Law and, Law in, Law as: The Definition, Rejection and Recuperation of the Socio-Legal Enterprise

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Recommended Citation
Law ‘And’, Law ‘In’, Law ‘As’: The Definition, Rejection and Recuperation of the Socio-legal Enterprise

Christopher Tomlins

The critical moment in socio-legal studies that flowered in the United States and elsewhere between the mid-1970s and the early 1990s coincided with the maturation of the Legal Studies Department at Melbourne’s La Trobe University. During its two-decade span (1972-1994) La Trobe Legal Studies developed multidisciplinary critical and theoretical perspectives on law as substance, as professional practice, as field of academic inquiry to an extent and depth unrivalled in Australia or, with just a few exceptions, internationally. This essay charts the particular trajectory followed by one of those perspectives, legal history, both at La Trobe and in the wider world. Simultaneously, it offers a short history of the Department itself: of its growth during the 1970s and 1980s; of its transformation into a law school during the 1990s; and of the struggles to maintain a place for the social in the legal that occurred during that transformation.

Perceptions of socio-legal scholarship have evolved over time into what may be described today as a ‘broad church’ of ideas – with a critical element ... They refute the notion that law is a self-contained, coherent and neutral discipline and adopt a critical and questioning stance.1

It is hoped that the new generation will draw what lessons they can from the La Trobe experience and be inspired by a sense of continuity and connection. Most significantly, justice demands that they do not give up on legal education in favour of the sway of market orthodoxy.2

I INTRODUCTION

The critical element in socio-legal studies that flowered in the United States and elsewhere between the mid-1970s and the early 1990s – in the form, most notably, of the critical legal studies movement (CLS) – took as a fundamental point of departure that ‘LAW IS POLITICS, pure and simple’.3 The contention was a statement neither of theory nor methodology. Rather, it was an insurgent claim that rules of law postulating a ‘dichotomy between the public sphere of politics and the private sphere of

1 A Celebration of Socio-Legal Scholarship: Call for Papers (2012).
law' were a fraud.\(^4\) Necessarily, however, the claim had both theoretical and methodological implications, for the critical movement's commitment to showing that law was actually politics proceeded from an initial excoriation of 'traditional' jurisprudence for its indifference to what (in its estimation) lay 'outside' law – that is, to 'social and historical reality'.\(^5\) Critique thus indicted jurisprudence – law's accepted mode of disciplinary self-explanation and self-theorisation – as a mode of obfuscation rather than elucidation, a source of 'myths about objectivity and neutrality' that characterised law and the state as 'value-free arbiters, independent of and unaffected by social and economic relations, political forces and cultural phenomena'.\(^6\) The turn from law's myths to its facts, from the falsehood of law's neutrality to the truth of its politics, could only be accomplished by turning away from traditional jurisprudence to society and history (reality). And once social and historical analysis had revealed law to be politics pure and simple, both past and present, law would no longer be able to resist politics on the spurious grounds that politics was something other than law. The result would be law opened to explicit political reimagination and change.

The critical era in legal studies coincides with the maturation of the Legal Studies Department at Melbourne's La Trobe University. Each was born in the 1970s, reached its peak influence in the 1980s, and declined in the 1990s. Notwithstanding this roughly similar chronology, their simultaneity is happenstance – the advent of CLS did not in any sense call forth the La Trobe department, nor did CLS determine the course that La Trobe Legal Studies would follow. Still, during its two-decade span (1972-1994) La Trobe Legal Studies developed multidisciplinary critical and theoretical perspectives on law – as substance, as professional practice, as field of academic inquiry – to an extent and depth unrivalled in Australia or, with just a few exceptions, internationally.\(^7\)

\(^4\) Ibid 410-11.
\(^6\) Kairys above n 5, 4.
\(^7\) According to Rick Abel, commenting on the status of La Trobe Legal Studies in 1985, “The Department has an enormous wealth of highly talented, diverse, productive people. In these terms, it is far better endowed than all but a very few institutions in the world, and stands comparison with Wisconsin, Berkeley and Oxford”; quoted in WG ‘Kit’ Carson, Tony Blackshield and Mortimer J Stamm, Department of Legal Studies: History, Aims and Objectives (La Trobe University, 1985) 5.
II Beginnings

Situated in a School of Social Sciences at a newly-established university situated in Melbourne's northern (plurality working-class and migrant) suburbs, La Trobe Legal Studies can be understood at its inception as a cautious step outside the highly formalistic and confined universe of Australian legal education. In its earliest years the department's distinctiveness was defined narrowly. Legal Studies was no more than a different way of studying law, albeit one that resulted not in an undergraduate law degree (LLB) but in a cluster of required and elective courses comprising a major or minor sequence in a Social Sciences BA. The department's early years (1972-1977) were characterised by attempts to work out what the relationship between legal orthodoxy and empirical social science should be, debates always dogged by the contention (unsubstantiated) that the remarkable undergraduate demand for legal studies courses that would fuel the department's rapid growth was in fact a demand for orthodox law instruction. Faculty appointments in the later 1970s decisively strengthened the department's orientation to socio-legal studies, and La Trobe Legal Studies took on a clearer 'law and society' cast. No identifiably 'critical' component emerged until the early 1980s, however, and then only as one among a proliferation of scholarly trajectories: law reform, law and society, 'forensic' legal studies, critical legal studies and feminist legal studies all melded, overlapped and competed to influence the course that Legal Studies followed. The department, in addition,
was informed by quite distinct scholarly traditions in socio-legal studies: the British, law-centric but with a Marxist and historical edge; the American, both positivist-empiricist and legal-critical; and the Australian, which combined British law-centrism with affinities to American legal realism and ‘progressive’ social policy. Faculty were largely law-trained (wholly so until 1980) but from 1977 on a significant and rising number of appointees also held graduate degrees across an ever-widening range of disciplines (anthropology, criminology, economics, history, law, political science, philosophy, psychology, sociology). At its peak in the late 1980s La Trobe Legal Studies probably represented the largest single concentration of socio-legal scholars anywhere in the world, and as such may justifiably claim to have enjoyed considerable influence on the course of socio-legal studies not only in Australia but also internationally: through the research and scholarship of individual faculty members; through their organisational efforts and initiatives, such as the Cambridge University Press monograph series *Studies in Law and Society*; and through the Department’s journal, *Law in Context*.

The extent, span, and dimensions of La Trobe Legal Studies’ place in the Australian, trans-Tasman, and international realms of socio-legal studies is collectively illustrated by the essays in this volume. In this particular essay, I address the case of legal history. Here, perhaps to a greater extent than in other dimensions of socio-legal studies at La Trobe, the ‘critical’ trajectory was quite pronounced, though never dominant. Further, considered as a species of critical legal history, legal history at La Trobe was also, in important ways, *sui generis*.

