ARTICLES

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RECENT CRITICISMS OF FORMALISM IN LEGAL THEORY AND LEGAL EDUCATION

Formalism

It is not the task of this article to explore all the dimensions of Australian formalism. Rather we are concerned to construct a theoretical model of formalism which, we believe, no one familiar with the Australian environment will find inappropriate. In the context of this model, we will examine the attacks on formalism available in the recent American literature of social theory of law. The characteristics of formal legal theory are:

(a) A conception of law as an autonomous discipline with its own methodology, rationality and history. Typical devices of the discipline to control cognition are legal logic, a system of hierarchial rules, dichotomous definitions, and an entrenched concentration of analysis on the appellate court judge.

(b) A pattern of evaluation of law and legal institutions which is coloured heavily by these cognitive controls and which principally measures the internal consistency of rules and their sources to the exclusion of their substantive content and social effect.

(c) A failure to examine the relationship between formal theories of law and the structural devices which underpin the operation of law. These structural devices include the use of a highly trained legal profession, a complex hierarchy of decision-making authorities, an anachronistic language and a high degree of mysticism in the apparatus of law.

(d) A precise and narrow demarcation of the legal from the non-legal, requiring limited appraisal of the social, political and economic realities, and a striking inability to theorise about purposes and effects of law.

These characteristics of formalism are evident in all Australian legal institutions including law schools.

Formalism in legal theory does not develop in isolation and is not neutral in its impact. "The paramount social condition that is necessary for legal formalism to flourish in a society is for the powerful groups in that society to have a great interest in disguising and suppressing the inevitable political and redistributive functions of law".[1] The comment is made in the context of an

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1. Morton Horwitz, *The Transformation of American Law 1790-1860* (Cambridge, Mass., Harvard University Press, 1977).

historical consideration of formalism in nineteenth century America. Whether it applies to the Australian experience should be of primary concern to legal educationalists. If the analogy runs, whether it is admitted or not, what we do in law school to perpetuate formalist theory is highly political.

Modern historical analysis of formalism in the American legal tradition has mapped subtle changes. Once the tradition divested itself of religious or natural law content, it turned to "metaprinciples".[2] A theory of contract was built on consensus and agreement; a theory of liability was built on fault and negligence; a theory of governmental responsibility demanded legal mechanisms for corporate and entrepreneurial action with minimum public control, and so on. Metaprinciples maximised individual freedom of the commercial class[3] and created the environment in which free will philosophy could be expressed and materialised in closely selected social contexts. The adoption of metaprinciples supposed that rules could be logically deduced from assumptions of free will and corollary principles of liberty, property and security. Legal theory at this stage was in accord with the then current political, moral and economic theory. In subsequent developments, twentieth century American thought has espoused scepticism and modernism. The metaprinciples of free will, liberty, property and security have been replaced by moral relativity and "policy" or "utility"[4] in processes reflected both in legal theory and legal education.

We could expect historical analysis of Australian formalism to reveal similar patterns, though theoretical description is still awaited. Despite the lack of analysis, however, it seems that the adoption by Australian law of relativity of morals and legal policy has been extremely limited, though modern needs have occasionally been met with vividly innovative developments. However, in Australia the primary device for innovation is legislation, not judicial decision. While formalism in legal education maintains a focus on judicial decision, even major innovation can be passed over without undue disturbance to the basic approach to legal education. Moreover, legal thinking at large has not been adventurous. The Australian legal experience involved continuous import of rules and principles of English common law, unconstrained by political trauma or overt nationalism, even after Federation in 1901. As in England, there was a much delayed recovery from the narrowness of Austinian postivism and predilection to regard political revolution as irrelevant to legal analysis. Law turned inward and perceived only those mechanisms of change prescribed by itself. Order became self evident and self justifying. The process was one of intellectual regression that slowly and surely lost the tempo of increasing social mobility, changes in the economic order and exponential technological growth.[5] The era of scepticism that struck the United States early this century and which brought with it the urge to change legal education to reflect a wider reality epitomised by the realists has yet to appear here.

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2. Duncan Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harvard Law Review* 1685, Part IV "Three Phases of the Conflict of Individualism and Altruism".
3. At the expense of other classes for whom these "freedoms" were not available.
4. This theoretical description was provided by Duncan Kennedy, "Form and Substance" *supra* n. 2. He summarised twentieth century experience of the United States thus: "A new scepticism destroyed the presumptive legitimacy of the old system, vesting a vast number of difficult legal problems, but solving none of them" (1733). He argued that particular rules had to be redefined or reconceptualized (e.g. duress as overbearing of the will), and that rules derived from abstract premises had to be justified anew or rejected (e.g. silence cannot be consent). He then saw the rise of new areas of law such as labor law, consumer protection, social insurance and securities regulation on the battle ground.
5. See Alvin Toffler, *Future Shock* (New York, Random House, 1970).

There is another obvious difference between the experience of law in Australia and America. While formalism was the predominant theory in America it was reflected in law schools and their publications, but, even before the turn of the century, it provided a catalyst for *advances* in teaching methodology. In its heyday and in the hands of its most narrow supporters, formalism in American law schools was mitigated by the multi-faceted case method approach which demanded and instilled a variety of intellectual skills.[6]. At the same time formalism in legal theory underwent substantial maturation. The concentration on appellate courts in the United States never gave unequivocal support for disciplinary narrowness. The nature of the courts required explanation of politically elected and appointed judges, and the immense social influence of the Supreme Court.[7] The problems of interpretation of the Bill of Rights confronted formalist lawyers with unlimited possibilities for judicial action which they found uncomfortable.[8] Moreover, formalism in the United States was bound to search for guiding principles:[9] the problems of exponential growth of commerce and bureaucratic government in the context of multi-state jurisdictions spawned the now abandoned Restatement tradition.

