Bar were discussed in ways that were, at certain points, unrecognisable to them. There had been a very similar controversy over Brian Galligan's important *Politics of the High Court* fifteen years before.[39] Both books addressed the world of the courts — they spoke of events in which barristers and judges had been actors, knowing intimately what had occurred — but they explained them in ways that sometimes bore no relation to the actors' own understanding.

That is a serious problem. Some divergence is to be expected. Academics and judges bring different tools to the task. They ask different questions. They situate their comments in different contexts. Academics, for example, may work with a longer timeframe, compare parallel developments in different societies, or explore the links between the law and other domains of activity (the economy; politics; and gender relations). They are meant to ask difficult questions of authority, not simply follow it. Moreover, it is by no means certain that practitioners are aware of all the factors that shape their activity. None of us, not even academics, are blessed with such perfect self-knowledge. But it is a problem when the two sets of explanations never meet: when they purport to explain precisely the same events, but provide mutually incompatible readings.

Sometimes, of course, a reading is just wrong. But often the problem derives from the difficulty we all have combining sociological explanations with explanations in terms of legal reasoning. The problem is not confined to the academic/professional divide. It is apparent in the contrast between the arguments barristers make in court and the explanations they give in their chambers which cite (for example) the professional background, philosophy and life experience of a particular judge, or whether the nature of the facts and the unsympathetic character of one's client were conducive to a favourable outcome. On both sides of the divide, we have trouble bringing the two types of explanation together. Sociological explanations in academia generally adopt a simplistic conception of legal reasoning (with little room for argument or judgement) or they ignore legal explanations altogether. Explanations in terms of legal reasoning often screen out

39 Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987). I do not want to overstate the concerns with the *Companion*. The *Companion* involved the participation of many authors (indeed several practitioners). The Chief Justice's concerns may well have been limited to a few entries.

sociological factors, or they treat those factors as regrettable intrusions, which run the risk of undermining the system's legitimacy. Very few explanations integrate the normative and the sociological in satisfactory fashion. Very few provide an account of legal argument that is conscious of the fact that we are historical beings, inevitably marked by the social contexts within which we live, yet who strive to justify what we do.

That, I believe, is one task to which we should direct more of our energies. Legal sociologists should seek ways of incorporating practitioners' deliberation into their analyses, exploring the relationship between it and broader social factors.[40] And those making legal arguments — professionals, judges and academics alike — should similarly reflect on how the two modes of explanation intersect. This may mean exploring how sociological studies might contribute to the construction of legal argument. This was one of Julius Stone's concerns — although I doubt that his solutions can withstand our current awareness of deep-seated disagreement: we are no longer confident that better sociology can resolve our normative disputes. Our grappling with these issues may also have consequences for our willingness to revise the law. If, for example, we believe that social attitudes have an unjustifiable impact on judicial decision-making, yet we still acknowledge that such an impact will inevitably occur, we may be more willing to revise past decisions, attempting through critical scrutiny to make up for our lack of normative perfection. At the very least the encounter should drive us to acknowledge the historical nature of law, so that we no longer pretend that judges declare a timeless law, but rather strive to incorporate a theory of change expressly into our legal reasoning.[41]

This acknowledgement of change, this realisation that there is a relationship between broader social factors and legal decision-making, need not promote an unrestrained judicial activism. There is still good reason for judicial restraint — for deference to legislative decision-making; for stability in the law even when that law is less than perfect; and for distinguishing changes that judges can legitimately make from those they should leave to the legislatures. But the one thing we cannot do is put the genie of the broader determinants of law back in the bottle.

