ON THE PAUCITY OF CAUSES FOR JIGS IN LEGAL STUDY

In 1977 Victoria University of Wellington introduces "Law in Society" as a new and compulsory first year law course, intended to provide a broader perspective of the role of law. In this article Wade Mansell discusses the conflicting ideologies implicit in traditional law courses and suggests an alternative method of approach to legal study.

In a book entitled *The Ambidextrous Universe*[1] by Martin Gardner there is, in the preface, the following story:

> In 1958 a small discovery in particle physics was reported at a meeting in Geneva. The discovery ironed out a theoretical difficulty that had long bothered Richard Feynham, a quantum theory expert . . . 'Dr Feynham broke away from a food queue' the New York Times reported on 5 September, 'and danced a jig when he heard the news'.

This paper is about the paucity of causes for jigs in legal study. The suggestion will be that there is nothing about the study of law which makes it inherently less jig-worthy than the study of physics, but that it is an indictment of the thinking of legal academics that it appears so. The indictment is not that teachers of law find nothing to dance jigs about, but that most simply cannot conceive of any sufficiently attractive or important revelation to justify such physical excesses.

This rather stultifying attitude has all the dangers of the self-fulfilling prophecy and it explains in part why legal education in New Zealand has undergone such minor changes over an extended period of time. The law student's study has been, and continues to be, concerned with a body of doctrine and the manipulation of rules relating to that doctrine. As a result most young lawyers know how to apply the law, know to whom to apply it, but have very little understanding of the effect of its application either on the society as a whole or indeed, often, upon individual clients.

Because law is not studied as a phenomenon but rather learnt as a doctrine, for the most part the sources for legal study are narrowly drawn with a heavy emphasis upon statutes and reported cases. The emphasis therefore tends to be upon law as a conflict-resolver and the concentration is upon the 'gone wrong' situation much more than upon the 'gone right' which the law has prestructured. The law student sees the positive dramatic intervention of the law.

1. London, 1967.

Unfortunately, memorable though this may be, the very fact that a case has been reported, evidences its atypical character. Another effect of this method of legal study is that perspectives of the law as represented in legal articles and the law examination papers, where again the emphasis is upon the aberrant rather than the typical, have changed very little over the years so that in many instances it seems that only the names of cases have been changed to preserve anonymity.

Does this criticism merely highlight the immutability of the law and its essentially conservative (in the best sense of the word) nature, or is legal education failing to come to grips with law as a discipline in the social sciences as well as a professional qualification? If it is the latter then the choice is to recognize legal education as appropriate for institutions other than universities or else, to make some radical and fundamental if belated changes in the approach to the teaching of law.

This is not intended to be an orthodox article on an abstruse legal point. The intention is broader and more open to reply, rebuttal and qualification; but the purpose is vital. It is to question some of the major, but often implicit, assumptions underlying New Zealand university legal education and to offer some suggestions towards a reappraisal. Such a reappraisal is essential if one is to justify the very existence of a law school in a university rather than in a polytechnic or some educational institution whose goals are more overtly concerned with career training and less with wider educational aims. If legal training is to be concerned primarily with the teaching of rules and the manipulation of those rules in order to fit a graduate for the legal profession then this task might well be better performed elsewhere and not in a situation where a constant academic disguise confuses even those narrow goals.

The underlying purposes in this article are twofold. First, to examine some aspects of the nature of legal training in New Zealand and secondly, to provide a brief outline of the aims and content of the Law in Society course which is, from 1977, to be a compulsory first year component of the law degree at Victoria University of Wellington. It is a course intended to meet some of the more telling criticisms of legal education.

In a paper presented to the ANZALS Conference in 1975 the Dean of the V.U.W. Law Faculty[2] suggested, by way of preamble, that the role of a law school is one of dual obligation:

> In the first instance, the role of the law school is the same as that of the university to which it belongs. In the language which appears in several of the New Zealand university statutes, the universities have been created: 'for the advancement of knowledge and the dissemination and maintenance thereof by teaching and research.'

2. Mr. J. C. Thomas.

Obligation to the Profession

> Before discussing academic objects of law teaching, it is important to note a special requirement relating to legal education. The New Zealand law schools have generally accepted a dual obligation, to the university and to the legal profession. The law course leads not only to a university degree, but also to admission to the legal profession. In running its courses, the law school makes some allowance for the needs and the views of the profession and, in giving credit for law school courses and in assessing their examinations, the profession makes some allowance for the fact that the law school has an obligation to teach a course which properly measures up to the academic standards and outlook of the university. The profession wants its members to be learned as well as practical. The law school wants its graduates to be practical as well as learned.