The Australian experience of formalism has been very different and has not been relieved by similar liberating influences. Indeed some features of the Australian legal experience substantially forestall mature analysis of legal institutions. The Brandeis brief is unknown. Evidence rules severely restrict the material presented to a court. Political and sociological realities are not directly included in legal arguments. Theorising about purposeful decision-making by the judiciary is inhibited by the failure of judges to admit that they do it silently and that they should do it expressly. While Australian judges realise rules "demand from their addresses adherence to the values to which they give expression"[10], they explain the values in terms of justice, peace and good order, or whatever is the appropriate rhetoric, without acknowledgement of the ideological difficulties created by pluralism in twentieth century Western societies. That the same rules can be viewed as mechanism for pursuit of vested interest[11] is unacknowledged; criticism of law is thus unanswered by those in the society who are probably best able to provide answers.

Certainly till the sixties, and even now in most schools, legal education was one of the primary institutions for expressing and developing a particularly narrow philosophy of formalism. This was generally manifested in a teaching method of straight lectures which expounded rules and authoritative precedent, distinguishing ratio from obiter dicta with meticulous and wonderful

6. Alan A. Stone, "Legal Education on the Couch" (1971) 85 *Harvard Law Review* 392, 407-418.
   Compare Paul Savoy, "Toward a New Politics of Legal Education" (1970) 79 *Yale Law Journal* 444.
7. Australian courts have a conservative view of themselves. See generally: Solomon Encel, *Equality and Authority: A Study of Class, Status and Power in Australia* (Melbourne, Cheshire, 1970) 74-77; and Eddy Neumann, *The High Court of Australia: A Collective Portrait* 1903-1970 (Occasional Minograph No. 5, Department of Government and Public Administration, University of Sydney, 1971).
8. The "neutral principles" debate should be seen in this context. The basic literature in the debate includes: Herbert Wechsler, "Towards Neutral Principles of Constitutional Law" (1959) 73 *Harvard Law Review* 1; "The Courts and the Constitution", (1965) 65 *Colombia Law Review* 1001; Arthur S. Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Adjudication" (1960) 27 *University of Chicago Law Review* 661.
9. See also the recent analysis of judicial decision making in the writings of Ronald Dworkin.
10. Roberto Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (New York, Free Press, 1976) 37.
11. William J. Chambliss & Robert B. Seidman, *Law Order and Power* (Reading, Mass., Addison-Wesley, 1971): Robert Lefcourt, editor, *Law Against the People: Essays to Demystify Law, Order and the Courts* (New York, Random House, 1971).

precision.[12] The discipline demanded limited intellectual horizons. Memory exercise was literally the only skill demanded of the average Australian student: straight exposition of texts with references to the Australian cases (since the texts were usually English) was the primary skill of the teacher. Australian students were taught Goodhart[13] and Paton[14] as foundation theory to create a context in which the cases, and not the judges, could be conceptualized as the source of law. Whatever the outcome of the inadequate student debate[15], the comparative youth of the Australian law student can no longer support the still very visible predilection of law schools for memory exercises.

Though detailed analysis of the relationship between the profession and the law schools in the United States has yet to be made, it is evident that it had a different character and produced different tensions to those experienced elsewhere. In Australia the tension between academics and professionals was narrowly defined and led to a reinforcement of formalism and a loss of intellectual vigor of participants as the debate oscillated between silence and dissipating consideration of alternatives to apprenticeship. The apprenticeship discussion, as conducted in Australia, rarely initiated consideration of the underlying philosophy of formalist theory either in legal education or in legal practice.

Criticism of Formalism

All the characteristics of formalism described above have been attacked in the last seventy years with varying degrees of effectiveness.[16] Yet, despite the realists and other opponents, formalist theory remains strong in the common law world.[17] The reasons for this are not apparent. Horwitz[18] suggests that the apparent immunity from theoretical attack lies in the relationship of formalist theory to the power of the legal profession and the groups it serves (though the nature of this relationship has yet to be explored).[19] Moreover, the diffused nature and sources of specific attacks have contributed to the survival of formalism. Kuhn's idea of a 'revolutionary' change[20] in the paradigm of thought in a discipline helps explain the failure of the modern critiques to redirect legal theory. It suggests that formalism will continue until the paradigm is fundamentally altered. However, a 'revolution' in legal thought faces enormous difficulties:

(i) It requires construction of an alternative to a theory that has been developing strength since Blackstone (arguably, since the Romans). Formalism defines legal thinking and any alternative can be treated as *prima facie* non-law and hence ignored by the main stream of the discipline.

