

COMMENTARY

TECHNOCENTRISM IN THE LAW SCHOOL: WHY THE GENDER AND COLOUR OF LAW REMAIN THE SAME[©]

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Despite valiant endeavours by feminist, critical race, and Queer scholars to transform the legal culture, the transformative project has been limited because of the power of corporatism, a phenomenon deemed marginal to the currently fashionable micropolitical sites of critical scholarship. However, liberal, as well as postmodern scholarship, has largely preferred to ignore the ramifications of the “new economy,” which includes a marked political shift to the right, the contraction of the public sphere, the privatization of public goods, globalization, and a preoccupation with efficiency, economic rationalism, and profits. I argue that technical reasoning, or “technocentrism,” has enabled corporatism to evade scrutiny. I explore the meaning of “technocentrism,” with particular regard to legal education. Because corporate power does not operate from a unitary site, but is diffused, I show how it impacts upon legal education from multiple sites, from outside as well as inside the legal academy in a concerted endeavour to maintain the status quo.

En dépit des tentatives courageuses des universitaires féministes, anti-racistes, et homosexuels, visant à transformer la culture juridique, le projet de transformation a été limité à cause du pouvoir corporatiste. Ce phénomène est considéré marginal par rapport aux domaines d'études critiques micropolitiques actuellement à la mode. Toutefois, la doctrine libérale, à l'instar de la recherche post-moderne, a largement préféré d'ignorer les ramifications de la nouvelle économie, laquelle inclut un changement politique notable vers la droite, une diminution de la sphère publique, la privatisation des biens publics, la globalisation et un souci d'efficacité, de rationalisme économique et de profits. Je soutiens que le raisonnement technique, ou le “technocentrisme,” a permis au corporatisme d'échapper à un examen approfondi. J'explore la signification du terme “technocentrisme,” d'un point de vue particulier sur la formation juridique. Puisque le pouvoir corporatif n'opère pas d'un lieu unique, mais est diffus, je démontre comment il influence la formation juridique à partir de plusieurs sources, à l'extérieur comme à l'intérieur du milieu juridique académique, dans une tentative concertée de maintenir le statu quo.

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Marcuse before Habermas, and Weber before Marcuse, identified as the most ominous feature of a fully “disenchanted age” not an immaculate nihilism but a form of nihilism in which “technical reason” (Marcuse), “means-end rationality” (Habermas), or “instrumental rationality” (Weber) becomes the dominant and unchallengeable discourse framing and ultimately suffusing all social practices.¹

I. INTRODUCTION: THE TECHNOCENTRIC IMPERATIVE

I use the term “technocentrism” to capture the way in which rules rationality exercises a centripetal pull within legality so as to disqualify other forms of knowledge. With particular regard to legal education, I seek to show how technical legal rules, with their appearance of neutrality and objectivity, effectively mask the partiality and the power of law, despite contemporary moves to alter law’s masculinist and raced partiality. Far from being neutral, the technical is in fact highly political, as Herbert Marcuse argued.² Although dominant interests are not temporally fixed, law continues to favour the interests of “benchmark men,” that is, those who are white, Anglo-Celtic, heterosexual, able-bodied, and middle class, and who support a mainstream religion and a right-of-centre politics. Benchmark masculinity asserts its normativity by producing and reproducing itself through legal and other discourses as the invariable standard against which “otherness” is measured.

Law can be imagined as a transparency that is placed over prevailing dominant interests so that it absorbs and reflects those

¹ W. Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) at 33.

² See especially H. Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* (Boston: Beacon, 1964) at xvi, 168.

interests. The movement at the edges of the transparency provides some scope for change in the configuration of dominant interests, but not very much. Michel Foucault's circulatory theory of power³ acknowledges the discursive effects of the challenges that occur at the edges, or in the "capillaries." Foucault shows how the traditional notion of sovereign, or juridical power, is supported by and interwoven with mechanisms of disciplinary power because they are able to disguise and deflect attention from the formal sites of authority and their exercise of power.⁴ I show how dominant interests are served by sites and techniques within both legal education and legal practice, together with the way in which they are imbricated with each other. I also suggest that the fragmented nature of contemporary corporatism, or the "new economy,"⁵ has required recourse to more technocratic modes of control, leaving even less space for alterity.

The changes that are occurring in the wake of the restructuring of the global economy have included the dismantling of the Keynesian welfare state, a phenomenon that has already occurred in Europe, Canada and New Zealand.⁶ Neoconservatism, deregulation and the privatization of public enterprises are notable facets of the restructuring that is now being confronted by all industrial economies. Massive restructuring has been facilitated through a proliferation of rational mechanisms in order to satisfy the "means-end calculus."⁷

The technocratic approach to law has been supported by modernist legal theory, particularly legal positivism, which has paid scant attention to power within the shifts and turns of national and global socio-economic movements. While the modernist jurisprudential vision has averredly been ruptured by dynamic new discourses, including

³ M. Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, by C. Gordon, trans. C. Gordon et al. (New York: Harvester Wheatsheaf, 1980) at 98 [hereinafter *Power/Knowledge*].

⁴ *Ibid.* at 106.

⁵ See H.W. Arthurs & R. Kreklewich, "Law, Legal Institutions, and the Legal Profession in the New Economy" (1996) 34 *Osgoode Hall L.J.* 1.

⁶ See P. Guislan, *The Privatization Challenge: A Strategic, Legal, and Institutional Analysis of International Experience* (Washington, D.C.: The World Bank, 1997); Arthurs & Kreklewich, *supra* note 5 at 8; S. Bergeron, "The Nation as a Gendered Subject of Macroeconomics" in I. Bakker, ed., *Rethinking Restructuring: Gender and Change in Canada* (Toronto: University of Toronto Press, 1996) 111; P. Morgan, ed., *Privatization and the Welfare State: Implications for Consumers and the Workforce* (Aldershot, U.K.: Dartmouth, 1995); and J. Kelsey, *Rolling Back the State: Privatization of Power in Aotearoa/New Zealand* (Wellington: Bridget Williams, 1993).

⁷ M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. by G. Roth & C. Wittich, trans. E. Fischoff et al. (Berkeley: University of California Press, 1978) vol. 2 at 1002.

feminist legal theory,⁸ legal positivism continues to be central to legal education within law schools, because it is pre-eminently concerned with law as a system of rules—a notion central to “learning the law.” Legal positivism assumes that law is a self-referential system that is capable of producing “right” answers. While there are many shades of positivism, its characteristics, as summarized by H.L.A. Hart, one of its most influential exponents, include the idea that law is autonomous, that there are discernible boundaries between law and morality, law and politics, and law and other disciplines.⁹ While legal positivism legitimates economic rationality in the interests of capitalism, it fails to capture the pragmatic, the instrumental, the institutional, and the bureaucratic elements that shape the law in action. Technocentrism goes further in, first, emphasizing the way that *techné*—technical knowledge—is privileged perennially over “non-legal” forms of knowledge. Second, the word *techné* makes clear that law cannot lay claim to a scientific status, but that it is a human artifact, and that legal truths are created, crafted, and produced. Third, *techné* also conveys something of the legal bias towards humanism and intellectualism.¹⁰ Fourth, *techné* captures the idea of the lawyer as the knower or all-knowing technocrat, who possesses privileged knowledge and who exercises power as a result of that knowledge. Indeed, as agents of legality, lawyers are the “*par excellence* institutional inventors”¹¹ who spend their time devising ways to circumvent regulation for corporate clients.¹² Accordingly, lawyers are also primary producers of legal knowledge, although jurisprudence—feminist and postmodern, as well as traditional—pays more attention to adjudication as the primary source of legal knowledge.¹³ The adjudicative bias is grounded in the law school case method, which privileges appellate decisions in which detailed written reasons are

⁸ See G. Minda, “Jurisprudence at Century’s End” (1993) 43 J. Legal Educ. 27 at 30.

⁹ See especially *The Concept of Law* (Oxford: Clarendon, 1994) at 302. See also C.J.G. Sampford, *The Disorder of Law: A Critique of Legal Theory* (New York: B. Blackwell, 1989) at 24ff.

¹⁰ Compare D.O. Friedrichs, “Narrative Jurisprudence and Other Heresies: Legal Education at the Margins” (1990) 40 J. Legal Educ. 3 at 14.

¹¹ M. Cain, “The Symbol Traders” in M. Cain & C.B. Harrington, eds., *Lawyers in a Postmodern World: Translation and Transgression* (New York: New York University Press, 1994) 15 at 31.

¹² See D. McBarnet, “Legal Creativity: Law, Capital and Legal Avoidance” in Cain & Harrington, eds., *supra* note 11, 73.