I cannot recognise this special obligation to the legal profession. Such a dual responsibility might well be either contradictory or self-defeating. The first and only responsibility must surely be to the society which provides and maintains those universities. Society's interest will be met adequately if the quotation from New Zealand university statutes is complied with. Unfortunately the discharge of this obligation might well be (and indeed probably is) antithetical to the stated obligation to the legal profession — at least as it perceives its own role.

One must be particularly apprehensive about the profession wanting its members to be learned as well as practical and the law school wanting its graduates to be practical as well as learned. The fear must be that the profession's definition of "practical" might better be translated as "functional to the profession". A law degree, should surely provide a critical analysis and description of the role and method of law in society. It may be that such an analysis will be seen to be implicitly critical — not least of the legal profession. If a critical perspective may be interpreted as impractical in the law graduate then the right (and obligation) of law schools to train "impractical" graduates should be asserted — but not impractical in the sense of being unable to contribute to the society of which they are a part.

At the same time it has to be recognised that there is a constant tension in law teaching between the technical and the academic. And it is a complicated tension. On the one hand one seems to require the technical training in law in order to make useful academic critical appraisals of the law, i.e. one must be trained in the techniques of law before it is possible to comment usefully upon them. On the other — and here lies the rub — to have been initiated into the law way makes it then much more difficult to perceive the law in terms other than those provided by the law. The dilemma is (in R.D. Laing's terms)[3]

3. Laing, *The Politics of Experience* (London 1967).

that it is difficult both to see through rules and also to see *through* rules. Once socialised into the law way and the law perspective it is extremely difficult to avoid having one's perception constrained, simply because one identifies with the law method.

This in itself is reason for attempting to provide wider perspective of the law at a very early stage in a law student's career. It is true that one must be skilled in doctrine before making doctrinal criticism but this is not the only perspective available. Initially, one must attempt to exploit academically the students' lack of technical training. This means providing tools which will allow the techniques and doctrine of the law to be perceived initially from outside the legal institution as well as later, from within. Thus the aim should be to provide a broad critical frame which will be constantly applicable throughout the indoctrination into the legal profession.

It is because of the dominance in legal training of the internal perspective that there is often consumer resistance to jurisprudence courses taught later in the degree. The difficulty of justifying a macro-examination of the law to students convinced of the inherent value of micro-examination is formidable. There is too, unfortunately, an obvious problem in the provision of such a macro-examination. It is difficult, for lawyers and legal academics to provide it, simply because of their own education. The techniques and the technicalities with which they are imbued have been both taught and learnt as objective knowledge. Indeed, the law students sense of superiority derives in no small measure from the fact that he believes himself to be learning practical things about the Real World. And of course, granted the actual existence of the legal system, the knowledge gleaned of doctrine is in a sense objective.[4] The unfortunate aspect of such "objective" knowledge is that to believe it to be objective, essentially puts it beyond examination.

This appearance of the lawyer's knowledge of the law as being objective, however, might well provide an early matter for discussion in an external appraisal of the legal institution. The legal institution does exist as a social fact. Though law may be "a system of beliefs confronting society as a fact"[5] it makes no sense to deny its existence.

In Auden's words[6]:

> Law is as I've told you before,
> Law is as you know I suppose
> Law is but let me explain it once more
> Law is the Law.

4. At least in so far as knowledge may be objective if anyone agrees on the object of that knowledge. See Goldman, *The Human Sciences and Philosophy* (London, 1969).
5. A phrase for which I am indebted to A. D. O. Thomson of the University of Kent. There is a general debt throughout this paper owed to erstwhile colleagues and in particular to Mr Thomson.
6. From the poem "Law Like Love" in *W. H. Auden: A Selection by the Author* (Harmondsworth, 1958).