12. Some theorists discredited the distinction: Abraham Harari, *The Place of Negligence in the Law of Torts* (Sydney, Law Book Company, 1962), Chapter 1.
13. A.L. Goodhart, *Essays in Jurisprudence and the Common Law*, Chapter 1, "Determining the Ratio Decidendi of a Case" (Cambridge, University Press, 1931).
14. George Paton, *A Textbook on Jurisprudence* edited by David Derham (Oxford, Clarendon Press, 1964).
15. Australian students are frequently compared adversely with the "more mature" U.S. variety though it seems to us that they are just as intelligent.
16. The realist attacks were highly successful in some ways though they failed to establish a cohesive theory.
17. It is particularly strong in Australia.
18. Horwitz, *The Transformation of American Law, supra* n. 1.
19. The current historical debate about the significance and nature of formalism in post-bellum America produces a number of hypotheses that should be considered in the Australian context.
20. Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago, University of Chicago, 1970). Kuhn's model has been applied to legal research: Edwin M. Lemert, *Social Action and Legal Change: Revolution in the Juvenile Court* (Chicago, Aldine, 1970). A short account of Kuhn's position is in R.A. Samek, "Beyond the Stable State of Law" (1976) 80 *Ottawa Law Review* 5, 9.

(ii) Anyway, searching for *an alternative theory* to formalism ignores the relativistic character of twentieth century knowledge: law as a discipline should contain and express a number of alternative theories about law, as do other related disciplines.

(iii) Construction and acceptance of alternative theories about law have implications for social stability which must be theoretically examined and empirically contained. This directly raises the major problem of our imperfect understanding of our socio/legal experience.

(iv) While innovations in methodology in science can be quickly recognized as legitimate if they produce "results", a pragmatic vindication of innovation is not available in law. What is an appropriate epistemology for the discipline remains a serious and unanswered question.

While this is not the place for a full exploration either of the theoretical difficulties confronting revolutionary legal thought, or for testing the analogy between scientific and legal paradigms, it is essential to recognise the diverse difficulties in the path of those attempting to construct a modern theory of law. The diversity and significance of these difficulties in great part explain why the widely diffused attacks on formalism are so far unreflected in mainstream analysis and writing in the discipline of law. What follows is a more detailed description of the characteristics of formalism and the relevant criticisms. For the purpose of drawing recent American critiques into the Australian context, we have given special emphasis to the fourth characteristic.

(a) The conception of law as an autonomous discipline with its own methodology, theory and history.

Before detailing the critique of this characteristic, it will help to amplify its content. Formal legal methodology primarily emphasises classification, definition and conceptualisation by exercise of deductive reason, not human will. It focuses on the technicalities of private law by analysis of rules and cases. Analysis is primarily method based, not policy based, even in constitutional law.[21] Lawyers find it convenient to give concepts clear boundaries; law is separated from non-law, fact from value, fact from law, procedure from substance, and so on. Dichotomous or bifurcated thinking derives from positivism in legal and scientific theory that separates moral judgments from other kinds of judgments by dividing the 'is' from the 'ought'. Classification theory is not based on a continuum of definitions since recognition of continuums of meaning would admit discretion and subjectivity.

Critique of this characteristic reveals fundamental epistemological inadequacies of formal theory. Emphatic demarcation of concepts by lawyers and scientists helps conceal value judgment under a paraphernalia of cognitive controls that deliver apparently satisfactory answers to problems without requiring the values underlying all substantive questions to be overtly and mechanically balanced.[23] Law follows the refined tradition of western thought of distinguishing objective and subjective judgment despite strong attack on

21. A commonly heard criticism is that the High Court judges read the Australian constitution as if it was a conveyancing document.
22. Despite studies of the problem of the penumbra explored in H.L.A. Hart, *The Concept of Law* (Oxford, Clarendon Press, 1963), Chapter 6.
23. Compare the L.S.P. method of making judgments. The most radical element in the Lasswell and McDougal framework is the demand for articulated values and rational analysis of value choice. See "Legal Education and Public Policy: Professional Training in the Public Interest" (1943) 52 *Yale Law Journal* 203.

this methodology:[24] there is an irreducibly non-subjective dimension of individual appraisal and passion, and an irreducibly non-objective dimension of a commitment to obey requirements acknowledged by the individual to be independent of the self.[25] Mere classification of things or events as facts implies theory, order and value.[26]

While other disciplines have absorbed these methodological critiques, law continues to rely on an epistemology appropriate to the nineteenth century. "Legal rationality", that is, reasoning with rules, is recognized at the expense of all other components of decision, such as creativity, imagination, feelings, states of mind, instincts and the limitations inherent in language itself. Despite Bentham's utility theory, these components cannot be ordered or predicted, either on an individual or social basis; thus it appears to be more systematic to ignore them. In the result, formal theory contains an inadequate version of human decision-making. It constructs an abstract system by concentrating on instrumental and structural constraints (producing masses of literature on legislative processes, the doctrine of *stare decisis* and appellate hierarchies) without consideration of the very fragile psychological internalization of their meaning which effectuates the constraints.

The ideas of legal logic and the version of law as an ordered or "scientific" system of rules embodied in precedent and legislation were demolished by the realists, but, by converting direct and compelling criticism into the ravings of "rule sceptics",[27] formalists retained superiority, though theoretically the legacy of realist criticism is still unmet.