We have already seen that the historical, no less than the social, had a large part to play in early critical scholarship’s jaundiced appraisal of conventional claims of law’s autonomy. Historians – or, more broadly, scholars interested in historical perspectives on the study of law – can be found well in evidence at La Trobe. The roster includes David Neal (c. 1975-1978), Martin Chanock (1977-2007), Adrian Jones (1980-1988), Kathy Laster (c. 1979-1982), Tony Blackshield (1979-1988), Christopher...
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Tomlins (1980-1994), Ian Duncanson (1980-2002), Diane Kirkby (1982-1988), WG (Kit) Carson (1982-1991), Judith Grbich (1984-2002), Pat O’Malley (1985-2002), Adrian Howe (1986-2001), Darren Palmer (c 1986-1995), and Susanne Davies (1990-2006). It will be apparent from these career spans that at La Trobe the greatest density of historically-inflected socio-legal research was reached between the early 1980s and the mid-1990s. Perhaps the greatest achievement of La Trobe’s legal historians during these years, outside the realm of their individual research, was the creation of a Melbourne-area ‘Law in History’ seminar in 1981, and an annual Australian ‘Law in History’ conference, which first met in 1982. The successful launch of the Law in History Conference paved the way for an annual ‘Law and Society’ conference that met for the first time late the following year. Both conferences eventually spawned scholarly associations which continue to exist and grow. During the 1980s several volumes of Law in History Conference proceedings were published by the Legal Studies Department under the editorship of Ian Duncanson, Diane Kirkby, and Christopher Tomlins.

III LEGAL HISTORY IN CRITICAL MODE

CLS’s identification of the social and the historical as reality-based standpoints from which law’s autonomy claims might be addressed grew out of its roots in the Law and Society movement, founded in the early 1960s, in which history-inclined scholars like Willard Hurst and Lawrence Friedman played an important formative role. By the early 1980s,

16 Of those listed, two remain in La Trobe University appointments: Diane Kirkby, now Professor of History in the Faculty of Humanities and Social Sciences; and Sue Davies, now Senior Lecturer and Convener of Legal Studies in the Faculty of Humanities and Social Sciences.
17 The Australian and New Zealand Law and History Society, established 1993; and the Law and Society Association of Australia and New Zealand, established 2006.
18 Ian Duncanson and Christopher L Tomlins (eds), Law and History in Australia: Selected Papers from the First Law in History Conferences held at La Trobe University, 1982 (Legal Studies Department, La Trobe University, 1982); Ian Duncanson and Diane Kirkby (eds), Law and History in Australia: Selected Papers from the Second and Third Law in History Conferences held at La Trobe University, 1983 and 1984 (Legal Studies Department, La Trobe University, 1986); Diane Kirkby, Law and History in Australia, Volume III: Selected Papers from the Fourth and Fifth Law in History Conferences held at La Trobe University, 1985 and 1986 (Legal Studies Department, La Trobe University, 1987); and Diane Kirkby, Law and History in Australia, Volume IV: Selected Papers from the Fourth and Fifth Law in History Conferences held at La Trobe University, 1985 and 1986 (Legal Studies Department, La Trobe University, 1987).
however, those connections had largely been severed. CLS rejected Law and Society's formative metaphor, law as a dependent variable, and its ascendant research practice, the ascription of objective meaning through positivist social scientific inquiry, in favour of its own variant of the anti-functionalist 'linguistic turn' then sweeping through the humanities and humanistically inclined social sciences. Specifically, CLS became associated with a renewed emphasis upon the study of legal doctrine, but from a perspective which treated doctrine as 'an exceptionally refined and concentrated version of legal consciousness,' and, simultaneously, indeterminate in its relationship to specific outcomes because founded upon insoluble contradictions immanent in the human condition. The critical perspective held social life to be legally – which is to say linguistically or discursively – constituted, but not in any determinate fashion. Legal forms were neither functional responses to, nor instrumental realisations of, social and historical developments. Instead their power lay in their influence on human imagination, specifically 'the categories of thought and discourse wherein political conflict will be carried out'.

The turn to language as constitutive of the social did not undermine CLS commitments to history. If anything those commitments were heightened. The mode of historical-legal analysis that became known as 'critical legal history' reproduced CLS's antagonism to functionalist or materialist explanations of law, however, by placing great emphasis upon the historicity of legal concepts – the embeddedness of concepts in specific social and historical contexts. If legal consciousness was socially constitutive, the


Laura Kalman, The Strange Career of Legal Liberalism (Yale University Press, 1996), 98-99. Kalman notes that in his 1981 Storrs Lectures at Yale Law School, Clifford Geertz called for 'a shift away from functionalist thinking about law – as a clever device to keep people from tearing one another limb from limb, advance the interests of the dominant classes, defend the rights of the weak against the predations of the strong, or render social life a bit more predictable at its fuzzy edges (all of which it quite clearly is, to varying extents at different times in different places); and a shift toward hermeneutic thinking about it – as a mode of giving particular sense to particular things in particular places (things that happen, things that fail to, things that might), such that these noble, sinister, or merely expedient appliances take particular form and have particular impact. Meaning, in short, not machinery'; ibid, 111-112. A scant three years later the Stanford Law Review published Robert Gordon’s extraordinarily influential essay ‘Critical Legal Histories’, which was in largest part an assault on ‘evolutionary functionalism’ in legal history; Robert W Gordon, ‘Critical Legal Histories’ (1984) 36 Stanford Law Review 57.

Gordon, above n 21, 114-116, 120.

Ibid, 118; and see, generally, Unger, above n 5.
means to comprehend both consciousness and what, precisely, it constituted, lay in interrogating the relationship between legal consciousness (concept) and context. The result was the reinvention of legal history as a new form of the history of ideas, or intellectual history, the objective of which was to identify ‘the rise and fall of paradigm structures of [legal] thought designed to mediate contradictions’ by reference to the contexts in which those structures of thought acquired meaning. This mode of historical-legal analysis remained sensitive to CLS’s indeterminacy principle. Meaning could only ever be provisional. Because contexts were inevitably plural, and relations between concept and context riven with fundamental contradictions, relations between concept and context could never be more than contingent. Hence Robert Gordon’s succinct statement of the nub of critical legal history in contrast to the ‘evolutionary functionalism’ of conventional legal history: ‘indeterminacy located in contradiction’.

Since the early 1980s historical work has been one of the most sustained exemplars of ‘critical’ approaches to legal studies, whether in the US or elsewhere. But it has not hewed uniformly to the legal-intellectual ‘history of ideas’ path. To a much greater degree, historical-legal scholarship has remained wedded to the socio-legal focus established well before the critical turn, while reconfiguring that focus by adding in the critical turn’s anti-functionalist emphases upon the historicity of legal phenomena and the contingency of their relations with their (social) context. For reasons that should be obvious, the overall result, whether the road followed is that of legal-intellectual or socio-legal history, has been a general decline in causal argumentation. To underline the contingency of a past event, decision, or course of action, legal historians have taken their role to be one that canvasses the entire range of possibility immanent at any moment – the (counterfactual) ‘paths not taken’ assuming as much significance as what actually occurred.