The central task, then, is to listen to different interpretations, give them the respect they deserve, and strive for an over-arching understanding that can comprehend them all, or at least explain why they diverge. This is the bridge building that the Chief Justice has urged upon us. We will not always agree. Indeed, we may vehemently disagree precisely because there is tension between

40 See the exchange between Roger Cotterrell and David Nelken: Roger Cotterrell, 'Why Must Legal Ideas be Interpreted Sociologically?' (1998) 25 *Journal of Law and Society* 171; David Nelken, 'Blinding Insights? The Limits of a Reflexive Sociology of Law' (1998) 25 *Journal of Law and Society* 407. The notion of 'legal culture' may be one solution to this challenge: David Nelken, 'Using the Concept of Legal Culture' (2004) 29 *Australian Journal of Legal Philosophy* 1; Jeremy Webber, 'Culture, Legal Culture, and Legal Reasoning: A Comment on Nelken' (2004) 29 *Australian Journal of Legal Philosophy* 27.

41 I explore the permissible scope for judicial reconsideration in Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*,' (1995) 17 *Syd LR* 5.

different modes of explanation. But that very tension, and the struggle to resolve it, is productive of insight. What is versus what should be; the question of how we might sustain normative community in a world of difference and disagreement, in which we ourselves are thoroughly entangled — these are the central problems of law, problems that have no easy answer. They present themselves in every instance of adjudication. They plague our work as legal scholars. And they are worthy of the concerted attention of both the profession and the academy.

4. Conclusion

The law schools are essential institutions in Australia's legal culture. Their role includes, as a *sine qua non*, the training of a new generation of barristers and solicitors. It also includes the in-depth consideration of issues important to practice. But in addition to these tasks, the law schools' role extends to the systematic investigation of law's effects, consideration of law's function in society, and reflection on law's nature and foundational principles. Those are essential tasks of law schools. If they are not done there, they will be left to the haphazard attention of researchers in other disciplines, who despite their strengths are likely to have little sense of law's peculiarities, little sense of its subtlety and complexity. Law deserves focused and expert reflection.

The role of the universities is therefore fundamental, and independent from that of the practising profession. There is a necessary gulf between practice and academia. Indeed the law schools are best conceived as a parallel branch of the profession, with their own responsibilities and their own set of professional standards. They are not merely the teaching and research arm of practice.

To insist upon that independence is not to say that the law schools should ignore the profession. Judges, barristers, solicitors, and legislators are essential interlocutors for legal academics. They form the constituencies that share our concerns most directly. The law schools and the profession confront, in their different ways, many of the same issues. Interaction with the profession serves as an indispensable stimulus for academic work and an important check when we find ourselves on the wrong road. The relationship should be cultivated. But in that encounter, we in the universities need to remain true to our role. Our very difference is what makes us valuable. It is only by maintaining that distinction that we can provide the level of commentary, criticism and comparative perspective that the profession has a right to expect. That commentary derives much of its power from the range of our empirical research and the quality of our theoretical reflection. Our ability to contribute to the development of the law — through reasoned reflection on the common law and proposals for legislative change — is a function of our capacity to see beyond today's solutions, to shake ourselves free of accepted wisdom.

This sense of our mission is, moreover, fully consistent with our teaching obligations. Our students work in a changing environment. We must give them tools to function in that world so that they can reflect on where the law may be going and contribute to that development. Theoretical reflection is an important

way to refine judgement, probably the most important (and most elusive) quality in a practitioner. And the more we know about the empirical effectiveness of the law, the better our students will be able to advise their clients on courses of conduct that are reasonable, not chimerical.

A good law faculty therefore balances a complex set of demands, all of which are integral to its responsibilities. A law school must pitch an expansive tent, bringing together people who are focused on everything from the teaching of professional skills to the elaboration of an area of law, empirical research, and the most difficult concepts of legal philosophy. Arguments over balance will arise, and precisely because there is no absolutely right answer to such questions, it is important to take challenges like the Chief Justice's seriously and use them as the occasion for satisfying ourselves that our choices are defensible. But our answers must, in any case, preserve the range of our work and its aspiration to academic rigour. That variety is crucial to the students obtaining a well-rounded experience. It is indispensable to the critical commentary, reasoned evaluation and provocative suggestions for future development that the profession, and Australians at large, should expect from their law schools.