¹³ Compare R.W. Gordon & W.S. Simon “The Redemption of Professionalism?” in R.L. Nelson, D.M. Trubek & R.L. Solomon, eds., *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* (Ithaca, N.Y.: Cornell University Press, 1992) 230 at 238.

produced. The high level of abstraction associated with superior appellate courts facilitates a propositional approach, relegating the merits and particularity of cases to the background. The pedagogical practice, which focuses primarily on formal rules, creates a law school environment in which the technocratic is normalized, thereby facilitating the connection between the means and the end.

The specification of particular subjects and areas of law by admitting authorities encourages the teaching of law as unproblematic categories of finite technical knowledge. The reduction of social problems to predetermined legal formulae permits what then passes for bona fide *legal* knowledge to be cordoned off from the affective, the corporeal, and the intuitive. The substance of the “core” legal curriculum is remarkably similar within Western liberal democratic countries, not only within common law jurisdictions,¹⁴ but also within civil law jurisdictions.¹⁵ Indeed, the “core” curriculum has witnessed comparatively few major changes of substance over the past half century, apart from the tendency to make more similarly oriented subjects compulsory. This is the phenomenon of the “creeping core” to which William Twining refers in the English context.¹⁶ Even within new law schools, curricular consistency is a notable characteristic. The subjects that are specified as essential prerequisites for admission to legal practice pertain to private property, individual rights and profits,¹⁷ thereby reflecting the dominant capitalist imperatives, even though modes of capital accumulation may have altered. Accordingly, it is no surprise to find that the foundational subjects include contract, property, torts and company law—subjects that tend to be preoccupied with technical rules, and are known as “hard” law, thereby also signifying their phallogocentric orientation. Such subjects facilitate the free market, corporatism, and private property ownership, and are invariably treated as compulsory within the law curriculum—either as prerequisites for the award of a law degree and/or for admission to the practice of law.

¹⁴ See: R.L. Abel & P.S.C. Lewis, eds., *Lawyers in Society: The Common Law World* vol. 1 (Berkeley: University of California Press, 1988); T.C. Fischer, *Legal Education, Law Practice, and the Economy: A New England Study* (Littleton, Colo.: F.B. Rothman, 1990); and S. Garkawe, “The Proliferation of Law Schools in Australia—Should Australia Adopt the American Bar Exam Model?” (1995) 13 J. Prof. Legal Educ. 23.

¹⁵ See R.L. Abel & P.S.C. Lewis, eds., *Lawyers in Society: The Civil Law World* vol. 2 (Berkeley: University of California Press, 1988).

¹⁶ W.L. Twining, *Blackstone’s Tower: The English Law School* (London: Stevens & Sons/Sweet & Maxwell, 1994) at 163.

¹⁷ Compare *ibid.* at 165; and H.J. Glasbeek & R.A. Hasson, “Some Reflections on Canadian Legal Education” (1987) 50 Mod. L. Rev. 777 at 795.

Commercially oriented subjects may be contrasted with subjects that involve the intimate aspects of people's lives, which are not easily commodified. This cluster of subjects includes family law, human rights and discrimination law—the averredly “soft” or feminized subjects that are primarily concerned with women and children, as well as raced, ethnicized, and sexualized “others,” rather than the benchmark Anglo, heterosexual, middle-class man of law. Because of the unruliness of the social and its resistance to being compressed within legal form, it may be suggested that subjects involving the affective and the conventionally private are not “real” law, so that teachers of “soft” subjects sometimes set out to harden them by teaching them primarily as propositional and rules-based. In such a case, the centripetal pull of rules rationality may be compared to the way in which some women and “others” are attracted to masculinized subject positions in employment in order to secure approval and legitimacy.

In an endeavour to discourage reflexivity, technocentrism purports to slough off the theoretical, the critical and the contextual but, as Ian Duncanson reminds us, law always *does* have a context.¹⁸ The 1970s imperative that law be taught “in context” instantiates the myth that technocratic law is taught as though it were neutral and acontextual—as though it were engaged in the pursuit of objective justice, rather than primarily facilitating the interests of wealthy corporations and benchmark men. Perhaps unsurprisingly, liberal legalism prefers any conscious advertence to context to be anodyne. Critical perspectives, with their subversive potential, and “soft” subjects, with their partial and humanistic orientation, are likely to be treated as optional or peripheral to the project of creating the “complete lawyer.”

The seeming neutrality and objectivity of legal doctrinalism effectively legitimates curricular cleavages between the compulsory contract-tort-crime-commercial clustering and the optional family-human-rights-theoretical clustering so that such cleavages are assumed to be rational. The divisions mirror the separation between public and private spheres of life, which are also assumed to be rational and “natural” and are legitimated by law.¹⁹ In fact, the public/private dichotomy is a convenient and malleable mechanism that has been constituted so that it shifts according to the political demands of the

¹⁸ See I. Duncanson, “The Ends of Legal Studies” (1997) 3 Web J. Curr. Legal Issues 1 [hereinafter “The Ends of Legal Studies”], available on the Internet at <http://webjcli.ncl.ac.uk>.

¹⁹ See M. Thornton, ed., *Public and Private: Feminist Legal Debate* (Melbourne: Oxford University Press, 1995); and K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985).

moment. Nevertheless, this separation operates to maintain very effectively particular iterations of masculinity and femininity, and of heterosexuality and homosexuality. If law wishes to avert its eyes from nuptial and pre-nuptial contracts, for example, it will characterize them as private—because they lack the technical requirements of intent and consideration.²⁰ In contrast, a court will have no problem with a contract between strangers engaging in a profitmaking transaction; it is unlikely even to expend time on the threshold question of whether there was a contract or not. Separate spheres are thereby constructed through law, and the activities of the market are legitimized and privileged over those characterized as private qua domestic, such as housework and child care—activities performed for love, not money. However, a feminist preoccupation with the gendered symbiosis between private and public life worlds can deflect attention from the dramatic changes being effected within the public sphere qua government with regard to the deregulation and privatization of education and welfare, and other heretofore “public” services.

For all intents and purposes, a merger has been effected between so-called “private” enterprise and the public sphere of government.²¹ This is the “new corporatism.”²² Deregulation and privatization, together with the declining role of unions, have significantly altered the corporatist character of the state. Nevertheless, the idea that there is a clear boundary between public and private life continues to be pervasive. Through the play on difference, or what Jacques Derrida refers to as *différance*,²³ between public and private, law is able to “oil the wheels of capitalism” in a way that appears unproblematic and even natural.²⁴ Furthermore, the consistent devaluation of the private qua domestic and/or sexual aspects of life continues to have significant ramifications

²⁰ See *Balfour v. Balfour*, [1919] 2 K.B. 571 (C.A.), which continues to be good law in both England and Australia. For a critique, see M. Freeman, “Contracting in the Haven: *Balfour v. Balfour* Revisited” in R. Halson, ed., *Exploring the Boundaries of Contract* (Aldershot, U.K.: Dartmouth, 1996).

²¹ See C.A. Reich, *Opposing the System* (New York: Crown, 1995) at 169.

²² The concept of corporatism emerged in political theory in the 1970s to describe the distinctive organization of economic and political interests within the capitalist state in a centralized and harmonious manner: see P.J. Williamson, *Corporatism in Perspective: An Introductory Guide to Corporatist Theory* (London: Sage, 1989); and A. Cawson, *Corporatism and Political Theory* (Oxford: Blackwell, 1986).

²³ See P. Kamuf, ed., *A Derrida Reader: Between the Blind* (New York: Columbia University Press, 1991) at 63.

²⁴ See J. Habermas, *Legitimation Crisis* trans. T. McCarthy (Boston: Beacon, 1975), for a thoroughgoing critique of the way capitalist economic society is presented as “natural.”

for the construction of masculinity and femininity, and of heterosexuality and homosexuality, despite the ongoing efforts of feminist and Queer legal scholars to remove the cloak enshrouding the private. Indeed, corporatism is predicated upon and sustained by law's constitution and retention of separate spheres, cleverly concealed beneath a technocratic carapace. The accord between the public sphere qua government, civil society, and the economy is possible only with the unacknowledged contributions of women in the private qua domestic sphere. The lopsided efforts of legislation to effect equal opportunity in the public sphere perpetuate this inequity no less than other, ostensibly neutral, regimes.