25 Gordon, above n 21, 114.


The discovery of contingency has been upheld as liberating: a demonstration of the infinite array of alternative paths underlines the arbitrariness of what came about, the falseness of its 'necessity'. Unfortunately, the claim of contingency has resulted in a fetishisation of the irreducible complexity of relations between legal phenomena and their environment. The upshot of thirty years of critical legal history is a field of research empirically richer than ever before, but impoverished as a mode of explanation and generalisation.\(^{28}\)

**IV LEGAL HISTORY AT LA TROBE**

There was no La Trobe Legal Studies ‘school’ of legal history. Individual scholars followed their own inclinations and research programs. Thus, in two major monographs, Martin Chanock pursued the legal and cultural history of European settlement and empire in Southern Africa through research that was at once sociological and anthropological, but also increasingly receptive of the turn to discourse.\(^{29}\) In numerous articles Ian Duncanson examined the intellectual history of English common law and its international migrations, culminating in his *Historiography, Empire and the Rule of Law: Imagined Constitutions, Remembered Legalities*.\(^{30}\) Judith Grbich’s work traversed variously the history of women’s studies in law and the history of tax,\(^{31}\) while Adrian Howe brought a trained historian’s sensitivity to major theoretical and empirical interventions in feminist legal studies and criminology.\(^{32}\) Kit Carson, Pat O’Malley, and Darren Palmer all undertook important empirical research in the historical sociology of law and in criminological history.\(^{33}\) Susanne Davies and

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Kathy Laster both emphasised the relationship between law, culture and social order in Australia by concentrating on the social history of crime and punishment.34 Diane Kirkby, now one of Australia’s leading social and cultural historians, has consistently combined her interests in women’s history, work and popular culture with the promotion of Australian legal history.35 Tony Blackshield, preeminent as an authority on Australian constitutional law, has always been as accomplished a constitutional historian as he is a constitutional commentator.36 Since the early 1980s my own work in Anglo-American history has inspected the intersection of labour and ‘legality’ across more than four centuries, variously emphasising political, discursive, and, more recently, materialist and structuralist modes of explanation.37

What will not be apparent from this brief survey is that critical legal history’s emphasis on historicising legal forms and on the contingency and indeterminacy of law that (allegedly) is exposed by that exercise was never a particularly prominent feature of the work of legal historians associated (at one time or another) with La Trobe Legal Studies. To the extent that La Trobe legal historians embraced a critical sensibility, it is their comparative lack of interest in the indeterminacy thesis that lends La Trobe legal history its *sui generis* quality.


35 See, eg, Diane Kirkby (ed), *Sex, Power and Justice: Historical Perspectives on Law in Australia* (Oxford University Press, 1995); Diane Kirkby and Catharine Coleborne (eds), *Law History Colonialism: The Reach of Empire* (Manchester University Press, 2001).


Some years ago Robert Gordon drew a distinction between that species of legal history that approached ‘dominant legal ideas and institutions’ from the standpoint of what they did – how law ‘dressed up in the costumes of neutral legality’ was ‘actually devoted to reinforcing the ability of the powerful to protect their privileges and subordinate the weak’ – and that which embraced his own preferred standpoint of law as intellectual history – ‘taking dominant legal ideologies at their own estimation and trying to see how their components are assembled’. The former had value, Gordon allowed, in that it uncovered ‘the grimy details’ of how law and the state had been pressed into service by the powerful, but it was not as ‘exciting’ as the latter with its emphasis on uncovering ‘the backstage devices employed in the construction of dominant legal forms’.  

Both species of research are forms of exposé – the one of what law does, the other of how it becomes what it is – and to an extent the distinction is a question of emphasis rather than choice, for action (what law does) and construction (what law is) do not fall into neatly separable categories. Nevertheless, even emphasis has an appreciable impact when it comes to fundamental objective, and though no collective decision was ever taken (nor would one have been possible) the attention of the La Trobe legal historians seems to have been given rather more to searching for positions from which to explain outcomes than to recapitulating the endless contingencies of legal forms.

That – and also to articulating an accompanying deep awareness of the salience of colonialism and empire, a standpoint that in the Anglophone world still eludes most US legal history and much of the UK’s. The resultant combination – explanation and empire – expresses a peculiar willingness to think of law unblinkinged. For example, in *The Making of South African Legal Culture*, Chanock embraces the proposition that ‘in the processes of building a new colonial state, law [is] best ... understood as a way of creating powers, of endowing officials with regulated ways of acting, a weapon in the hands of the state rather than a defence against it’. In my own *Freedom Bound*, I argue, not dissimilarly, that law in the hands of the coloniser is at once a technology that organises the process of settlement, a discourse that justifies it, and a modality of

rule – of governance, of jurisdiction – that secures it. In *Historiography, Empire, and the Rule of Law*, as a final example, Duncanson stresses the interweave of law and empire in the construction of human subjects, but also the dependence of ‘the career of legality’ upon the logics of forces – economy, polity, history, society – from which it proceeds. 41

V LAW ‘AND’ OR LAW ‘IN’?

The conjunctive ‘law and’ has become a familiar and convenient expression of law’s presumed departure from formalist self-absorption, its decline as an autonomous subject. 42 ‘Law and’ relies on empirical context to situate law as a domain of activity. First mooted at the turn of the 20th century, encouraged by American legal realism, ‘law and’ considers law’s most important context to be the social, and the social to be empirically verifiable, such that law is held to be an empirical and social phenomenon. Hence law and legal outcomes have come to be explained by parsing their relations to cognate but distinct domains of action – society, polity, economy, human behaviour, and motivation – and by mobilising the disciplines that take those domains as their particular object. Conjunctive relationality, in fact, is assumed by virtually all non-formalist modes of legal studies. Instrumentalists may claim that law is more or less entirely a creature of its context – social, political or economic; 43 structuralists may speak of law’s ‘relative autonomy’ of its context; 44 poststructuralists may postulate a ‘contingent’ or mutually constitutive relationship between law and context. 45 But whatever the conceptual design, without exception the process of inquiry proposes an initial separation between the object of inquiry – law – and its context in order to determine the nature of their relationship.