The sheer difficulty of even envisaging either alternatives to, or the abolition of, the legal institution is well made by Lukacs[7]:

> Even in the very midst of the death throes of capitalism broad sections of the proletarian masses still feel that the state, the laws and the economy of the bourgeoisie are the only possible environment for them to exist in. In their eyes many improvements would be desirable ('organisation of production'), but nevertheless it remains the 'natural' basis of society.
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> This is the ideological foundation of legality. It does not always entail a conscious betrayal or even a conscious compromise. It is rather the natural and instinctive attitude towards the state, which appears to the man of action as the only fixed point in a chaotic world.

But the processes by which the institution has become, and continues to maintain itself as, a special fact which cannot be denied, must surely be studied in order to understand the nature of the "objective" knowledge we have of it. Indeed this very facticity suggests a way of approaching the law externally. It provides a clear indication that we must examine the nature of the institution itself. We must examine not only the doctrine but the significance of the doctrine for the institution.

It may be argued that this is the primary concern of jurisprudence courses anyway. Unfortunately, with rare exceptions, this is untrue both because of the heavy predominance of the philosophy of law in most courses in jurisprudence and also because of the study of law as fact rather than the study of the fact as a phenomenon. Many students (and probably many legal scholars) have felt as did Arnold when he said "Law as a philosophy is the property of scholars; as a technique it is the property of lawyers".[8] The inability to explain the significance of law as technique in philosophical terms has much to do with student disenchantment with jurisprudence.

I have already observed the problems of examining an institution into which one is becoming socialised. There is a further limitation. It is difficult both for law students to discuss or describe the law in language external to the legal institution. The use of legal language to describe the law is itself coercive. The institution becomes inevitable because the words refer to tangible phenomena. They are not non-referential. Further, words relating to the institution take on not only their dictionary meanings but emotive significance as well. Titles such as "Courts of Justice", the "House of Lords", are not merely applications; they also seem to describe and evaluate. An external description of the institution would require the use of neutral words in order to avoid the legal institution's evaluation of itself. This is particularly true because the internal "logic of the law" of which we hear so much

7. Lukacs, *History and Class Consciousness* (London, 1971) 262-263.
8. Arnold, *The Symbols of Government* (New York, 1962) 129.

does exist. Granted the (usually unexamined) premises of the law, it is in major aspects an impressively coherent and internally consistent institution. This may not be true from an external perspective.

One seeks, therefore, ways of describing the legal institution which as far as possible are not directly constrained by the attributes and perceptions of that institution itself. This is where other social sciences can provide ways of analysing the law unknown to the legal discipline with consequent major insights which, if they do not provoke jigs, might at least stimulate the lawyers' square dance. That they have not provided such insights more often, is a direct result of the exclusivity of the legal institution and its constant demand that people comment upon it only when they understand it (i.e. have accepted its own objective knowledge). Fortunately there is some evidence that social scientists are becoming less easily intimidated.[9] It is also a result of the compartmentalising which has occurred in the social sciences.

On these premises then is the Law in Society course founded. It is an attempt to provide a more accurate and more neutral description of law and the legal institution than is possible with a purely legal approach.

Initially it will be related quite closely to the Introduction to Law course taught at the University of Kent in England. The history of that course is not insignificant in highlighting the difficulties of a multi-disciplinary approach.

The University of Kent was opened only in 1965 and was built in what must now be seen (at least by academics) as the halcyon days of university expansion and intellectual idealism. At that time, concerted efforts were being made to escape traditional social science subject boundaries which were seen as essentially restrictive and narrowing. The ideology of the new English universities was to attempt new perspectives through new subject definitions. Unfortunately, although the theories may have been correct, and certainly did provide insights, the experiment was not an unmitigated success. A major problem which became manifest was that it was optimistic to expect enough academics, trained in traditional disciplines to be prepared to acquire extensive knowledge of what they had thought of as "not their field". Certainly some managed, but even they actually met considerable resistance from their colleagues in what could best be described as academic demarcation disputes. Those who had not accepted the initial philosophy of the new universities were actually possessive of their own area of expertise.

So in many aspects the experiment was less than successful and was in varying degrees modified or abandoned. Even so there were some beneficial results albeit perhaps unintended. At Kent the Board of Studies in Law remained within the Faculty of Social Sciences and law students followed a common first year social science course of

9. See particularly Bankowski and Mungham, *Images of Law* (London, 1976).

which law was only one component. It was from this that the impetus arose to provide a social science perspective of law — especially as the majority of students studying the Introduction to Law course were not actually reading for law degrees. It was intended both to provide a perspective for subsequent legal study and, for those pursuing no further law courses, to give in itself some insight into the role and method of the law. This was the combination of factors which led to law teachers adopting a multi-disciplinary approach which did not rely heavily on inputs from other social scientists.