II. TECHNÉ IN THE LAW SCHOOL

In order to ensure retention of the privileged status of *techné*, there is an expectation of docility from law students in order that they might be transformed through the experience of legal education. The docile student is one who is teachable (from the Latin *docere*: to teach). Foucault defines the docile body as one that may be “subjected, used, transformed and improved.”²⁵ In the context of legal education, the process of transformation is likely to be facilitated with the law student's consent; students cannot be said to be oppressed in the sense that Paulo Freire speaks of pedagogical oppression.²⁶ Indeed, so great is their anxiety to conform that within a few weeks of commencing law school, law students sound like fully fledged lawyers with a proficient command of the grammar of law. The lure of professionalism is a powerful factor in effecting the transformative project. Furthermore, the majority of law students in traditional law schools are generally not social outsiders. Private school background and family connections mean that there is already an acceptance of the correlation between white ruling class, masculinity, and legality,²⁷ an homology that facilitates acceptance of corporatism.

While the image of “the lawyer” has been constructed in terms of benchmark man, the desire on the part of some women and law students

²⁵ M. Foucault, *Discipline and Punish: The Birth of the Prison* trans. A. Sheridan (New York: Vintage, 1995) at 136 [hereinafter *Discipline and Punish*].

²⁶ See P. Freire, *Pedagogy of the Oppressed* trans., M.B. Ramos (New York: Continuum, 1996) at 33.

²⁷ See A. Ziegert, “Social Structure, Educational Attainment and Admission to Law School” (1992) 3 *Legal Educ. Rev.* 155.

from diverse class and cultural backgrounds to be quiescent, anonymous, and assimilable cannot be discounted. To some extent, they act as the agents of their own transformation. They go to law school because they wish to make a successful career in law and to erase any memory of perceived disadvantage as quickly as possible. They evince an ever-present desire to move close to the norm, that is, the privileged position occupied by benchmark man, to merge with him and to become indistinguishable from him. Some students are aided and abetted in the normalizing project by upwardly mobile parents who may have experienced disadvantage and lack of opportunity themselves. The public ranking of law schools by the media²⁸ can induce anxiety in students in lesser ranked schools, which they seek to overcome by establishing their command of *techné* as early as possible. The centripetal pull of *techné* thereby operates to slough off diversity and radicalism in legal education.

Not all students accept the docile subject position expected of them and they may find themselves responding with anger, anxiety, or dismay at what they perceive to be the intellectually stultifying and personally transformative experience of legal education.²⁹ Chris Goodrich has written insightfully about his year as a student at Yale Law School, undertaking a special Master's degree for journalists. He enrolled for a collection of subjects typical of first-year law students, including constitutional law, torts, contract, and civil procedure. Goodrich describes his fear of being seduced by legal training "which doesn't create selfish, aggressive people—but it does provide the intellectual equipment with which recipients can justify and give force to beliefs and actions most people would wholeheartedly condemn."³⁰ He proceeds to describe the subtle process that the law school engaged in to "steal his soul." Being taught to "think like a lawyer" involved inducing a massive sense of insecurity in the first instance: "it seemed impossible for anyone to go through a single day of law school without sensing that he or she didn't measure up—that the ability to think like a lawyer was demonstrably different, and better, than the ability to think as one once did, like an ordinary person."³¹ This sense of insecurity may be

²⁸ See, for example, "Maclean's Law School Survey" *Maclean's* (6 October 1997) 13.

²⁹ Compare R. Abel, *American Lawyers* (New York: Oxford University Press, 1989) at 213.

³⁰ C. Goodrich, *Anarchy and Elegance: Confessions of a Journalist at Yale Law School* (Boston: Little, Brown, 1991) at 4.

³¹ *Ibid.* at 4.

magnified on the part of those women and racialized “others” who endeavour to resist the mesmerizing effects of the norm.³²

What does it mean to “think like a lawyer?” Is it qualitatively different from thinking like any intelligent human being? The answer is probably not. The law student learns the principles of legal reasoning and legal method: how to identify material facts, how to characterize the issues for resolution, how to select an authoritative precedent to be applied to the instant case, how to determine the *ratio decidendi* of a case, and how to interpret a statute,³³ as well as deference to hierarchy.³⁴ The successful acculturation of the law student into accepting automatically legal form facilitates the process of rendering substantive justice incidental. The outcome of a dispute is then treated as analogous to the outcome of a sporting context; it does not matter who wins, provided that the rules are fair. Technocratic law cloaks the partiality of justice so as to disguise its masculinist, class, race, heterosexual, and corporatist predilections. As Goodrich observes, the legal system’s rules about justice may ensure that justice is not done.³⁵ There is, therefore, a political dimension to learning to think like a lawyer; the process is directed not only to improving the quality, precision, and clarity of thinking,³⁶ but to the rationalization of particular outcomes. It is this unstated political dimension that constitutes the distinctive element to “thinking like a lawyer.”

The political underpinnings of law are further occluded by a “submersion or denial of self” within legal discourse.³⁷ The distance between the legal knower—the creator of knowledge—and the knowledge itself is collapsed, so that the knowledge appears to be objective. A familiar technique in legal writing, and one that students are encouraged to emulate, is the use of the third person. The norm of depersonalization is breaking down in law review articles, where the subjective voice has acquired a semblance of legitimacy as a result of the

³² See M. Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Melbourne: Oxford University Press, 1996) at 73-105 [hereinafter *Dissonance and Distrust*]; and C. Weiss & L. Melling, “The Legal Education of Twenty Women” (1988) 40 *Stan. L. Rev.* 1299 at 1314.

³³ See M.J. Mossman, “Feminism and Legal Method: The Difference it Makes” (1986) 3 *Aust. J.L. & Soc’y.* 30.

³⁴ See D. Kennedy, “Legal Education as Training for Hierarchy” in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982) 40.

³⁵ *Supra* note 30 at 260.

³⁶ See J.O. Mudd, “Thinking Critically About ‘Thinking Like a Lawyer’” (1983) 33 *J. Legal Educ.* 704.

³⁷ Friedrichs, *supra* note 10 at 12.

impact of feminism and postmodernism, and the correlative denunciation of essentialism. Depersonalization, however, remains the norm in judicial discourse. The technique operates to deny the “leeways of choice” encountered at every step of the adjudicative process.³⁸ The positivist myth that the judge lacks agency and is no more than a conduit through which objective knowledge is received has contributed to the erasure of the subject and the dehumanization of law.

The *form* of law is a key technocratic device for delimiting the ambit of law that quickly takes on an appearance of normalcy and naturalness to the neophyte law student. I have noted the limits of law as a remedial tool in addressing systemic complaints of discrimination.³⁹ The sexism, racism, and homophobia giving rise to discriminatory acts are buried deep within the social fabric, but a formal complaint requires a complainant to identify a particular wrongdoer and to prove a causative nexus between the wrongdoer and the impugned conduct. The social harms of sexism, racism, and homophobia are not legal harms unless they can be made to conform with the procedural requirements of a formal complaint. The probative burden that the individual complainant has to bear is onerous, particularly in the case of employment complaints where the employer invariably adduces a rational explanation for the impugned conduct. The disparity in power and resources between an individual complainant and a respondent make it almost impossible for, say, an Aboriginal woman to succeed in *proving* employment discrimination according to the requisite standard against, say, a mining corporation. To endure a hearing and then fail to satisfy the burden according to legal form may actually legitimize racism and sexism because the discriminator has been exonerated by a seemingly fair and neutral process in which it is assumed that complainant and respondent are engaged in a contest on a “level playing field” because both “sides” have legal representation. This is the myth of equality before the law. The form of law privileges corporatism, as well as masculinism and racism, for respondents in sex and race discrimination suits are invariably powerful institutional players with significant resources. Harry Arthurs and Robert Kreklewich suggest that the privileging of corporatism in legal disputes is likely to become more overt with the propulsion towards deregulation and privatization.⁴⁰

³⁸ J. Stone, *Legal Systems and Lawyers' Reasoning* (Stanford, Ca.: Stanford University Press, 1964).

³⁹ See M. Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Melbourne: Oxford University Press, 1990) [hereinafter *The Liberal Promise*].

⁴⁰ See *supra* note 5 at 27.

When we focus a little more closely on approaches to teaching in a professional program, it can be seen that technocrism permits the development of what Charles Derber calls “ideological desensitization.”⁴¹ The focus on technical knowledge enables professional workers to deny the real significance of the work in which they are engaged. This concept is particularly pertinent to law as it facilitates an understanding of the way in which legal practitioners are able to absolve themselves from ethical responsibility when serving dubious interests, such as defending the racist and sexist behaviour of a mining company against a complaint of discrimination by an Aboriginal woman. The predominant ethical interest is loyalty to one’s client, a principle upheld by the adversarialism of the common law and the “cab rank” rule of the legal culture. Broader issues of ethical practice and justice are likely to be given short shrift and treated as subordinate to the mastery of rules. The technocratic imperative is underpinned by the fact that professional ethics rarely are accorded even the status of an optional subject within the law curriculum, although admitting authorities may require a few hours of lectures pertaining to the rules of professional conduct in terms of “unreflective conformity.”⁴² The “good” lawyer is one who sets out to win the case for the client, regardless of the social ramifications.