While it is acknowledged to be too narrow a basis from which to view law, the paradigm of the appellate court judge still continues to monopolise class time and publishing resources.[28] This concentrates analysis on institutional demarcation of people entitled to decide; decision is viewed theoretically as the prerogative of judges while behaviour of administrators and bureaucrats is either ignored or clothed with a spurious semi-judicial quality. Analysis of judicial behaviour emphasises and juxtaposes decision according to purposes[29] where discretion must be admitted because of the casting of rules in the language of standards, equity, presumption, principles and maximization theory.[30] Thus judicial decision according to purposes can be denied in the narrowest formal theory, and only cautiously admitted in the more modern form.[31]

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24. Kenneth M. Casebeer, "Escape from Liberalism: Fact and Value in Karl Llewellyn" (1977) *Duke Law Journal* 671, 684-689.
25. Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (London, Routledge & Kegan Paul, 1958) 300-303.
26. Michael Foucault, *The Order of Things: An Archaeology of the Human Sciences* (London, Tavistock Publications, 1970); Duncan Kennedy, "Legal Formality" (1973) 2 *Journal of Legal Studies* 351, 363-365; Gunnar Myrdal, *Objectivity in Social Research* (New York, Random House, 1969) 9: "Valuations are thus necessarily involved already at the stage when we observe facts and carry on theoretical analysis ...."
27. A typical evaluation is in H.L.A. Hart, *The Concept of Law, supra* n. 22, 132-137, 250.
28. A short account of the influence of the paradigm is in Colin Campbell, "Legal Thought and Juristic Values" (1974) 1 *British Journal of Law and Society* 13.
29. The distinction between decisions built on rule application and decisions built on purposes comes from Max Weber, and is discussed fully by Duncan Kennedy, "Legal Formality" *supra* n. 26, footnote 13, 358.
30. Ronald M. Dworkin, "Hard Cases" *supra* n. 9 distinguishes the roles of principle and policy in judicial decision, favouring the former and reserving the latter for other forums. Duncan Kennedy, "Legal Formality" *supra* n. 26 has a critical account of formal theory and analysis of hierarchies of discretion, noting that "principles, policies, standards, equity and presumptions" can either be assimilated or excluded altogether". Footnote 11, 356.
31. Ronald Dworkin admits decision according to non-literal rule interpretation in "The Model of Rules" (1967) 35 *University of Chicago Law Review* 14. He attempts to argue that "judicial decisions in civil cases .... characteristically are and should be generated by principle not policy" in "Hard Cases" (1975) 88 *Harvard Law Review* 1057, 1060 and *passim*.

The formal history of traditional law is an internalised account of the development of legal doctrine in terms of previous doctrine[32] while in reality change of doctrine and form is neither spontaneous nor *ad hoc*. It is influenced by pressures that are excluded from the analytical perspective of a formalist.

(b) Evaluation

Internal evaluation in formal theory is provided by measures of consistency and source. These measures are past-orientated, not future-orientated, and theoretically biased or circular since they gain their coherence from the theory they are invoked to prove.

Where external validity is required, formal theory develops a mechanism for matching the law with lay values, emphasising justice and order. Meanwhile, as a particular legacy of positivism[33], the definition of justice draws scholastic attention and its pragmatic invocation is continually ignored. Like natural law, justice can be a revolutionary or a regressive argument, depending on the political milieu and distributions of power and wealth in which it is utilized.

The formal measure of efficacy requires rules to be adjudged effective insofar as they reflect the behavioural reality. If people are seen to behave in a way different from the legal prescription, the formalist assumption is that the law or the behaviour should be changed. Examples of this argument abound, especially where law and morals are mixed. Drug laws, prohibition, obscenity controls, abortion and homosexuality laws and fault-based divorce law are areas where reform has been suggested because the rules do not reflect behaviour. The naivety of this argument is exploded by social theorists who recognize that non-conformity is inevitable and sometimes even healthy since rules have functions more complex than mere description and prescription of behaviour. Power allocation, expressions of consensus of values[34], specification of deviant behaviour and symbolic reinforcement of norms and opinions[35] are consequences of legal rules that formal legal theory ignores.

(c) The relationship between Formal Theory and its Structural Supports

The subtle oscillation between mysticism and functionalism is unexamined in formal theory in which law is, to varying degrees, conceptualised as a heavy, secret, ritualised process beyond the immediate comprehension of those it controls.[36] At the same time the theory views law as providing essential social stability and efficient, detached government.

Formalism demands a legal profession because law is seen as complicated and comprehensible only to the initiated. More importantly, law is concep-

32. T.S. Midgley, "The Role of Legal History" (1975) 2 *British Journal of Law & Society* 153.
33. Roberto Unger, *Law in Modern Society, supra* n. 10, 31 makes a critical evaluation of the consensus doctrine.
34. Howard Becker, *Outsiders: Studies in the Sociology of Deviance* (London, Free Press of Glencoe, 1963); J.R. Gusfield, "On Legislating Morals: The Symbolic Process of Designating Deviance" (1968) 56 *California Law Review* 54; S.B. Berman, "Symbolic Dimensions of the Enforcement of Law" (1976) 3 *British Journal of Law and Society* 204; Richard L. Abel, "Law Books and Books About Law" (1973) 26 *Stanford Law Review* 175. See also Alfred Conard "Macrojustic: A Systematic Approach to Conflict Resolutions", (1971) 5 *Georgia Law Review* 415, for a distinction between wish rules and observed rules.
35. See generally Hans Kelsen, *Pure Theory of Law*, transl. Max Knight (Berkeley University of California Press, 1967). "Kelsen's ultimate norm of legality is vacuous because it is consistent with all legal systems and therefore constrains none, although it does distinguish legal systems from other types of systems", Morton A. Kaplan, *Justice, Human Nature and Political Obligation* (New York, Free Press, 1976). (Though this is exactly what Kelsen set out to do.) A more difficult problem for Kelsenian Theory is discussed by Kaplan, note 30, 277. Kelsen's fundamental assumption of legality is a *political* reality and theoretically unrelated to his analysis of a legal system.
36. Anthony Blackshield, "Five Types of Judicial Decision" (1974) 12 *Osgoode Hall Law Journal* 539, quotes a report that Sir Owen Dixon while Chief Justice of the High Court of Australia said "a certain mystery should surround the judiciary in its higher reaches".