Contemporary legal historians find all law at all times amenable to one or other of these strategies of critical contextualisation, and indeed may feel free to move opportunistically among them because they add the

41 Duncanson, above n 30, 12.
further overweening temporal context of historicity.\(^{46}\) Although critical legal history initially distinguished itself from functionalist accounts of relations between law and its context, and indeed claimed to be engaged in ‘blurring’ the distinction between law and society, recent assessments suggest that the blur was incompletely realised. Assessing the impact of critical legal history on the US field, for example, Susanna Blumenthal describes three ‘working assumptions’ now widely shared among legal historians: that relations between legal systems and social orders are culturally and historically contingent; that law and society are ‘mutually constitutive’; and that law itself is an ‘an arena of social struggle’.\(^{47}\) All three assumptions rely upon a distinction between the legal and the social. The first remains a relational assumption, merely substituting critical theory’s complexity for functionalism’s simple relationality.\(^{48}\) The second, if it is to be coherent, requires as an initial postulate that the two realms mutually engaged in constituting each other be distinguishable; the third also distinguishes the legal from the social by identifying law on the one hand as a locale where, on the other, a mode of social action (struggle) takes place. The ‘arena’ metaphor can stand, passively, for the ground on which struggle takes place, or alternatively and more actively for a dedicated space to which struggle is confined or within which (in the sense of amphitheatre) it is contained. None of the three assumptions is easily operationalised – they are descriptively evocative rather than statements of theory or testable hypotheses. They signify the distinctly murky status of causal argumentation that, I have already argued, critical legal history has left in its wake.\(^{49}\)

The alternative is to forgo the conjunctive relational assumption. As Duncanson observes, ‘law is best not understood as separate from that from which it proceeds’.\(^{50}\) It is worth noting that when La Trobe’s legal historians launched their first conference in the early 1980s, they – or at least those who did the organising – chose to call it the Law in History Conference rather than the Law and History Conference.\(^{51}\) In what passed

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47 Blumenthal, above n 26, 175-176.


50 Duncanson, above n 30, 12.

51 As did our Canadian counterparts; see Wesley Pue and Barry Wright, Proceedings of the 1987 Canadian Law in History Conference, Volumes I III (Jurisprudence Centre Carleton University, 1987).
for a general statement of intent at the time, the organisers of that first conference wrote as follows:

Australian specialists are trapped by the circularity inherent in the apparatus of traditional professional scholarship, the most basic assumption of which is that the phenomenon to be studied, 'law,' is infused with such uniqueness as to justify the use of this discrete apparatus for studying it. In seeking this status for itself, legal history seeks for law its own chronology and its own logic of development. This in turn guarantees the field's own internal integrity, ensures its autonomy from other fields of historical research and thus completes the circle by underwriting the continued propagation of law's claim to uniqueness. The historical profession makes its own contribution to this situation either by tending all too often to treat law as purely epiphenomenal, or, equally unjustifiably, by accepting its claims to transhistorical uniqueness. In either case law ends up coming not from history but from elsewhere — from the economy in the first case [epiphenomenal] or from jurisprudence in the second — a situation which professional historians tend to treat as symptomatic of the dubious utility of studying legal history. In these circumstances, legal historians will be able to enter the world of historical explanation and participate in the generation of problems, programs and hypotheses for historical studies at large only if they abandon the privileged status of law, the justification of their autonomy and cause of their marginality, and then only if historians already active in that world demonstrate that they are capable of generating explanations which can account for the appearance of law and which can accommodate the conclusions of legal historians within a broader realm of social explanation. 52

Here was an attempt to place law in history, not as a statement of relation, but of definition. 53

The organisers also had views on the particulars of the history in which law was to be placed, that is the particulars of Australian history, a history at that time marked more heavily than today by what one might term a paradigm of 'carry over/adaptation' — an impulse to sort people, places, events and institutions into those imbued with, touched by, or representative of the metropolis, and those which derived their meaning and purpose from their insertion into a uniquely non-English environment. 'Insofar as Australian legal history is guided by the assumption that its task lies in cataloguing the English connection in its various institutional and ideational manifestations on the one hand and in pointing out uniquely Australian developments on the other,' we wrote, 'it participates in the production and reproduction of this paradigm.' 54 Our hope was to see the development of an Australian historiography that treated Australia as a distinct social organisation, even if one politically and economically subordinated to the United Kingdom, such that an Australian legal history could come about that was more than simply a catalogue of common law

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52 Duncanson and Tomlins, above n 18, 6.
53 For a similar attempt, approaching feminist jurisprudence as women's studies in law, see Grbich, 'Feminist Jurisprudence', above n 31.
54 Duncanson and Tomlins, above n 18, 7.
events that happened to have occurred in a particular physical locale called Australia. We welcomed the turn of Australian historians toward the examination of specifically Australian forms of social organisation, class structure and ideology, and their simultaneous impulse to join in the reconfiguration of British history then being pioneered by John GA Pocock as the history of processes of 'formation and disruption of state structures' corresponding with the expansion of a colonial periphery out from a lowland English centre. In this formulation, 'British' history became oceanic and global, colonial and imperial. Rather than a record of those events occurring in the cartographic locale known as 'Britain', British history was constructed simultaneously in many locations and dialectically as an interaction between each location and British influence, and also among those locations. We concluded:

The relevance of this approach to the development of an 'Australian' history which is of use to legal historians seems plain. First, its global scale allows us to place Australian legal history in a meaningful context in which North American, Irish, South African and Indian (to name but a few) expressions of 'British history' become directly relevant to the formulation of questions in Australian legal history – questions, for example, about the status and nature of military government, the role of subordinate legislatures, the diffusion of institutions, the nature of the structures mediating relations among social classes or interest groups – and we cease defining the imperial context of Australian legal history merely in terms of those English colonial policies which we can identify as specific to this part of the South Pacific. Second, its dialectical thrust enables us to acknowledge that 'British' legal practices and institutions dominated in Australia and simultaneously to realize that the specification and reproduction of those practices and institutions in Australia was a consequence as much of local as of metropolitan social organization. Pocock's historiography, that is, provides a framework for analysis of the mimetic impulse which, we have argued, is a central theme of Australian culture and which, [Alex] Castles has shown, is the single most important characteristic of nineteenth century Australian legal development. It enables us to appreciate the extent of and reasons for the colonial contribution to the production and reproduction of English institutions in the antipodes.

No credit is due to us, but it is worth observing that the impulse on display here – in effect to write the legal history of each locale of the British Empire both for itself and simultaneously as the product of dialectical interaction amongst multiple locales – has become a major theme of contemporary legal history.