The ethical dilemmas are complicated by the fickleness of corporate clients in the postmodern world, for they no longer feel obliged to remain loyal to a particular legal firm, but are likely to shop around for one prepared to do their bidding at the best price.⁴³ Hence, the corporate client can exert pressure on maverick law firms to refashion professional ethics, always located in a shadowy terrain behind *techné*. Law and the facilitation of corporatism thereby become imbricated with each other so that what might elsewhere pass for unethical behaviour becomes normalized. Students are quickly acculturated into accepting this mode of thought. Derber reports that studies involving first-year students in a wide range of professions, including law, reveal a rapid shift from a predominantly moral

⁴¹ C. Derber, “Managing Professionals: Ideological Proletarianization and Mental Labour” in C. Derber, ed., *Professionals as Workers: Mental Labour in Advanced Capitalism* (Boston: G.K. Hall, 1982) 167 at 180.

⁴² Gordon & Simon, *supra* note 13 at 236.

⁴³ See E. Nosworthy, “Ethics and Large Law Firms” in S. Parker & C. Sampford, eds., *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford: Clarendon, 1995) at 57. See also Gordon & Simon, *supra* note 13 at 257.

orientation to a technocratic one.⁴⁴ The phenomenon of law students demanding to know “the law” and resisting theoretical and critical material is a familiar one to teachers of first-year law students, particularly those teaching non-technocratic courses, such as history and philosophy of law, and introductory jurisprudence. The metamorphosis of the neophyte law student concerned with social justice into graduate obsessed with status and money has joined the stock figures that populate anti-lawyer jokes.⁴⁵

The pedagogical methods of law school assist in embedding the technocratic approach and the moral neutering of the law student.⁴⁶ The so-called Socratic method, widely attacked because of the scarifying experiences to which students have been subjected,⁴⁷ has had a narrowing effect because law teachers—unlike Socrates himself—all too often assume that there *is* a right answer. Even more constraining is the lecture method. Current financial pressure on public universities is causing a reversion to large lectures, where the interchange between lecturer and student is minimal, and the student passively imbibes predigested knowledge. The pressure to teach more students means that research essays, which provide at least a modicum of scope for imagination and critique, are likely to be discouraged—because they take longer to assess than examination scripts. Economic rationality aids in reining in knowledge boundaries so that students understand that they are expected to regurgitate aspects of the doctrinal exegesis that comprised the substance of lectures—in a limited time frame, and according to a predetermined formula. Freire’s metaphor of banking aptly describes this pedagogy—in which students are treated as passive receptacles who receive knowledge from a “knower”—because they

⁴⁴ *Supra* note 41 at 182.

⁴⁵ See, for example, The Rodent, *Explaining the Inexplicable: The Rodent’s Guide to Lawyers* (New York: Pocket Books, 1995). The publicity surrounding cases involving excessive legal fees has done little to enhance the public image of lawyers. For example, US\$49 million was paid in fees and costs to the lawyers who acted for the plaintiff flight attendants in a class action suit against four tobacco companies. The plaintiffs received no money themselves, although an award was made for medical research. Experts were quoted as saying that the lawyers probably received (on a contingency fee basis) many times what their legal work was worth: see N.A. Lewis, “First Thing We Do, Let’s Pay All the Lawyers” *New York Times* (11 October 1997) A8.

⁴⁶ See W. Bachman, *Law v. Life: What Lawyers are Afraid to Say About the Legal Profession* (Rhinebeck, N.Y.: Four Directions, 1995) at 57.

⁴⁷ See, for example, *ibid.* at 55; J. Morgan “The Socratic Method: Silencing Cooperation” (1989) 1 *Legal Educ. Rev.* 151; and J. Jaff “Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning” (1986) 36 *J. Legal Educ.* 249.

know nothing.⁴⁸ The banking notion of legal consciousness is one in which the lecturer regulates the way in which the legal world “enters into” law students.⁴⁹ The process contributes to the dehumanization and objectification of legal knowledge, neutralizes the agency of students and ensures reproduction of that which is “knowable”:

The more students work at storing the deposits entrusted to them, the less they develop the critical consciousness which would result from their intervention in the world as transformers of that world. The more completely they accept the passive role imposed on them, the more they tend simply to adapt to the world as it is and to the fragmented view of reality deposited in them.⁵⁰

Technocentric legal knowledge disqualifies the lifeworld knowledge students bring with them to law school, as well as the non-legal knowledge they acquire elsewhere within the academy. Attempts to alter the gender and colour of law from within the law school are limited, other than in a simplistic additive sense. The micropolitical sites of power that operate within the substance and pedagogy of legal education are underpinned by the multi-faceted character of corporatism.

III. THE POWER OF CORPORATE LAW

Corporate law firms, where practice is likely to take the most technocratic and specialized form in the interests of corporate clients, exert a disproportionate impact on the legal culture.⁵¹ As corporate law firms are a primary destination of law school graduates, particularly for those from the older, élite, establishment institutions, and corporate lawyers are an important source of alumni donations,⁵² their “needs” cannot be ignored in designing the curriculum. Law schools are also anxious that corporate firms employ their graduates, and sponsor

⁴⁸ *Supra* note 26 at 53.

⁴⁹ Compare *ibid.* at 57.

⁵⁰ *Ibid.* at 54.

⁵¹ See A.T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Belknap, 1993) at 273; and A. Freeman, “A Critical Look at Corporate Practice” (1987) 37 *J. Legal Educ.* 315 [hereinafter “A Critical Look”].

⁵² See R.L. Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (Berkeley: University of California Press, 1988) at 288.

recruiting visits by them. By not promoting alternate forms of legal practice, such as public-interest law, law schools subtly discourage it.⁵³

Law graduates themselves find it difficult to resist the lure of the big firms. The first-year salaries offered to associates in these firms are often staggering, compared with typical starting salaries. Columbia University Law School in New York City noted that the median private sector starting salary for its graduates in 1997 was US\$87,000.⁵⁴ The myth that the conjunction of money and power means corporate legal work is the most intellectually challenging also encourages many bright students to gravitate to the big firms with their narrow specializations. In addition, the contraction of the public sector, and the move to abolish or privatize public instrumentalities and utilities, has meant that there are fewer public sector jobs for altruistically minded graduates. Significant debts accumulated in the process of higher education also make the financial offers of the big firms harder to resist. Once ensnared, associates are kept captive by the firm and its large corporate clients during a lengthy and insecure period of apprenticeship as they work feverishly for the great rewards flowing from elevation to partnership, including a salary as much as ten times their present salary: "Thus, the long and painful postgraduate apprenticeship in the law firm teaches the associate that extraordinary rewards will be granted by those in absolute power to some of those who display total obedience and work compulsively."⁵⁵ The intense competition stifles creativity, other than how best to serve the interests of the firm and its corporate clients.

The increase in the time it takes to become a partner, and the lowering of partnership rates,⁵⁶ are also important technologies of power through which knowledge boundaries are contracted. Furthermore, partners in corporate law firms do not have the same degree of security as in the past: today, a lacklustre performance can result in a partner

⁵³ A survey of 168 American law schools in 1997 revealed that 66 per cent did little to promote public interest law, in contrast to the support afforded corporate law: see B.S. Martin, "Why Most Law Schools are Failing at Public Interest Law" *National Jurist* (October 1997) 16. For an insightful analysis of the waning student commitment to public interest law, see A. Stone, "Women, Law School and Student Commitment to the Public Interest" in J. Cooper & L.G. Trubek, eds., *Educating for Justice: Social Values and Legal Education* (Aldershot, U.K.: Ashgate, 1997) 56.

⁵⁴ See "Employment at 98% for Class of 1997: Placement for the Class of '97 by Graduation (May '97)" *The Adviser* (25 August 1997) 1. The American National Association for Law Placement noted that in 1996, the overall median salary for graduates entering private practice was US\$50,000, and US\$30,000 for those entering public interest employment: see Martin, *supra* note 53 at 20.

⁵⁵ *American Lawyers* *supra* note 29 at 222.