tualised as the intervenor between arbitrary power and anarchy, or between the state and citizen with lawyers the neutral guardians of the arsenals of power. In reality, lawyers, and not law, are political forces; yet to preserve the familiar rhetoric, the profession portrays itself as specially trained, mechanistic, monopolistic, autonomous and objective. Its reputation of cultivated neutrality enables it to maintain its entitlement to be final arbiter of questions of power. A range of devices including legal education, admission procedures, adversarial argument and recourse to rules allows the profession to perform these arbitration functions. These devices often conceal and vindicate deliberate pursuit of professional interest just as the version of law as the preserver of individualism conceals realities of exploitation. Lawyers appear at the interface of status quo and change, applying law already loaded with political and economic power, a position of involvement not best described in the rhetoric of neutrality.[37]

Over time, the gap between formal rhetoric and political reality produces complex patterns of legitimation marked by diverse but ordered hierarchies of functionaries, all structurally interdependent. The discipline develops its own internal rigour which requires professionals to adopt personal detachment by limiting justification of decision to the terms of existing rules. Consequently legal education, a related institution, is narrowed to the study of existing rules and doctrine assumed to be capable of more or less complete systematic statement in terms of sources rather than content or policy. By ignoring disjunction[38] and the wide variety of levels of generality in the rules[39], legal education creates an expectation of certainty and respect for the 'wholeness' of the system that contributes directly to conservatism amongst lawyers.[40] Such educationalists provide the bulk of legal writing; publications in law reinforce these tendencies.

(d) Self-Sufficiency and Narrowness

Narrow traditional theory has historical roots in England and theoretical roots in the focus on structured decision-making to solve and obviate disputes. It postulates a mythical goal of static harmony by "rule of law" and ignores the continuous social dialectic between disputation and consensus. While it fails to account for conflict which is intrinsic in social order and for inevitable transformation of consensus as a normal social process, traditional theory cannot "do justice to the precariousness of consensus in society."[41]

The most important cross-disciplinary adventure for formal theorists in England involved using analytic philosophy.[42] In the long run, this considerably improved techniques of legal analysis without disturbing the underlying theory, though the success of the cross fertilization is encouraging and needs repeating. Meanwhile, serious development of legal theory has occurred in the United States. Building on the pragmatism of Holmes, the sociological jurisprudence of Pound, the "realist" theories and the Law, Science and Policy

37. Alternative perspectives relevant to this essay include: Max Weber, *Max Weber on Law in Economy and Society* ed. Max Rheinstein (Cambridge, Mass., Harvard University Press, 1966) 188-191; Eugen Ehrlick, *Fundamental Principles of the Sociology of Law* (New York, Russell and Russell, 1936). See 11.
38. Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, Little Brown, 1960) 521-535; William Twining and David Miers, *How To Do Things With Rules: A Primer of Interpretation* (London, Weidenfeld and Nicolson, 1976) 210-211.
39. Julius Stone, *Legal System and Lawyers' Reasoning* (Sydney, Maitland Publications, 1964) 268-270.
40. Colin Campbell, "Juristic Values" *supra* n. 28, 22-30.
41. Roberto Unger, *Law in Modern Society supra* n. 10, 32.
42. Robert Summers, "The New Analytical Jurists" (1966) 41 *New York University Law Review* 861 accounts for a level of professionalism amongst legal philosophers.

Approach of Lasswell and McDougal, the demand for cross-disciplinary work has become the most important attack on formalism. It is the foundation of the idea that the discipline of law can contain and systematise a variety of approaches.[43] The distinction between theories of law and theories about law found its way into legal literature starting with the Lasswell and McDougal article.[44] It has been brilliantly applied since then[45], and has been institutionalised by concerted attempts to blend law with related disciplines that long ago passed from mere fashion to the *sine qua non* of legal education in the United States.[46] The interdisciplinarians have become unequivocally professional.[47]

The level of interdisciplinary cooperation in teaching programs in law schools in Australia is small. There is little attempt to integrate law and economics by reviewing rules in policy language of price theory, game theory and efficiency even in the 'core' subjects of property, contract and tort, though post-Posner[48] it is the new religion in the United States law schools.

Given the background of formalism, Australian academics are hard driven to justify cross-disciplinary adventures. Psychoanalysis, anthropology, social science and political science are eschewed by lawyers, though these disciplines are creating a theoretical framework for interpretation, analysis and criticism of legal phenomena.[49] There are numerous examples of Australian law teachers venturing forth, sometimes brilliantly, but eclectic borrowing in spontaneous reaction to disciplinary dissatisfaction is not a solution. Borrowing should be systematic, building towards articulated goals and encouraged by law schools with suitable curricula, libraries and patterns of interaction with other faculties and departments. At the same time law as a discipline should foster a high level of internal debate about the wide variety of modern law-related movements.