At the time ours was primarily an organisational contribution to Australian legal history, an attempt, reasonably successful, to create an intellectual community where none had previously existed. Among La Trobe's legal historians it would be others – notably Howe, Kirkby,
and Davies – who lent the specifics of Australian legal history more sustained attention. Here I want to consider briefly two of their interventions – Adrian Howe’s ‘Prologue to a History of Women’s Imprisonment’\(^\text{57}\) and Diane Kirkby’s ‘Lawyer’s History, Conversationally Speaking’\(^\text{58}\) – because in different ways they point to two developments of fundamental importance to the trajectory of Australian legal history: first, the sustained influence of feminist perspectives; and second, the fundamental importance of phenomena of colonialism and empire that, I have already argued, is distinctive to the legal histories of settler colonial societies. In both these respects, Australian legal history has developed in a fashion far more akin to the field in Canada and New Zealand than to work in the United States.\(^\text{59}\)

Howe’s ‘Prologue’ is an utterly unsparing account of the difficulties attending a particular kind of legal-historical research project. ‘I would like to write a history of women’s imprisonment in Australia,’ she begins. The remainder of the ‘Prologue’ is, so to speak, a catalogue of the barricades that obstructed the path she desired to follow – barricades erected by criminological theory, by penology, by the sociology of crime, and by the (then) ‘new’ social history, all of which expressed masculinist perspectives at best indifferent to her project. There were, that is, clear reasons why, in 1990, ‘the history of women’s imprisonment in Australia is still waiting to be written’, why, amid the celebration of the revisionist theoretical-historical research on social control, on crime and punishment, on surveillance and discipline written in the 1970s and 1980s there existed ‘a formidable silence about the historical realities of women’s imprisonment’. With one exception (Michel Foucault, and then only if carefully parsed from a feminist standpoint) the available history and theory was simply incapable of representing women’s experience.\(^\text{60}\)

The critique was devastating, the way forward from it difficult. To avoid becoming simply a ‘gender-revised’ variation on a ‘male-focused historiography’, Howe argued, her history had to be an explicitly feminist history, the product of a feminist epistemology.\(^\text{61}\) Here her challenge was frontally to the objectivist claims of existing history and theory. Frankly avowing a ‘partial and invested position’ in the production of knowledge

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\(^{57}\) Adrian Howe, ‘Prologue to a History of Women’s Imprisonment: In Search of a Feminist Perspective’ (1990) 17 Social Justice 5.


\(^{60}\) Howe ‘Prologue to a History of Women’s Imprisonment’, above n 57, 5, 8, 10, 17-18.

\(^{61}\) Ibid, 13, 13-16.
in order to undertake the project she had embraced. Howe simultane­ously asserted that all historical knowledge was necessarily produced from partial and invested positions. Hers was hence a position on the politics of history – that history should be, could not be other than, political. Virtually as she wrote, however, objectivist claims were crumbling amid the academy’s post-structural turn toward the contingent. Given the rising fetishisation of the irreducible complexity of relations between phenomena and their environments, partial knowledge produced from an explicitly feminist standpoint becomes no more than one more kind of knowledge amid a smorgasbord of possible knowledges. To endow a ‘partial and invested position’ with truth content, in my view, it becomes necessary to overcome the academy’s turn to complexity, to find a way of arguing that although all positions may be partial and invested, not all are rendered equal thereby. I return to this below.

Dianne Kirkby’s ‘Law[yer]’s History’ was a briefer intervention than Howe’s, but no less informative. A contribution to a forum honouring the Australian legal historian Alex Castles, Kirkby’s commentary serves as a short guide to the development of the field in Australia. Though mindful of Castles’ pioneering scholarship, Kirkby politely but firmly embraced the view that ‘law as a discipline need[s] to be researched and interrogated by non-lawyers for a truly critical interdisciplinary study because legal education [teaches] lawyers to talk law’s conversation’, the very issue ‘which need[s] critical analysis’. Pointing to the work of Australian social historians of law – Stephen Garton, Mark Finnane and Judith Allen – as exemplary of that critical analysis, Kirkby argued that by bringing history and law into disciplinary apposition, both would be informed. The objective was to know ‘how historical context/discourse/debate has constituted law’, but also ‘how law tells us about the construction of history as an evidentiary discipline of memory, artefact and written documentation’. Contemporary Australian research in native title cases both transcended the disciplinary separation and rebounded upon it. ‘Considering the imperialism of law in native title claims’ had led Australian historians ‘to question the very nature of historical enquiry and method.’

Kirkby chose two examples – women’s history and the history of empire – to illustrate her contention that, properly approached, the interdisciplinary apposition law/history should leave neither component untransformed. In the first case she described the alteration of her own historical practice from research that assessed the importance of law and

62 Ibid, 15.
63 Howe’s own recent work – notably Howe, Sex, Violence, and Crime, above n 32 – is itself an important attempt to break out of this trap by reactivating the brilliant feminist critical criminology of Maureen Cain and Carol Smart.
64 See, eg, Alex Castles, An Australian Legal History (Law Book Company, 1982).
65 Kirkby, above n 58, 47, 48, 51.
legal change to women’s working experiences and economic independence only in relation to ‘the meaning for women of law’s history, not the meaning for law of women’s history’ to research that considered how women’s history – for example campaigns by women to change specific oppressive laws – opened up law’s history. The two were ‘intertwined, mutually constitutive and revealing’. In that mutual entanglement, Kirkby found cracks where Howe had seen only roadblocks – testimony, perhaps, to the 15 years of feminist writing in Australian legal history that separated Howe’s frustrations from Kirkby’s probes.66

The institutional certainties of a feminist movement with specific goals which were or were not achieved in specific reforms, and of law courts and statutes which were or were not visibly responsive to those goals, has given way to a more nuanced and subtle reading of the dialogue between formal and informal structures, popular culture and high legal culture as two sides of a same coin, or mutually informative practices.67

Kirkby’s second exploration of disciplinary conjunctions built on her first in emphasising the centrality to Australian legal history of themes of colonialism and imperialism. Citing Martha Fineman – ‘the very best feminist legal scholarship is about law in its broadest form, as a manifestation of power in society, and for the most part it recognizes that there is no division between law and power’68 – Kirkby suggested a natural affinity between legal-historical inquiry into settler colonialism and feminist scholarship. Like the organisers of the first Law in History conference more than 20 years earlier, she saw in ‘an enlarged and expanded empire studies’ an opportunity to problematise ‘common experiences, common problems and ... common solutions’ – specifically those arising from the influence of race and gender on the production of nation-states and their national histories.69

Though Kirkby detected dialogic possibilities where Howe had found masculinist monologues, her perspective on history as such was, like Howe’s, one that still emphasised its politics – ‘the relation between present values and the way we write about the past’. To history’s politics, Kirkby added a nod to law’s, specifically its politics of absorption, ending her commentary on a note of uncertainty. ‘While we in Australia and New Zealand take pride in the growing success of our conference and organisation, are we at the same time deluding ourselves about our success in transforming the narrowness and insularity of law’s conversation?’70 Given

66 Ibid, 49. See, eg, Kirkby above n 35 for a sampling of the intervening years’ feminist writing.
67 Kirkby, above n 58, 49.
68 Martha Albertson Fineman, ‘Introduction’ in Martha Albertson Fineman and Nancy Sweet Thomassen (eds), At the Boundaries of Law: Feminism and Legal Theory (Routledge, 1991), xvi.
69 Kirkby, above n 58, 50, 51.
70 Ibid, 50, 51.
law's oft-demonstrated capacity to absorb other disciplines, to take from them what it needed to modernise its own disciplinary and professional discourse, who was influencing whom?