⁵⁶ See M. Galanter & T. Palay, *Tournament of Lawyers: The Transformation of the Big Firm* (Chicago: University of Chicago Press, 1991) at 63.

being dismissed.⁵⁷ In addition, economies of scale dictate depersonalization and a high level of generality. National and international law firms are stratified, bureaucratized, top-down organizations, which bear little relationship to the typical law firm of the past.⁵⁸ The direct ad hoc control of day-to-day operations by a small group of partners has been replaced by a specialized division of powers between professional administrators, long-range planners, and department heads.⁵⁹ The term “the law factory” first appeared in the 1930s to capture the growth in scale that had already occurred in American law firms.⁶⁰ Arthurs and Kreklewich refer to the “Fordist law firm,” to continue the industrial analogy into today’s world, and to argue that lawyers’ lives are being altered by the new economy in ways that parallel the working lives of blue-collar workers.⁶¹

Within the new milieu, the legal associate is transformed and rendered docile by bureaucratization and the desire to win approval in a way that is similar to the subjection of the law student. Employed lawyers in the contemporary mega-firm are subject to surveillance through a plethora of bureaucratic devices, including the phenomenon of billable hours. Foucault draws attention to the regulation of the day as a key disciplinary technology of power.⁶² If the day of the lawyer is divided into six-minute slots, for which she is accountable, there is no time for feminist reflexivity or critique. She must focus on being a skilled technocrat, whether she is advising wealthy corporate clients or “bread and butter” family law clients. The corporatization of contemporary legal practice is therefore able to accommodate increased numbers of women and diverse others, provided that they are docile and accept legal orthodoxy. The universalizing tendencies of technocentrism effectively erase advertence to the sexed, raced, and sexualized identities of agents of legality.

The absorption of increased numbers of women, Aboriginal people, and differentiated “others” into law has coincided with the period of economic growth in common law countries since the 1960s and 1970s. The global economy “needed” more skilled personnel to

⁵⁷ *Ibid.* at 61.

⁵⁸ For the classical study of status and institutional rigidity that accompanies bureaucratic ordering, see Weber, *supra* note 7.

⁵⁹ See Nelson, *supra* note 52 at 2.

⁶⁰ Galanter & Palay, *supra* note 56 at 16-17.

⁶¹ *Supra* note 5 at 44.

⁶² *Discipline and Punish*, *supra* note 25 at 149.

accommodate changes in the delivery of legal services. The expansion led to the rise of “mega-firms” in Europe, North America, and Oceania, with highly centralized and bureaucratized administrative structures designed to adapt quickly to rapidly changing market conditions. Reflecting the character of legal technocentrism in the way that it deals with personnel within an abstract, rule-bound system, bureaucratization sheds the social, the subjective, and the affective. Thus, corporate workplaces may be prepared to adopt procedures for “dealing with” what are largely gender-specific problems, such as sexual harassment, because of the fear of adverse publicity. However, bureaucratization and formalism do not necessarily mean that such workplaces are any more sympathetic towards an embodied notion of femininity than small workplaces that lack procedures, as is apparent in the continued resistance towards reasonable accommodation of parenting (read mothering), particularly for those (women) in senior positions. The extensive feminist and legal feminist scholarship addressing these issues seems to have had remarkably little impact upon the practice of corporate law.

Indeed, the corporatization of law firms has resulted in a mirroring of the gendered configurations that typify bureaucracies. Hierarchical ordering within bureaucracies results in superordinate positions becoming masculinized, while subordinate positions remain feminized, racialized, and ethnicized. The characteristics of control create the conditions of feminization that cause male flight. Thus, the lower echelons of the legal profession, including contract, untenured, and poorly-paid positions, are carried out by proportionally more women than men, as is already the case in academia. “Feminization” therefore does not mean that the increased numbers of women are evenly distributed across the profession or within hierarchies, but that women preponderate within the pyramidal base of professional legal hierarchies.⁶³ Although gender, racial, and social exclusiveness may have been reduced or even swept away at the recruitment level,⁶⁴ it remains significant within the inner sanctums of elite firms.⁶⁵ It is preferred that women and “others” who threaten the calculus of the

⁶³ See *Dissonance and Distrust* *supra* note 32.

⁶⁴ Galanter & Palay, *supra* note 56 at 53.

⁶⁵ See Arthurs & Kreklewich, *supra* note 5 at 47. See also C.F. Epstein *et al.*, “Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession” (1995) 64 *Fordham L. Rev.* 291; and J. Hagan & F. Kay, *Gender in Practice: A Study of Lawyers’ Lives* (New York: Oxford University Press, 1995).

technical should occupy subordinate positions where they will be subject to surveillance so that any possibility of disorder can be kept at bay.

The nexus between the practice of law and corporate capital is facilitated by the depersonalized focus on procedural rules. As Alan Freeman points out, it is not that corporate legal practice in itself oppresses poor people, but that it has the potential to commit ever-increasing legal resources to corporate struggles.⁶⁶ The “winner” in such a case emerges after a paper war that may go on for months, with lawyers working insane hours. Despite the myth that corporate practice represents the apex of lawyerly ability, it is ultimately resources, not expertise, that secures the victory.⁶⁷ Hence, the system of corporate lawyering renders it virtually impossible to effect substantive change in the lives of those deemed peripheral to corporate interests, such as Aboriginal people. In focusing on the technocratic rules of procedure, the merits, or justice, of the case are soon sloughed off. In the case of inter-corporate contests, extensive public resources—in the form of judicial and court infrastructures—are expended in the pursuit of victory designed to privilege particular corporate interests above others. Camouflaged by technocentrism, these contests reify the conjunction of status, power, money, and benchmark masculinity in obeisance to the corporate imperative. When it is understood that the overwhelming preponderance of litigation within courts of general jurisdiction is dominated by corporate litigants whose lawyers are inventive technocrats, it can be appreciated that the scope for altering the gender and colour of either substantive or procedural law through litigation is limited.

IV. PEDAGOGICAL POLITICS

By reference to La Trobe University as a case study, I show, first, how the practices and politics of legal professionalism constrain the teaching of law as an autonomous discipline; secondly, I show how economic rationality, effected through government and university funding practices and policies, contributes to the shaping of legal education so as to favour corporate interests. It may be seen how economic rationality effectively diffuses power so that the end result—the quelling of intellectual diversity—appears reasonable.

⁶⁶ See “A Critical Look,” *supra* note 51 at 319.

⁶⁷ See *The Liberal Promise* *supra* note 39; and “A Critical Look,” *supra* note 51 at 320.

In Australia, there has been a dramatic expansion in legal education in recent years, with the number of law schools increasing from eleven to twenty-eight within a decade but, contrary to what the casual observer might have expected, the evidence of curricular diversity is limited. This increase occurred as a result of a government decision to devolve programming responsibility to universities. The offering of law programs was a popular choice among vice-chancellors because of the high demand, the calibre of law students, the prestige of a professional degree, and what was considered to be the comparatively low cost of teaching (based on the large-lecture method). However, the expansion in legal education coincided with the introduction of Uniform Admission Rules (UAR) for legal practitioners in Australian states and territories in 1994. Thus, at the crucial moment of realizing the possibility of diversification in law schools, the impetus was nipped in the bud by the rationality of uniform rules in a federal system. The UAR specifies eleven areas of knowledge that need to be studied for admission.⁶⁸ As already pointed out, the “core” subjects and their technical orientation exercise immense influence on the law curriculum in the common law world, despite ongoing attempts to diversify the “legal canon” by including feminist, critical race, postmodern, and post-structural perspectives. However, some of the new law schools have themselves favoured an approach that is even more conservative than that of the established schools in the belief that traditionally educated graduates would be able to compete more effectively for positions in prestigious corporate law firms. Technocentric orthodoxy is thereby clinched via the legal labour market.⁶⁹

In the current conservative and economically rationalist environment in Australia, the intellectual parameters of the law discipline are contracting even further. Some law schools are in the process of sloughing off, or at least containing, their earlier commitment to diversity in the form of socio-legal scholarship. In accordance with the imperatives of the “new economy,” higher education is in the process of becoming another commodity within the conservative agenda. The implication that the role of law schools is to serve dominant political and

⁶⁸ Rule 3(b) specifies Criminal Law and Procedure, Torts, Contracts, Property (Real and Personal), Equity (including Trusts), Federal and State Constitutional Law, Civil Procedure, Evidence, Company Law and Professional Conduct.

⁶⁹ Compare J. Lancaster, *The Modernisation of Legal Education: A Critique of the Martin, Bowen and Pearce Report* (Sydney: Centre for Legal Education, 1993), who attributes the lack of vitality and substantive diversity in Australian legal education to the bureaucratic mode of decisionmaking developed by the state in its attempts to modernize the discipline.

commercial interests has become more overt, thereby heightening a paradox, in that while legal education is expected to sustain corporatism, corporatism drains the lifeblood from legal education.