Social Theory of Law

One of the recent developments in a critique of formal theory is social theory of law, though it is presumptuous to suggest there is *a* social theory or that there is anything more than a repetition of the experience of the American realists who were united by a sense of dissatisfaction with the state of the discipline of law rather than in any alternative. Amongst the literature of social theory of law there are specific insights that are impressive, but strangely ignored in Australia. Social theory sees laws as a social phenomenon, but utilisation of its range of hypotheses and insights is impossible within a formalist legal structure. The traditional concept of a legal system "does not

43. In this regard the development of legal studies programs is important. A successful program is operating in Australia at the Department of Legal Studies, La Trobe University, Victoria. An account of a program in the United States is in Peter d'Errico, S. Arons and J. Rifkin, "Humanistic Legal Studies at the University of Massachusetts at Amhurst" (1976) 28 *Journal of Legal Education* 18.
44. H. Lasswell and M. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest", *supra* n. 23.
45. Richard Abel, "Law Books and Books About Law", *supra* n. 34.
46. William A. Lovett, "Economic Analysis and its Role in Legal Education" (1974) 26 *Journal of Legal Education* 385.
47. Especially in law and history, and law and economics.
48. Richard A. Posner, "The Economic Approach to Law" (1975) 53 *Texas Law Review* 757; *Economic Analysis of Law* (Boston, Little, Brown, 1972)
But see Arthur Leff "Economic Analysis of Law: Some Realism about Nominalism" (1974) 60 *Virginia Law Review* 451; "Law And" (1978) 87 *Yale Law Journal* 989.
49. Examples of cross-disciplinary work include: Llewellyn and Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Justice* (Norman, University of Oklahoma Press, 1941), discussed by William Twining, "Law and Anthropology: A Case Study in Inter-Disciplinary Collaboration" (1972) 7 *Law and Society Review* 561; Roberto Unger, *Law in Modern Society, supra* n. 10; Richard Abel, "A Comparative Theory of Dispute Institutions in Society" (1973) 8 *Law and Society Review* 217.

presuppose or yield any coherent theory about the relationship of law and society. It may even be inimical to the development of such a theory."[50] Moreover, a lack of information about Australian legal experience seriously impedes the construction of patterns, projection of trends, selection of goals and directioned approaches to problems. The deliberate use of social theory to analyse our different rhetorical modes of legal thought and their practical implications is far from easy. However, an examination of recent American contributions offers a better understanding of Australian law.

(a) Invigorating Perceptions of Internal Legal Order

A strictly formal interpretation of rules is dysfunctional in many ways. Its limitations are acknowledged in formal theory by the development of non-literal interpretative modes according to which the rules must be ordered outside their expression and according to their content and context (and sometimes even their policy though this is seldom articulated). Since the logic of formalism or literal interpretation knows no boundaries, it must be checked and balanced.[51] Yet traditional analysis examines only few of the techniques in use. Others, such as the subtle mechanisms of power, standards, appeal, compromise, pressure, values and symbolism, are left to social theory. Duncan Kennedy explores this problem in terms of individualism and altruism, two competing rhetorical modes of legal thought for dealing with substantive issues. However, he goes further than describing alternative thought modes and presents a broad analysis of rules. In themselves, they are not self applying. They are too complex, especially in bureaucratic states. They are internally inconsistent. They are presented by formal theory in an arbitrary order of compulsion, "principles" above "rules", "goals" above "principles", with resort to the levels a matter for *ad hoc* decision in the particular instance. Formal theory purports to formally analyse these levels of generality without resort to the substantive issues involved.[53]

Centrality of rules to formal theory belies their relative significance in human, or even in legal, order, and omits consideration of other mechanisms and devices that sustain the system. To say that the part of the human order involving rules (and principles and goals) is legal is to argue by definition when the definition is in issue. Can legal behaviour be explained, described, identified, predicted and justified solely by rules? Can formal theory exclude other kinds of human order from the umbrella of legal order on an acceptable epistemological basis?

(b) Social Control

In traditional theory the rules are supposed to impact on people through the device of coercion: its paradigm is criminal law. Formalism assumes a sanction is a necessary component of law to be specified in detail and applied by a designated person.[54] However, social theory shows socially applied force is too

50. Lawrence W. Friedman, "Legal Culture and Social Development" in *Law and the Behavioural Sciences* (Indianapolis, Bobbs-Merrill, 1969), edited by L.W. Friedman and Stewart Macaulay, 1002.
51. Roberto Unger, *Law in Modern Society, supra* n. 10, 204.
52. "Form and Substance" *supra* n. 4 *passim*. The two modes are individualism and altruism. The first involves the use of clearly defined, highly administrable general rules. The second involves the use of equitable standards producing *ad hoc* decisions of relatively little precedential value.
53. These comments are not intended as a summary of the Kennedy position. His analysis of "The Jurisprudence of Rules" 1687-1701, and "The Relationship Between Form and Substance" 1701-1713 is recommended. See also "Legal Formality" *supra* n. 26, para. 64.
54. That they do not is a legacy of John Austin.

primitive an explanation of social conformity or of the impact of law on consciousness. Desired conduct can be achieved by many other devices, some of which should come within the rubric of law.[55] Social restraint is a complex product of a variety of stimulants. Morality and prudence dictate the level of obedience more successfully than law compels it. Legal theory needs to recognise that morality, prudence, apathy, and convenience underpin the legal system along with physical force and rational pursuit of self interest.