Having earlier criticised the traditional approach to law it is now no doubt incumbent upon me to suggest, or at least hint at, some of the insights which such a first year course as has been accepted as desirable ought to provide and the method it ought to follow. The basic aim of the course is, as already stated, to provide various perspectives from which to examine the law. So its first aim must be essentially an intellectual one, namely to provide a social perspective of the law as opposed to the lawyers perspective and thus to provide an alternative description of the role, method, and function of the law.

Perhaps unfortunately, such descriptive analysis often tends to be seen as implicitly critical of the law role and the law world. This is first because, in the words of Joan Robinson in *Economic Philosophy*[10], "The leading characteristic of the ideology which dominates our society today is its extreme confusion. To understand it means only to reveal its contradictions". But more importantly it is because law comes to be seen as manifestly not politically neutral. And if law comes to be revealed as politics[11] it is equally clear that it defines and protects some interests at the expense of others.

Further, prima facie, any attempt to demystify the law, to suggest that the description the institution gives to itself is functionally inaccurate suggests that mystification is a confidence trick whereby society is duped. It is important to stress that while there is an element of truth in this, it does not necessarily preclude mystification being useful and functional to society as a whole. One of the great attributes of the law might conceivably be its power to provide conflict pre-emption and resolution without recourse to force and it might be that this power of the law is dependent upon the acceptance of some degree of mystification.

The initial task of the new course will probably be the most difficult and critical for students to grasp. It is to provide a coherent conceptual framework within which to examine the role of law. The theses implicit in this frame are threefold.

The first and dominant thesis is that the role of law in society is essentially one of social control. The law's first task is to maintain

10. London 1962, 28.
11. On this point see e.g. Lefcourt (ed.), *Law Against the People* (New York, 1971).

the coherence and to reinforce the shared perception of a society. Law is the guardian of the shared values and ways of interpreting phenomena which define a society. This means, in Llewellyn's[12] terms, controlling the centrifugal tendencies within society. It means that law will define disputes and threats to a society's ideology in a way which allows the law to control, in order to maintain a stable society. It also means pre-empting conflict.

Such a thesis dictates an examination of the nature and meaning of conflict resolution both for the individuals involved and for the society as a whole. This examination will be facilitated by using materials concerning conflict resolution in less complex societies than our own.[13] Two important features which ought to emerge are first, the distinction between conflicts which require official resolution and coercion and those which do not and secondly, the distinction between conflict which is, or may be, identified as functional and that which is identified as disfunctional to the society in which it takes place.

Of course law is not the only institution to provide conflict resolution. Nor is it the only agency of social control. It may usefully be compared, in its methods of dealing with and controlling conflict and deviance, with other institutions a part of whose function can be seen to be social control and dispute resolution, e.g. the church, the family. Perhaps the easiest institution for comparison is that of psychiatry — the law labels those it defines as a threat to society 'bad' (criminal), the psychiatric institution 'mad' (insane). The consequences are not dissimilar. Nevertheless the law method of social control does have special features, not the least of which is the possibility of the application of direct but legitimate force. The second thesis to pursue is that the law method of conflict resolution is concerned with providing an interpretative, or specialist reality which allows the law to translate a conflict into legal terms for resolution. Such a translation, achieved through a selection of 'relevant facts', enables the law to fit any particular dispute within a legal category. This translation process itself can have great effect in defusing a dispute but it does mean that the questions which arise for official determination are usually not identical to those the parties to the dispute would have selected. The law's translation of social facts into legal facts, on the one hand changes the nature of the conflict; on the other, it places this official interpretation on events simply because the disputes it is called upon to resolve are those which either cannot be resolved in the social world (or primary social reality), e.g. where the dispute arises over the allocation of scarce resources; or, those which can be solved at the primary social level only at a considerable cost to the community.

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12. Llewellyn "The Normative, the Legal, and the Law Jobs: the Problem of Juristic Method" (1940) 49 Y.L.J. 1355.
13. E.g. Hoebel, *The Law of Primitive Man* (Harvard, 1967) and Bohannan (ed.), *Law and Warfare* (New York, 1967).