The case of La Trobe University is salutary. For twenty years legal studies programs had been taught within a school of social sciences that did not qualify graduates for admission to legal practice. The school was therefore not theoretically constrained in directing its critical and scholarly gaze towards any facet, perspective, or meaning of law. Indeed, it had been one of only a handful of institutions in the English-speaking, common law world to focus exclusively on this project. I took up a Chair in Legal Studies at La Trobe in 1990 when the question of offering an LL.B., in addition to the existing programs, was being mooted. I was excited at the prospect of being involved in an innovative law and legal studies programs within a school of social sciences. While the social sciences do not necessarily eschew positivism, they can provide a critical standpoint, the possibility of which may be denied by an overly close relationship with legal professionalism, which can occur in the case of the more conventional law schools. In my inaugural lecture,⁷⁰ I considered past endeavours to integrate law with the social sciences, such as the attempts by the American Legal Realists at Columbia Law School in the 1920s⁷¹ and at Yale Law School in the 1930s,⁷² all of which had been unsuccessful. Indeed, both Columbia and Yale Universities instituted inquiries as to why their law schools were not teaching "law." I hoped that by developing a transdisciplinary approach, comparable to that adopted by Women's Studies, there would be at least a possibility of experimenting with the integration of law and the social sciences at La Trobe. The rigidity of disciplinary borders would then be collapsed, allowing space for a reflexive socio-legal approach.⁷³

The possibility of an overwhelming legocentric bias was lessened by the diverse disciplinary orientation of members of the school: of the forty full-time academic staff, twenty were legally qualified, while twenty

⁷⁰ See M. Thornton, *Portia Lost in the Groves of Academe Wondering What to Do About Legal Education* (Inaugural Lecture, 1991) (Melbourne: La Trobe University Press, 1991).

⁷¹ See R. Stevens, "Two Cheers for 1870: The American Law School" in D. Fleming & B. Bailyn, eds., *Perspectives in American History: Law in American History* vol. 5 (Cambridge: Charles Warren Centre for Studies in American History, 1971).

⁷² See L. Kalman, *Legal Realism at Yale 1927-1960* (Chapel Hill: University of North Carolina Press, 1986).

⁷³ See "The Ends of Legal Studies," *supra* note 18; and P. Goodrich, "Sleeping With the Enemy: An Essay on the Politics of Critical Legal Studies in America" in J.D. Leonard, ed., *Legal Studies as Cultural Studies: A Reader in (Post)modern Critical Theory* (Albany: State University of New York, 1995) 299 [hereinafter "Sleeping With the Enemy"].

were more closely identified with history, economics, politics, philosophy, or sociology/criminology. In a further attempt to discourage legal professionalism from disqualifying alternate sources of knowledge, applicants for the LL.B. programme were required to have completed at least two years of a university degree other than law. Generally in Australia, students undertake an LL.B. concurrently with another undergraduate program, but the experience of combined programs has been that law has tended to disqualify non-legal knowledge. In the La Trobe case, it was hoped that the students, most of whom were mature graduates, would be equipped with the necessary arsenal to resist legal technocentrism. But, as is the case in North America, this was not to be.

The erosion of the socio-legal orientation of the law degree began to occur even before the first students had enrolled. A list of the “law” subjects to be offered was circulated, all of which sounded very traditional and very familiar (albeit that the UAR had not then been devised): contracts, torts, property, criminal law, constitutional law, and so on. While these subjects do not have to be taught conventionally, there was pressure to hire doctrinally oriented legal academics, rather than socio-legal scholars, to teach what were perceived to be “black letter” or “hard” law subjects, which immediately disturbed the disciplinary balance among the staff. It was assumed that “to be authentic, an understanding of law must be from a lawyer’s point of view.”⁷⁴ There was concern in some quarters that the critical and theoretical approaches favoured by incumbent staff would not be approved by the Victorian admitting authorities. Indeed, the suspicion of a legal-studies orientation did attract unprecedented scrutiny of the new programs to be offered by La Trobe and by Deakin University (another Victorian institution with a reputation for innovation which also had a new LL.B. program approved at the same time). The Academic Course Appraisal Committee wanted details as to the pedagogical methods, forms of assessment, and number of hours to be devoted to the various topics within each subject area. The result was that socio-legal perspectives were largely blanching from the subjects necessary for admission to practice. Incidentally, the completion of the “core” subjects was not necessary for the award of the LL.B. at La Trobe, but it was rare for a student to opt not to undertake them—“just in case” they decided to be admitted later on, or “to keep their options open.” Once again, it can be seen how the legal labour market plays a powerful role in securing institutional conformity within the academy.

⁷⁴ I. Duncanson, “Degrees of Law: Interdisciplinarity in the Law Discipline” (1996) 5 Griffith L. Rev. 77 at 80.

The LL.B. students shared optional subjects with B.A. students, but a schism manifested itself at an early stage: “We want more *law* subjects,” chorused many of the law students. What they wanted was more technocratic law of the “core” variety, for they put in petitions for advanced contracts, trade practices, and mainstream taxation (eschewing the critical feminist tax course that was offered). They also claimed that they were academically superior to legal studies students and should be in separate classes. The profile of the school began to change as more mainstream lawyers joined the staff, and socio-legal scholars departed, or their contracts were not renewed. The culture was rapidly being transformed from a socio-legal studies environment to that of a traditional law school.

David Friedrichs has written about the way in which those who study the legal system are marginalized within the legal culture, particularly if they adopt an interdisciplinary, critical, and humanistic approach.⁷⁵ Unquestioning deference to the dominant legal culture is all-important, as law students soon realize that it is dangerous for a lawyer to look in the mirror. As Richard Collier has noted, “methodological reflexivity ... in law ... remains ... akin to heresy.”⁷⁶ Thus, La Trobe staff, as well as students, sought to secure their futures and to legitimate their intellectual positions by disowning critique, or even by dissociating themselves from legal studies altogether.

More recent changes in government policy have also played a role in narrowing the curricular canvas. Since a conservative (Liberal) government came into office in 1996 at the federal level, it has been busy contracting the public sphere by “curbing” expenditure and by instituting privatizing measures. Higher education has not been immune. La Trobe University determined that more law and less arts students would be enrolled in what is no longer a Faculty of Social Science, but a Faculty of Law and Management, clearly signalling the new economic turn. Gone is the requirement that LL.B. applicants have at least two years of university education; the “market” is to be directed primarily to (the more docile?) school-leavers. As a result of changes to the Higher Education Contribution Scheme, law is now costed at a higher rate than arts, so that B.A. and LL.B. students can no longer take the same legal studies subjects: the schism has been set in concrete. Furthermore, legal studies subjects, such as those involving feminism and critical criminology, have been rationalized, while new subjects “more

⁷⁵ *Supra* note 10. Compare L.M. Friedman, “The Law and Society Movement” (1986) 38 *Stan. L. Rev.* 763.

⁷⁶ “Masculism, Law and Law Teaching” (1991) 19 *Int’l J. Soc. L.* 427 at 434.

appropriate” for law students are being introduced. They involve the hard, technocratic law that the students lobbied for, while legal studies students are left with the remnants of the critical, the interdisciplinary, and the theoretical subjects perceived to be elastic and dispensable—a point made more poignant by encouraging staff in disfavoured areas of specialization to take early retirement packages. However, the magnetic effect of “hard” law is also affecting legal studies in the changed climate—the more technocratic the content, the more like “real” law it is, and the more attractive to students. In this way, the “social” is contained so that the voices of women and “others” are muted or silenced altogether within an abstract and universalized discourse designed to privilege mainstream and corporate interests. While academics still theoretically have a space in which to articulate critical ideas, the Damoclean sword of downsizing, wielded by university administrators, has induced a remarkable quiescence regarding changes to the academy, including the demise of legal studies. Ian Duncanson, one of the few scholars to have spoken out, puts forth a persuasive case for the retention of legal studies which, he argues, must necessarily “operate at some remove from the traditional vocational priorities of the law discipline.”⁷⁷

A further dimension of rationalization relates to practical legal training (PLT), which is offered in lieu of articles in some Australian states as a prerequisite to admission.⁷⁸ The narrowing effect of PLT on the law graduate’s vision is comparable to that of the American bar exams in reining in diversity.⁷⁹ As a result of the changes in post-secondary education funding policies, PLT is being cut back. Nevertheless, because of the concern by law schools that their graduates might be unable to practice if denied access to PLT, some law schools have responded by including more skills training, including drafting, interviewing, dispute resolution, negotiation, and advocacy in their LL.B. curricular offerings.⁸⁰ While law schools might be better equipped to

⁷⁷ “The Ends of Legal Studies,” *supra* note 18 at 12.