(c) Universality and Theory

While formal legal theory leaves international relations to businessmen, missionaries and international lawyers, the development of a social theory of law directly involves constructing hypotheses that can include all cultures. Extrapolating from our experience to another country can be a difficulty[56], but if errors are admitted the experience is the basis of deeper understanding. The consciousness of ideological bias can stimulate attempts to work out a new methodology in which to perceive relationships and patterns of law.[57] The whole process can give significant insights into the legal life of western society, and a new appreciation of its complexity.[58]

Instrumentalism or the idea that law can be used to direct human behaviour according to social goals is common to all but the most radical modern legal theory. The popularity of instrumentalism is obvious to those who contemplate the political significance of ideas in western society. Instrumentalism both ensures the strength of the state and requires a mechanism to restrain the tendency of law, industrialisation and capital growth to increase the centrifugal power of the state. The law and the state are seen as interconnected: law gives the state a monopoly over disputes that come within its cognizance in a mutual and evolutionary dependence expressed in structures which allocate decision-making power and in the wider political realities that support the system. Instrumentalism depends on the assumption that law can be used to achieve social goals; at this point formalism which normally eschews politics must contain the political, and it does so with a degree of naivety. If social goals are solely state defined, law becomes a monopoly of state power for state purposes.[59] Traditional theory postulates law as a mechanism of restraint over state power, but this remains empty if law fails to establish its own divergent goal setting mechanism, or, seeing this offends the myth of professional neutrality, if law fails to respond to goals defined by groups that are unrelated to the state.

To answer this dilemma of state power and instrumental law, a variety of political explanations has developed. The first of these is by far the most important in formal theory.

(i) Instrumentalism can view the state as a neutral institution for negotiating struggle between particular groups through the device of law.

55. For instance, Stewart Macaulay has made a sustained analysis of the impact of continuing relationships between parties to disputes on their invocation of legal rights: *Law and the Balance of Power: The Automobile Manufactures and Their Dealers* (New York, Russell Sage Foundation, 1966).
56. David Trubek, "Towards a Social Theory of Law: An Essay in the Study of Law and Development" (1972) 82 *Yale Law Journal* 1.
57. Richard Abel, "Dispute Institutions in Society", *supra* n. 34; Marc Galanter, "The Modernization of Law" in L. Friedman and S. Macaulay, *Law and the Behavioural Sciences, supra* n. 50, 989; reprinted from *Modernization: The Dynamics of Growth,* Myrin Weiner ed. (New York, Basic Books, 1966).
58. For example, Marc Galanter, "Why the Haves Come out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law and Society Review* 95, 104; Arthur Leff "Injury, Ignorance and Spite — The Dynamics of Coercive Collection" (1970) 80 *Yale Law Journal* 1.
59. Compare Marxist theory.

(ii) An instrumental pluralism can view the state as a goal setter, contending with other goal setters for access to devices of power, including the law. David Trubek[60] sees pluralism as essential for preserving society from state power, Duncan Kennedy[61] explains this simply as the theory that the observance of rules prevents state apparatus (as opposed to the postulated legitimate legislative body) from becoming an actor in its own interests and from generating as much conflict with citizens as it represses between them.

(iii) Another instrumentalism sees the centrifugal force of the state as undeniably reality; the state by definition is the only goal setter. In the hands of the political radicals (including Marxists) this justifies moves to ensure the state power is broken and that its mechanisms are fundamentally altered to divest the groups in power of their privilege.

These explanations contain competing explanations of the variables of power, restraint of state action and attainment of social goals. The second and third explanations demand an integration of legal theory and political reality and frequently present mature insights about legal order and the political and ideological bias of its theoretical infrastructure. The over-concentration of formalist legal theory of the first explanation is hardly realistic in a world often dedicated to the last, especially in a country such as Australia with close geographical and economic ties with the Third World.

Social theory of law has concentrated on the second explanation and has developed a critical account of power in modern political systems. Analysis of social processes shows that law reflects goals of groups once they become cohesive and powerful: labor, women, homosexuals and blacks gained legal support in response to articulated demands predicated on a power base that challenged the status quo. More recently there has been a struggle to create mechanisms of expression for uncohesive groups, such as the very young and very old, the mentally ill, and future generations (particularly in regard to environmental heritage). While history suggests such movements will come to nought unless a power base is established, the social theories see the struggle involves fundamental challenges to the anthropocentricity of the legal order implicit in formal theory and an attempt to broaden legal theory to encompass inanimate objects and non-human life forms.[62]

(d) Evaluation of Legal Order and a Social Theory of Law

Formalism supports status quo order of power and resource sharing by appealing to rationality in the establishment of order, and by developing strict rules for allocation of and control over official behaviour. Supporting arguments tend to be based on theories of necessity (legitimation by need), evolutionary development (legitimation by history), or by appeal to 'higher values' such as justice or inherent rationality or the correctness of the distributive result (legitimation by external morality).