VI FROM 'IN' TO 'AS'

Because I have argued that the turn to complexity in legal studies that resulted from CLS's hermeneutic critique of 'law and' has proven barren, it is worth reminding ourselves that the critique itself was nonetheless unanswerable. In its default mode, 'law and' produced a causally functional and empirical account of law. CLS showed that whatever the realm of action in relation to which law is situated, the outcome was the same – indeterminacy marked by complexity and contingency. Critique did not dispense with the components of the default account ('law' and 'society'). That is, it did not produce a new account. Though it claimed to 'blur' law and society, in fact the two categories remained conceptually distinct. What CLS did achieve, however, was to make any and every expression of their relationality inexpressible in causal or functional terms.

We have seen that, at least at the outset, La Trobe legal historians attempted to distance themselves from conjunctive relationality by placing law in history rather than at a remove from it. Unfortunately, the attempt did not last. One may attribute this in part to the difficulty inherent in resisting the sheer ubiquity of the 'law and' slogan in socio-legal studies, in part to the failure of La Trobe's legal historians adequately to theorise their alternative. To imagine law 'in' history – or 'in' context – necessarily requires that one be able to imagine law apart in order to know the difference that 'in' made. In the absence of theorisation of what 'in' actually meant, the result was a certain suspicion that 'law in history' still placed its emphasis on law. 'Law IN History ... was problematic' Kirkby writes, in that it appeared to 'place[ ] Law at the centre of research'.

The question that arises is how to steer past 'law and' while avoiding the two traps to which I have referred: the complexity fetish that relentlessly relativises every statement about and standpoint on law, and the concern that the only alternative to critical relationality is legal centrality. Informed by law in history's attempt to dispense with the relational, suppose instead of parsing relations between distinct domains of activity, between law and what is extrinsic to it, we imagine them as the same domain: what do we get if we imagine law and economy (for example) as the same phenomenon – that is, law as economy, or economy as law? What of law as society, as history (and the obverse)?

It is important to note that this is not as innovative as it may appear. As Kunal Parker has shown, the practice of 'contextualising' law by placing it

71 Ibid, 9.
in apposition to something imagined as distinct, as ‘other,’ was a distinctly late 19th century invention. Consider, for example, Philadelphia jurist Peter Stephen Du Ponceau’s earlier representation of the relationship between law and life:

[W]e live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake, and when we lie down to sleep, when we travel and when we stay at home; and it is interwoven with the very idiom that we speak; and we cannot learn another system of laws without learning, at the same time, another language.

The point is not that Du Ponceau’s representation of the ubiquity of the common law was conservative in an early 19th century America of republican legislatures – although of course it was. The point is the absence of any separation between law and life. The absence unites strange bedfellows: in this regard, at least, Du Ponceau’s law/life metanarrative was no different from Adam Smith’s, or William Blackstone’s, or Edmund Burke’s.

Law’s separation from life and custom – from history, economy and society – was the creature (like so much else) of the 19th century’s flight from metaphysics, its disciplinary reorganisation of knowledge and its creation of the modern university to embody that reorganisation. As the disciplines created themselves as distinct positivist knowledges, the key question for each became the nature of its knowledge vis-à-vis others. In the United States, birthplace of the modern law school, law became an early site for this self-interrogation – both the entering wedge of modern professional education and its recreation of knowledge as technical expertise, and the subject of corrosive modernist reappraisal that would culminate in legal realism. For Parker the key exemplar is Oliver Wendell Holmes, Jr, whose critique of law revealed ‘the merely temporal origins of [legal] phenomena in order to dismantle the foundations upon which such phenomena rest, whether those foundations be the logic allegedly underlying law, or the accumulated weight of law’s past that authorises its own repetition’. This antifoundational extrusion of law from a prior given order was ‘a ground-clearing gesture’, a preliminary to new, conscious, reflection on what law was, or should be, in relation to all that (society and so forth) from which it now stood distinguished. From Holmes to Roscoe Pound’s sociological jurisprudence (the first explicit statement of the separation of law and society), to the twin Progressive Era reductions of law to politics and politics to expertise, to realism, and

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73 Quoted in Parker ibid, 1-2.
74 Duncanson, above n 30, 11.
76 Parker, above n 72, 7.
on to the Law and Society movement and critical legal studies, is not a difficult modernist sequence to follow. 77

‘Law as ...’ attempts to escape that sequence. 78 Concretely, it rejects the dual disciplinary hypostatisations of law and context. Concurrently, as history, it rejects the similar hypostatisation of past and present – the rigid distinction between then and now that flows from historicism’s insistence on the absolute temporality of all phenomena. As history, ‘law as ...’ dwells instead on the conditions of possibility for a critical knowledge of the here-and-now, of the moment, it might be said, when the origins of the present ‘jut manifestly and fearsomely into existence’. 79 Here, I think, is a politics of history that can endow Howe’s ‘partial and invested position’ with formidable truth content.

‘Law as ...’ does not attempt to be programmatic. It simply offers legal history the potency of metaphors of appearance in place of the relational conjunctures of ‘law and’. By way of conclusion, let me offer three points of conceptual purchase premised on appearance: scope, scale and structure. 80

More than 20 years ago, Martin Jay described modernity as ‘resolutely ocularcentric’, by which he meant dominated by the visual. Instead of a divine text, Cartesian perspectivalism read the world as a mathematically regular spatio-temporal order. Instead of the wise and lonely sovereign who respects divine justice and human customs, the ‘scopic regime’ of cameralism and police rendered the public domain and its population resources to be inspected and managed. James C Scott, in particular, has described the modern state in scopic terms, as a regime dedicated to ‘seeing’, its central problem and task one of rendering the contents of the public domain ‘legible’. 81

Though immensely suggestive, Scott’s work has been quite strongly criticised for its essentialism. Mariana Valverde, in particular, has argued that modern governance regimes are far less linear in their character than Scott’s Weberian account of the rise of the modern state implies. Using municipal government as an example, Valverde stresses its hybrid character. ‘Pre-modern logics ... not only survive but continue to pop up

77 Ibid, 279-292.
80 The following discussion is a condensed version of Tomlins, ‘After Critical Legal History’, above n 28, 52-57.
anew. On its own, then, scope does no more than establish a field of legal practices that the legal historian can isolate for study.

My second point of purchase, scale, offers conceptual means to refine understanding of differences among those practices by introducing means to study both coexistence and variation. Valverde’s critique of Scott is not only a critique of his representation of logics of governance as successive, it is also a critique of its insensitivity to scale. Scott assumes that in the modern state law operates at one scalar level, that of the nation. Valverde’s municipal-based counter-examples introduce the level of the city. Jurisdiction separates distinct legalities and allows them to coexist within the same space of governance as a matter of scalar differentiation.

Attention to scale in legal history disciplines ‘complexity.’ Complexity is at least in part an effect of perspective. As Marilyn Strathern has put it, ‘the more closely you look, the more detailed things are bound to become.’