⁷⁸ Formal PLT courses were developed in the 1970s to overcome the unevenness of the articling experience offered by law firms. A full-time course usually lasts six or seven months. In addition to receiving lectures on the day-to-day problems of practice, students also receive “hands on” practical experience by being divided into simulated “firms.”

⁷⁹ Compare Garkawe, *supra* note 14.

⁸⁰ A. Lamb, “Changes in Attitude, Changes in Latitude: The Changing Climate in Pre-Admission Practical Legal Training in New South Wales” (1995) 13 J. Prof. Legal. Educ. 173 at 179. The University of Newcastle Law School (NSW), for example, incorporated so much clinical experience in its law degree that it was able to be accredited as a practical legal training course, in addition to satisfying the substantive components. Other universities have responded by offering PLT training as a full fee-paying course available to law graduates.

teach practical skills than many law firms,⁸¹ and skills can be taught innovatively,⁸² the technocratic and vocational imperatives inevitably assume centre stage so that the critical and reflexive voice is even more likely to be disqualified in skills teaching than in other facets of the curriculum.

Australian higher education is in a state of flux as a result of changes induced by the new economy. Many universities have already decided to charge full fees for at least some law places; others will offer entire programs on a full fee-paying basis, designed to attract students by adopting a minimalist approach to legal education and qualifying them for admission in the shortest possible time. Again, the effect is to emphasize technocratic law as the only *legitimate* substance of the law curriculum and to make everything else dispensable.

It might also be noted that the academy is in the process of sloughing off its long-cherished norms of collegiality in favour of bureaucratized, top-down, managerialist forms of governance, reflecting the “Fordism” that has transformed law firms. Eugene Clark and Martin Tsamenyi refer to this phenomenon as “creeping corporatism,”⁸³ whereby academics have become workers whose tenure is no longer assured, and who are likely to be subjected to multifarious disciplinary technologies of surveillance, which could even include clocking on and off, according to the recommendations of one university vice-chancellor. Deans and unit heads, who are responsible for the policing of staff, are likely to be appointed, rather than elected, and they themselves are likely to be subject to supervision by an additional layer of control, comprising “mega-deans” and pro-vice-chancellors. Reflecting the gendered pyramidal structure of the law firm, the apex has become more overtly masculinized and difficult for women and “others” to inhabit, while the pyramidal base, comprising support staff and academics employed on a casual basis or short-term contract, remains feminized and ethnicized.

With the example of Law and Legal Studies at La Trobe University and the changes that have occurred in the funding of Australian universities, I have sought to show that corporatist and masculinist forms of power flow through whatever sites are available,

⁸¹ See N.L. Schultz, “How Do Lawyers Really Think?” (1992) 42 J. Legal Educ. 57.

⁸² See M. Le Brun & R. Johnstone, *The Quiet (R)evolution: Improving Student Learning in Law* (North Ryde, Australia: Law Book, 1994).

⁸³ “Legal Education in the Twenty-First Century: A Time of Challenge” in P. Birks, ed., *Pressing Problems in the Law: What Are Law Schools For?* vol. 2 (Oxford: Oxford University Press, 1996) at 43.

including any that might arise out of opportunities created by the new economy. The dominant are thereby able subtly to continue to shape the law school environment in order better to serve their interests, while simultaneously limiting the possibility of critique by destabilizing academic positions. Thus, it can be seen that the launching of a radical project from within a law school was a risky enterprise; as Peter Goodrich has observed: "The dice are loaded against a politically radical critical legal studies."⁸⁴

V. CONCLUSION

Feminist scholarship has sought assiduously to alter the landscape of legal education over the last two decades.⁸⁵ Indeed, there has been a marked broadening of issues in course curricula and textbooks, together with a notable change in the content and character of mainstream law journals, as well as special issues and journals dedicated to feminist legal scholarship.⁸⁶ Feminism also has exerted an effect on legal theory,⁸⁷ as has critical race theory,⁸⁸ and Queer theory.⁸⁹ However, critical legal theory of whatever kind is marginal to the facilitative and technocratic project of the law school. The marginality of subjects such as "Women and the Law," "Aborigines and the Law," "Sexuality and the Law," "Law and Literature," "Law and Culture," and so on, is secured through their optional and "add-on" status. The message of optionality affirms the peripheral status of all critical and theoretical subjects to the calculus of the technical, which are

⁸⁴ "Sleeping With the Enemy," *supra* note 73 at 323.

⁸⁵ See A. Detlev, *The Effects of Feminist Jurisprudence on the Content and Pedagogy in Legal Education* (Ph.D. Thesis in Education, University of California, Los Angeles, 1992) (Ann Arbor: UMI Dissertation Services, 1993).

⁸⁶ The bibliography is vast; I could not begin to do justice to it. To illustrate the exponential growth in feminist legal publishing, it might be noted that there are now more than two dozen English-language, feminist law journals, most of which have appeared in the last decade: see M. Minow, "The Young Adulthood of a Women's Law Journal" (1997) 20 Harv. Women's L.J. 1.

⁸⁷ See, for example, M.H. Kramer, *Critical Theory and the Challenge of Feminism: A Philosophical Reconception* (Lanham, Md.: Rowman and Littlefield, 1995); and Minda, *supra* note 8.

⁸⁸ See, for example, G. Bird, G. Martin & J. Nielsen, eds., *Majah: Indigenous Peoples and the Law* (Sydney: Federation, 1996); K. Crenshaw *et al.*, eds., *Critical Race Theory: The Key Writings that Formed the Movement* (New York: New Press, 1995); and R. Delgado, ed., *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995).

⁸⁹ See, for example, R. Robson, *Lesbian (Out)Law: Survival Under the Rule of Law* (Ithaca, N.Y.: Firebrand, 1992).

dispensable at times of economic rationalization. Thus, despite the effort expended, critical theory generally has exerted surprisingly little impact upon the mainstream curriculum. Indeed, as I have argued, it is the role of technocentrism to resist such destabilizing incursions because what we are witnessing is the attempt to re-absorb the study of law into mainstream intellectual life.⁹⁰ Such a project necessarily must represent a further site of contest because few practitioners are likely to acknowledge the legitimacy of the desire of legal academics to be accepted within the academic community as bona fide scholars and intellectuals.

Rather than rely upon the doubtful impact of optional subjects within the law curriculum, and the ad hoc and uncertain trajectory of social change, some feminist scholars have deliberately set out to produce gender-sensitive materials for the “core curriculum.”⁹¹ In Australia, a federal government initiative was launched, following a period of intense media focus on “gender bias in the judiciary” in 1993⁹² which involved consultants preparing materials on the themes of citizenship, work, and violence.⁹³ Copies of the materials were sent to all law schools and were made available on the Internet, but it was left to individual academics to determine what use they would make of them. While the impact of such initiatives cannot be gauged accurately, the powerful discourses of “academic freedom” and “political correctness,” together with the norms of masculinist and corporate orthodoxy, ensured that the materials would not be embraced unequivocally. In any case, the inclusion of the occasional article within the legal canon that recognizes women as litigants, or in subject positions other than that of

⁹⁰ Twining, *supra* note 16 at xix.

⁹¹ See American Bar Association, Commission on Women in the Profession, *Elusive Equality: The Experiences of Women in Legal Education (Executive Summary)* (Chicago: American Bar Association, 1996).

⁹² The most notorious of these instances involved a remark by Bollen J. of the South Australian Supreme Court in the course of a marital rape trial to the effect that “rougher than usual handling” was acceptable on the part of a husband towards a wife who was less than willing to engage in sexual intercourse: *R. v. Johns* (26 August 1992), (S. Aust. S.C.) [unreported].

⁹³ The citizenship materials were prepared by Professor Sandra Berns, Ms Paula Baron, and Professor Marcia Neave, and the Work and Violence materials by Professor Regina Graycar and Associate Professor Jenny Morgan: see R. Graycar & J. Morgan, “Legal Categories, Women’s Lives and the Law Curriculum OR: Making Gender Examinable” (1996) 18 Sydney L. Rev. 431. The writer chaired the overseeing committee. Of course, gender bias in the judiciary is by no means a recent phenomenon. Yet, as the Hon. Shirley S. Abrahamson observes, it has only recently been “discovered,” which has led to the establishment of a large number of gender bias task forces: see “Toward a Courtroom of One’s Own: An Appellate Court Judge Looks at Gender Bias” (1993) 61 U. Cin. L. Rev. 1209.

victims, does not transform the law curriculum.⁹⁴ On the contrary, selective inclusion may illustrate how diverse knowledge can be domesticated so that its dangerousness is neutralized. Legal education has a remarkable capacity to “water down and absorb seemingly discordant and threatening ideas.”⁹⁵ Indeed, the retention of the form of law, while adding in “the other,” as I have argued in respect of discrimination complaints, actually may legitimize the status quo, thereby illustrating how law is thoroughly imbricated with the corporate imperative and benchmark masculinity.