Social theory recognizes arguments of legitimation can be made *ex post facto* to support any human order and that processes of legitimation rather than

60. "Social Theory of Law", *supra* n. 56.
61. "Legal Formality", *supra* n. 26.
62. These include: Clarence Morris, "The Rights and Duties of Beasts and Trees: A Law Teacher's Essay for Landscape Architects" (1964) 17 *Journal of Legal Education* 185; Christopher D. Stone, "Should Trees have Standing? — Toward Legal Rights for Natural Objects" (1972) 45 *Southern California Law Review* 450; Lawrence Tribe, "Policy Science: Analysis of Ideology" (1972) 2 *Philosophy & Public Affairs* 66; Lawrence Tribe, "Ways not to Think About Plastic Trees: New Foundations for Environmental Law" (1974) 83 *Yale Law Journal* 1315; Lawrence Tribe, "From Environmental Foundations to Constitutional Structures: Learning from Nature's Future" (1975) 84 *Yale Law Journal* 545.

the rightness of the enunciated theory, are primarily interesting. Why do we resort to legitimation? Why is the observation of working order not sufficient? What is the relationship between demand for change and appeal to ideal orders? What are the relationships between legitimation in law, political science and social theory? Does legitimation in western thought relate to other types of thought? What constraints on legitimation are imposed by language modes, thought patterns, cognition and enculturation? Formal theory fails to admit these questions because it presumes legitimation to be a self evident and inevitable product of the rhetoric of the working legal order.

Formalists recognize the relevance of social observation to law reform of specific areas but fail to recognize a deep theoretical rift between themselves and social theorists. While formal theory selects either stability or change, polarising them as opposities, social theory aims at effectuating both values and offers an alternative perspective for law reform, presenting the dialectic as an essentially stabilising feature of life. Social theory attacks the reform-minded expert who visualises the law and not himself as the mechanism through which mutation occurs. Stability and change are two competing but unattainable goals; balancing them requires intelligent consideration of men in wider terms than an analysis of *stare decisis.*

Significant developments in social theory of law borrowed from structural anthropology[63] and linguistics[64] to offer a structural analysis of legal orders and their institutions. Such analysis ensures feasibility of cross-cultural descriptions of social and legal orders. The messages of the prisoner's dilemma[65] and the universality of social disputations[66] indicate that a myopic, internalized legal theory is highly regressive to an understanding of even local legal phenomena.[67] Social theory has already reworked theoretical analyses of disputation, seeking to determine the relationships between types of structures, sources of authority, personnel, techniques of education, dispute patterns and solutions with acceptable justifications and levels of satisfaction.[68] Even the present embryonic state of the analysis offers lawyers effective tools for the creation of sensitive critical perspectives on a macro level as distinct from the micro level presently adopted by formal theory.

Social theory seeks to explain rather than to legitimate. It accepts perversity of nature, the lack of resources to satisfy all, and the service of special interests by *any* allocative rules. It accepts basic behavioural theory that men will maximise their view of their own best interests, the inevitability of state or society, and the creation of a level of security for the state and for individuals. Thus it contends that certain types of social structures and institutions are immediately ruled out. These include:

(i) Planned assignment of shares and values before the fact — since we cannot know the facts ahead of time;

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63. Claude Levi-Strauss, *Structural Anthropology,* translated by Claire Jacobson and Brooke Grundfest (London, Basic Books, 1963).
64. Naom Chomsky, *Aspects of the Theory of Syntax* (Cambridge, Mass., M.I.T. Press, 1965); *Problems of Knowledge and Freedom* (London, Barrie and Jenkins, 1973); *Language and Mind* (New York, Harcourt, Brace, Jovanovich, 1972) and *The Logical Structure of Linguistic Theory* (New York, Plenum Press, 1975).
65. John Rawls, *A Theory of Justice* (London, Oxford University Press, 1973) 269.
66. See Karl Llewellyn, "The Normative, The Legal and the Law-Jobs: The Problem of Juristic Method" (1940) 49 *Yale Law Journal* 1355 and Richard Abel, "Dispute Institutions in Society", *supra* n. 34.
67. A wider vision can increase both powers of perception and appraisal: see Roberto Unger, *Law in Modern Society, supra* n. 10.
68. Richard Abel, "Dispute Institutions in Society", *supra* n. 34.

(ii) Post dispute *ad hoc* compromises — which predictably create uncertainty and diminish the total fund of wealth;

(iii) Delegation of state allocative responsibility to agents, since they would act in their own best interests.[69]

In keeping with the modern twentieth century perspectives of knowledge, and particularly the relativity of epistemologies, social theory does not present one type of legal reality as desirable.

Conclusion

The point of considering social theory of law is to demonstrate that it is no longer possible to approach law teaching primarily on the theoretical constructs of formalism, at least not if the teaching takes place in universities. To continue doing so would jeopardise the reputation of law as an intellectual discipline.

It is beyond the scope of this article to mount a comprehensive theoretical attack on formalism based on the recent developments in social theory of law. We have made a more modest argument that it is high time Australian legal education started to be aware of its local heritage, and began to reflect the vast array of critical perspectives available in the late seventies and now in the eighties, the most important of which is social theory.[70] For the discipline to blossom it is absolutely essential to develop a literature on legal education with a deliberately broad structure to encompass value analysis, the social effects of law and its relationship with other disciplines in *the Australian context.*

69. This modifies the insights of Duncan Kennedy, "Legal Formality", *supra* n. 26, 367.
70. The impact of social theory is felt by radical legal theorists who, in turn, have offered a more effective critique of the sociological direction than have traditional theorists. See Bierne, *Fair Rent and Legal Fiction: Housing Rent Legislation in a Capitalistic Society* (London, Macmillan, 1977) for an excellent account of the modern sociological direction in England and the United States.