Acute readers might wish to suggest that this emphasis on conflict resolution misses a major facet of the law in that it suggests a preoccupation with actual conflict whereas the law is really much more concerned with conflict prevention rather than with its resolution. This is a major point and one which is often neglected, but it really arises for discussion when examining law as social control. The method by which law prestructures in order to avoid conflict without overt dissent brings in to question the origins and maintenance of the authority with which the law is clothed. To understand law not simply as coping with 'gone wrong' situations but also providing 'gone right' situations, and to understand the means by which it achieves this requires an appreciation of the role of law in society. At the risk of lapsing into jargon this means an appraisal of what Berger and Luckman call 'the social construction of reality'. It means examining the dynamics of the processes of socialisation, institutionalisation, internalisation and reification. Translated, this means that to understand law as a provider of 'gone right' situations it is necessary to appreciate the ways by which citizens are socialised to identify with laws which reflect the ideology of society.

I anticipate neither of these theses leading to too much controversy. The third thesis, however, because it examines law as politics, may be seen as itself political. The thesis is that it is a further task of the law to provide the allocation and maintenance of power that both allows for and legitimates, a given political and economic system.[15] Law, it will be suggested, legitimates the existing order simply (and obviously) because it reflects the ruling ideology, the ideology of those with the say. That is a trite point but worthy of all men to be received. It should continue to amaze that so many people see, or profess to see, the law as politically neutral. (Indeed how could the law be politically neutral when it is after all simply the manifestation of policy?)

To sustain the thesis that law is in fact political involves an examination of the process whereby policy becomes law. It also raises questions as to whose interests are served by law being perceived as politically neutral. This second point will receive discussion towards the end of the course when the relationship of the legal institution to political and economic institutions receives attention. The fact of the change in attitude between policy and law is well exemplified by disputes which arose in the United Kingdom after the passage of the Industrial Relations Act 1971. This enactment was of course fought with ferocity and bitterness from the day the policy was announced. Having been passed however, the subject for debate changed dramatically. From being a debate about the rights of workers and the desirability of such a policy the debate suddenly concerned the obligation to obey the law and this was an obligation

14. Berger and Luckmann, *The Social Construction of Reality.*
15. Power here includes wealth in so far as wealth is either a means to, or a manifestation of, power.

affirmed by most of the opponents of the policy, at least most of those not directly affected. Even so this Act failed simply because those to whom it was directed refused to see it as law rather than policy. Legislation requires some acceptance of the policy it contains by those it affects. Because the legislation never achieved this the National Industrial Relations Court it created also failed to gain acceptance as a legal rather than a political organ. The then President of the Court is reported to have observed; "Some commentators say that the Industrial Court is a political court and that I am a political judge — that is not true and never has been — I look upon politics as a monk looks upon sex, with nostalgia".[16] It is clear however that if procedures and rules themselves are political then those who administer them, no matter how objectively, do have a political role.

These three theses then, interrelate and run through the entire course. Once the conceptual frame has been completed it will discharge two functions. It will allow an illustrative analysis of dynamic legal cases highlighting features unimportant in traditional legal analysis. Further it will provide a means for an institutional analysis of the legal world. The courts and the judiciary, the legal profession, the police, prisons, tribunals and law schools may then be examined both in terms of their own ideology and self-description and, as aspects of the dynamic which is law. Thus, having examined the dynamic role of law in society, it will be possible to analyse the constituent elements of the law while still seeking to provide perspectives external to the legal.

The final task which seems appropriate for such a course is to examine the relationships of the legal institution to the economic and political institutions and to see to what extent law reflects the ideology of the society and to what extent overtly and to what extent covertly. The easiest way of approaching this problem is to look at comparative material examining the role of law in non liberal-capitalist societies. In many such societies the role of law is much more explicitly political. The result of this seems to be either that there is a more frequent resort to force or else the political goals which the law reflects are, in their overt form, consciously acceptable to the people in the society. This in itself gives rise to a further appraisal of the use of mystification in the law.

This then is an outline of a response to legal education's traditionally narrow perspective. It is based upon a major premise, of namely that the legal institution has responsibilities of which too few lawyers are aware and that these responsibilities become manifest when the law's mystifying cloak of neutrality is removed. Law is not politically neutral and members of the profession must be made aware of the responsibility they have not merely to the law but for the law.

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16. Reported in Bankowski and Mungham, op. cit., 7.

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