While the discursive attempts to alter the gender and colour of law are not unimportant, they are unable to displace the potency of technocentrism. The role of technical reason is crucial in decentring and diffusing power, a phenomenon that Wendy Brown refers to as “centrifugation,”⁹⁶ the converse of the centripetal effect on competing knowledges, on which I have focused. Nevertheless, there is a symbiosis between these twin movements—the centrifugation of power and the centripetal effect of the technocratic (technocentrism)—as they move in opposite directions to confuse and diffuse the loci of corporate and masculinist power. This fragmentation suggests a more complicated phenomenon than a simple dominance theory of class or patriarchy. I have argued that moves towards the new economy, including the global phenomenon of large corporate law firms and the privatization of public goods, have been facilitated by the magnetic, albeit numbing, effects of technocentrism to which law students quickly succumb. The law school culture, including modes of assessment, the pressure to be accepted as a high-class professional, and the lure of the legal labour market serve to neutralize student resistance, even if the partiality of *techné* is glimpsed through the fog that is induced by studying countless cases and statutes. To prevent the possibility of insurgency in legal practice, I have also argued that the bureaucratized corporate law firm itself constitutes another disciplinary regime. Government and university changes reveal there are in fact “polymorphous disciplinary mechanisms” in operation that underpin and normalize (corporate) power.⁹⁷ In seeking to project an image of itself as value-free and neutral, law is able to accommodate—chameleon-like—divergent interests, including those perceived to be

⁹⁴ C. Menkel-Meadow, “Portia Redux: Another Look at Gender, Feminism, and Legal Ethics” in Parker & Sampford, eds., *supra* note 43, 25 at 54.

⁹⁵ J. Feinman & M. Feldman, “Pedagogy and Politics” (1985) 73 *Geo. L.J.* 875 at 925.

⁹⁶ *Supra* note 1 at 34.

⁹⁷ *Power/Knowledge supra* note 3 at 106.

in vogue at a particular moment, such as sex, race, sexuality, and post-colonialism. The commitment is parlous, however, and may be jettisoned if education programs have to be rationalized or if it becomes threatening, as may be seen in the contemporary rolling back of affirmative action in the United States and elsewhere. The insidious way that law operates was percipiently remarked upon by Alexis de Tocqueville well over a century ago:

The lawyers [of the United States] form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time, and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community, and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purposes.⁹⁸

The “deification of technicality”⁹⁹ is denounced from time to time but few legal critics are prepared to confront the full import of de Tocqueville’s words, that is, that dominant interests are complicit in fashioning law in their own image. Marlene Le Brun and Richard Johnstone, for example, acknowledge the impoverishment of a rules-oriented approach in legal education, and the reluctance to change.¹⁰⁰ While they identify a number of endogenous factors as to why law schools perpetuate a rule-based image of law, including convention and deference to hierarchy,¹⁰¹ they tend to disregard factors such as the prevailing socio-economic trends and the growth of corporatism. On the other hand, quite a few legal scholars have expressed concern about the commercialization of legal practice and the decline of professionalism,¹⁰² and about the malaise that has beset the legal profession, including the profound dissatisfaction and cynicism regarding the teaching and practice of law, particularly in the United States.¹⁰³ Harry Edwards suggests that the growing disarray in the profession can be directly related to the growing incoherence in law teaching and

⁹⁸ *Democracy in America* trans. H. Reeve (Cambridge: Sever and Francis, 1862) at 358.

⁹⁹ L.M. Wormser, *The True Function of Schools of Law* (New York: Bronx County Bar Association, 1923) at 17. Compare Marcuse, *supra* note 2.

¹⁰⁰ *Supra* note 82.

¹⁰¹ *Ibid.* at 28-38.

¹⁰² See, for example, Sampford & Parker, “Legal Regulation, Ethical Standard-Setting and Institutional Design” in Parker & Sampford, eds., *supra* note 43, 11 at 12; and Galanter & Palay, *supra* note 56 at 2.

¹⁰³ See Bachman, *supra* note 46; M.A. Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (New York: Farrar, Straus and Giroux, 1994); and Kronman, *supra* note 51.

scholarship.¹⁰⁴ Some scholars, such as Andrew Goldsmith, acknowledge that while the practice of law is increasingly dominated by concern for efficiency and profitability, transformation can be effected through the academy by a pedagogy that combines theoretical, experiential, and technical knowledge.¹⁰⁵

The tension between the life of the scholar and the practice of law is long standing,¹⁰⁶ but it is clear that the schism has become more pronounced. Anthony Kronman goes so far as to suggest that the tension in the case of American legal education can be described as pathological,¹⁰⁷ a condition for which he holds anti-prudential movements, such as Critical Legal Studies, responsible.¹⁰⁸ Kronman evinces an idealized longing for the past when the “lawyer-statesman” was committed to serving the public good.¹⁰⁹

Far from idealizing the past, feminist, critical race, and Queer legal scholars focus on the future in their endeavours to envision the way things might be. Many have rejected legal practice as a subject of study in favour of more arcane and esoteric areas of scholarship and remain deeply suspicious of the sexism, racism, and homophobia that typifies legal practice—corporate practice, in particular. The reflexivity, the interrogation of power, and the nature of micropolitical studies has rendered impossible a return to the modernist methodologies of the past, despite the institutional pressures to do so. Has it become the fate of postmodern intellectuals then, as Peter Goodrich asks, to be tied to a specific institution and its practice, while diverting their gaze elsewhere?¹¹⁰

Although not optimistic about changing the gender and colour of law because of the way the exigencies of the new economy have neutralized past gains, I do not wish to suggest that the legal system is

¹⁰⁴ H.T. Edwards, “The Growing Disjunction Between Legal Education and the Legal Profession” (1992) 91 Mich. L. Rev. 34 at 75.

¹⁰⁵ “Heroes or Technicians? The Moral Capacities of Tomorrow’s Lawyers” (1996) 14 J. Prof. Legal Educ. 1.

¹⁰⁶ See, for example: Twining, *supra* note 16 at 53; Edwards, *supra* note 104; A.V. Dicey, *Can English Law be Taught at the Universities?* (Inaugural Lecture delivered at All Souls College, Oxford, 21 April 1883) (London: Macmillan, 1883) at 29; and W. Blackstone, *An Analysis of the Laws of England*, 3d ed. (Oxford: Clarendon, 1758) at 37.

¹⁰⁷ *Supra* note 51.

¹⁰⁸ *Ibid.* at 268. Compare M.R. Martini, *Marx Not Madison: The Crisis of American Legal Education* (Lanham, Md.: University Press of America, 1997).

¹⁰⁹ *Supra* note 51 at 307. Compare Martini, *supra* note 108.

¹¹⁰ “Sleeping With the Enemy,” *supra* note 73 at 317.

totally closed. As Foucault has demonstrated, power is never totalizing; it always generates a resistance that creates instability.¹¹¹ Thus, some law students, especially those who carry the seeds of “otherness” with them will not accept unconditionally the power of orthodoxy. Their questioning unsettles law’s claims to truth, neutrality, and universality. In addition, critical legal scholarship of all kinds endeavours to resist the tentacles of technocentrism. As I have suggested, law journals are overflowing with articles that explore alternative forms of knowledge in conjunction with alternative pedagogies, including those emanating from law and feminism, critical race theory, and law and literature. However, while the dynamism of postmodern scholarship can be intellectually exciting, its impact has been limited, not only because of the technocratic imperative, but because it evinces only the most marginal relationship with the academic discipline of law.¹¹² At the barriers of legitimate legal knowledge, technocentrism either resists what is threatening or assimilates a few anodyne notions. The homologous relationship between the core subjects of the law degree and corporate practice must be understood as ongoing sites of contest that demand eternal scholarly vigilance. The new corporatism is not just another modernist narrative that has passed its use-by date.

¹¹¹ *The History of Sexuality, An Introduction* vol. 1, trans. R. Hurley (New York: Random House, 1978) at 114.

¹¹² “Sleeping With the Enemy,” *supra* note 73 at 304.