But as Strathern continues we see that perspective – looking more or less closely – is intimately bound up with scale. Thus Annelise Riles writes that ‘an implicit notion of scale – of the difference between large and small – is a crucial foundation for the effect of perspective.’ Perspective is a scopic regime – ‘a way of looking’ – that observers can vary according to the knowledge they desire to produce. What Riles notices is that modern knowledge, whether conventional or critical, tends to assume that whatever the perspective adopted, scale is a constant. Hence perspective is taken ‘to be perspective on something,’ something that itself does not vary, that is ‘raw material for observation.’ But once one notes the inconstancy of scale, perspective becomes part of the subject matter: ‘the act of viewing and the material that is viewed are one and the same.’ Complexity is revealed as a facet not of empirical reality but of how one constructs arguments; not then as a stopping point as it so often is, but rather as the point where theory must become decisive.

How, finally, can scope and scale be made part of the same theoretical conjuncture? Here I turn to the concept of dialectical image or constellation that lies at the heart of Walter Benjamin’s critical practice and of his philosophy of history. Benjamin offers us history as a scopic regime that is dynamic and nonlinear, its purpose to make shards of the past manifest for, and in, the present. He describes this as a ‘Copernican revolution’ in historical perception: ‘Formerly it was thought that a fixed point had been found in ‘what has been,’ and one saw the present engaged in ... concentrating the forces of knowledge on this ground. Now this relation is

83 Marilyn Strathern, Partial Connections (Alta Mira Press, 2004), xiii.
... overturned, and what has been is to become the dialectical reversal ...

_The facts become something that just now first happened to us, first struck us._ Here we encounter Benjamin's 'dialectical image' – a montage of fragments uprooted from their given surroundings and established anew as a constellation by the now that for the first time recognises the image formed. The character of the object does not arise from its past moment, but from our historical experience; it is not enlivened by the relationalities within which it allegedly belonged (the relationalities of its time) but by the fold of time that creates it for the first time, in constellation with the present. 85

Considered as an argumentative practice, the concept of dialectical image has clear scopic and scalar capacities. First, it is intensely visual, graphic. Second, its visualisations of historical objects understand those objects in terms of the distinct scopic regimes that attribute meanings to them, that seek to render objects legible in a particular way, for particular purposes. Third, its emphasis upon the construction and explanation of temporal conjunctions among putatively distinct objects – as in Valverde's modern and pre-modern logics of governance – renders it readily applicable to the hybridity of scale. Finally the concept's sensitivity to the fragmentary nature of what is apprehended, but also to the possibility of completing the comprehension of truth content by critique, renders it an antidote to indeterminacy and complexity.

Collectively, scope, scale, and structure – however schematic their introduction here – point to the availability of distinct theories, distinct conceptualisations, a distinct philosophy of history, and a distinct understanding of law, that can inform a different approach to legal history. In place of the incessant parsing of the familiar conjunctive conceptualisations of 'law and' – instrumentalism, formalism, relative autonomy, mutual constitutiveness – and its postmodern apotheosis – complexity – they lead us to more productive questions: why did differentia of appearance (of economy, polity, law) come about? How did they become so powerful? By examining the production of differentiation we are led to questions of purpose and effect. As law came to be distinguished as one way of looking amongst others, what optics, aesthetics, functions, or claims did it (and they) take up to further the differentiating project, and why? How was its own differentiation represented within or explained by law?

In short, 'law as ...' stands for an intellectual moment in which, a century after its proclamation, the relational understanding of law upon which the 20th century's socio-legal enterprise is founded has cracked apart. It is time for something new, and for new institutions to pursue it.

In 1992 La Trobe’s Legal Studies Department became the Department of Law and Legal Studies, and commenced teaching an undergraduate law degree alongside existing legal studies courses. In 1994 the department became the School of Law and Legal Studies. One might see this altered nomenclature as the beginning of something new, the creation of a new institution that could pursue the socio-legal into (or as) law teaching itself. But in fact the opposite tendency was at work – a slow but relentless expulsion of the social from law. In 1994 Legal Studies lost its formative orientation to the social sciences when a restructuring of the university placed the new school in a Faculty of Law and Management alongside Business, Economics, Hospitality, and Tourism. La Trobe Legal Studies’ former partners in the School of Social Sciences – the Departments of Politics and Sociology – became part of a new Faculty of Humanities and Social Sciences. In 2000 ‘Legal Studies’ was excised from the school’s name, which became ‘La Trobe Law.’ In 2002, several tenured members of the law school’s academic staff who identified themselves as socio-legal scholars were quite abruptly declared redundant and dismissed. In 2006 the last remnants of Legal Studies were excised from the school.

Carefully conceived, a law teaching program housed within La Trobe Legal Studies would have made a major contribution to Australian legal education, and to La Trobe University’s national and international reputation. The University recognised that possibility in the wake of the 1987 Commonwealth Tertiary Education Commission’s deeply critical assessment of existing Australian law schools (colloquially known as the Pearce Report), in which La Trobe Legal Studies was extolled for the fresh and distinctive approach to legal education it might offer. University Vice-Chancellor John Scott encouraged the Department of Legal Studies to take advantage of the opportunity the Pearce Report offered. His encouragement came at the peak of the department’s development: its academic staff had grown to some 40 members, many with research degrees; it taught nearly 1000 undergraduates in first year Legal Studies courses, and many more in second and third year electives. Its research output was growing, as was its graduate programme. And it was engaged in the recruitment of a senior academic to fill a third professorial chair in Legal Studies alongside those occupied by Professors Blackshield and Carson.

Failure to attend adequately to the development of internal consensus over precisely how to pursue the law teaching initiative, however, meant the issue became plagued by disagreement. The situation was not assisted by turnover in leadership at both department and university levels. Tony Blackshield left Legal Studies in 1988 to return to Sydney and a chair at Macquarie Law School. Kit Carson also left the department to become a La Trobe University Deputy Vice-Chancellor in 1991; he would eventually
leave La Trobe to become Vice-Chancellor of the University of Auckland in 1994. John Scott retired as La Trobe’s Vice-Chancellor in 1989 and was replaced by the less courtly Michael Osborne in 1990. Upon her arrival in Melbourne in early 1990, Margaret Thornton, recruited from Macquarie University Law School to the vacant professorial chair in Legal Studies, found herself confronted by a fractious department. The following two years saw the law teaching initiative dogged by deepening acrimony.

The law teaching program that eventuated would come to exhibit many of the weaknesses that the Pearce Report had criticised, primarily because it was undertaken at the expense of La Trobe’s socio-legal orientation rather than informed by it. Throughout the 1990s, as members of academic staff oriented to socio-legal studies departed, they were replaced by law teachers. In 1999, a University-commissioned review of the Faculty of Law and Management (the Mortley Report) recommended the University take steps to accelerate the departure of socio-legal scholars by offering them redundancy packages so that their positions could be taken by ‘professionally-oriented’ law teachers to teach subjects such as trade practices, competition law, intellectual property and tax. The exodus quickened, but not quickly enough for the School’s administrators.

Margaret Thornton writes:

Six tenured La Trobe socio-legal academics, whose contributions to the School had enhanced its international reputation, were notified that they held one of six positions identified as being in the ‘Legal Studies area’, and that four of these positions were to be excised from the School’s establishment. As well as being noted scholars, they were inspiring teachers who had attracted, challenged and excited a generation of students. The termination of their employment was euphemistically referred to as ‘organisational change’. No reasons were ever given for the action, but it was announced that when the University had dispensed with their services, new staff would be appointed ...

86 La Trobe Law School credits Professor Martin Chanock as ‘the chief architect in transforming the then Department of Legal Studies into a professional School of Law’, responsible specifically ‘for the proposal that the then Department of Legal Studies offer a professional Law degree’ and for ‘planning the transformation of the School’; La Trobe Law School (2008) ‘Nomination of Professor Chanock for Emeritus Professor’ (copy on file with the author).

87 Thornton, above n 2, 12. The six scholars in question were Sandra Cook, Susanne Davies, Ian Duncanson, Judith Grbich, Cathy Lowy, and Andrea Rhodes-Little. In 2005-06, Margaret Thornton, the law school’s Richard McGarvie Chair of Socio-Legal Studies, herself came under intense pressure to resign her chair. Uniquely among Australian legal scholars, Thornton had been awarded an Australian Research Council Professorial Fellowship. Appropriately, the focus of her research was ‘Equal Employment Opportunity in a culture of uncertainty’. In 2006 Thornton left La Trobe to take up a position at the Australian National University where she became Professor of Law and ARC Professorial Fellow. The last remaining shards of Legal Studies were separated from the law school and moved into the Faculty of Humanities and Social Sciences. Under the leadership of Susanne Davies, Legal Studies has flourished in its new-old social science surrounds.
Thornton adds, ‘five out of the six who were targeted were women, the majority of whom were feminist scholars’. Evidence subsequently emerged suggesting anti-feminist animus had indeed played a role in the affair.88

Ian Duncanson, Adrian Howe, and Margaret Thornton have all written the history of the end of Legal Studies at La Trobe.89 Remarkably, what is uppermost in their accounts is both their will to explain, and the relative absence of contingency – paths not taken, alternative outcomes – from those explanations. The primary significance of the La Trobe Department, in Duncanson’s account, lay in its institutionalisation of interdisciplinary teaching and research on law in the form of ‘a discipline with an administrative base’. Though the demise of Legal Studies during the 1990s might well have been represented as the outcome of clashes of personality, grudges held and discharged, administrative shortcomings, failures of imagination and initiative – or in other words, eminently avoidable – what Duncanson finds decisive is the wider political, economic and cultural context: ‘a resurgence of conservatism in government’ and ‘a lack of confidence in innovative scholarship in a country which is oriented, and whose assets are largely owned from, overseas’.90 Duncanson continues:

In Australia, as in Canada, the need to defend critical, creative and curiosity-driven scholarship originates in the cyclical return to an approach to education and knowledge which Matthew Arnold famously characterised as ‘Philistinism’ – the conviction that, to be useful, knowledge must be closely related to some commercial activity in near proximity to being carried out.91

Thornton, similarly, embraces modes of explanation in which contingency plays little role, locating the life and death of Legal Studies in the larger realm of transition from the social liberalism ascendant in western capitalist democracies in the post-WWII era to the neoliberalism clearly in evidence, in the Australian case, by the second half of the 1980s. Neoliberalism meant the atrophy of the social and a turn to unalloyed ‘capital accumulation and promotion of the self through the market ... facilitated by government.’ In this process ‘key institutions of

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90 Duncanson, above n 89, 3, 1.
91 Ibid, 3, 2.
civil society, [such as] universities' are pressed into roles that service a proclaimed national interest in the sanctification of market competition and the commercialisation of all life. Thornton means her account of 'the trajectory of change at La Trobe University' to be a case study of 'the neoliberal mosaic that has transformed higher education'. Though the events that provide the case with its substance 'could not have occurred without the agency of individual administrators,' it is to 'the prevailing political economy of higher education' that one must look for 'the conditions that facilitated these acts'.

One may argue that in these accounts of a deeply painful experience – the deliberate extinguishment of an intellectual trajectory of internationally recognised validity and its replacement with its opposite – La Trobe's legal historians have managed nevertheless to hold on to their *sui generis* criticality. They have not given us a history that forsakes explanation for a riot of might-have-beens. They have approached ideas and institutions from the standpoint of what they did. Such a history is peculiarly valuable; it informs those that might wish to risk another tilt.

**VIII  EPIL戈UE**

Forty years have passed since the foundation of La Trobe Legal Studies, 20 since its extinction was set in motion, 10 since the university expelled virtually all the discipline's remaining proponents. Times have changed again, as the first epigraph to this essay proclaims. Socio-legality is back in vogue at La Trobe Law. A (largely) new generation of Australian legal scholars once more sees value for legal education in 'a "broad church" of ideas – with a critical element'. Once more scholars find reason to question 'the notion that law is a self-contained, coherent and neutral discipline'. La Trobe Law promises prospective students that their 'innovative and high-quality legal education' will come with 'practical experience that links learning with legal practice'. But it will also include 'a strong commitment to social justice, interdisciplinary enquiry [and] an international perspective'. The student is to be 'prepared for employment in a global legal economy,' but proper preparation is understood to require studying the law 'in its broad social, political and economic context'.

Of course one applauds La Trobe's rediscovery of the socio-legal, and of critique as the means to its exploration. One hopes that La Trobe's heritage in legal studies, as represented in this volume but also reaching far beyond it to an extended body of scholarship and experience spanning

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92 Thornton, above n 2, 3. See also, generally, Blackshield and Williams above n 36, 25-27.

40 years, can become a resource of use to the university’s law school as, still itself a new institution, it attempts once more to include the social in the legal academy. It is certainly not alone in the attempt. Such company may be to La Trobe’s advantage the second time around.

La Trobe’s legal historians have produced their own accounts of the first time around, but much more besides. They have produced histories of legal education in Australia and elsewhere, and of law’s serial encounters with other disciplinary modes of inquiry; they have produced substantive legal histories and accounts of legal historiography; they have produced histories of the social in the legal, and they may yet produce histories of the social as the legal. Whatever the subject of their histories, however, they have been unsparing in their commitment to using history as a mode of explanation rather than speculation. They are historians bitten hard by life who have written hard-bitten histories to match, who have not shied away from explanation even at the most difficult of moments. They can be proud of what they have written, and they can be allowed to hope that the next 20 years will provide an environment more conducive to what they aspired to achieve, even if they are not directly party to achieving it.

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