BEYOND SKILLS AND DOCTRINE: THE NEED FOR POLICY SKILLS AND INTERDISCIPLINARITY

Nathan Jon Ross*

ABSTRACT (Summary)

There is debate about the ratio of doctrine to skills in undergraduate law programmes arising from a purported lack of "practice-ready" capability. This article looks at this discussion relative to an assumed objective of universities, which is to develop graduates with a rounded understanding of the world, and with skills for objective fact-finding and analysis. Rather than the two dimensions of doctrine and skill, this article employs a framework of four dimensions, basic and deep skills, and basic and deep knowledge. It is used to assess a four-year law programme taught largely through case-method against that assumed objective of universities. It concludes that two substantive elements were not addressed sufficiently, policy skills (as an element of deep skills) and deep knowledge. The importance of those elements is described and recommendations are offered for how to incorporate them with minimal impact on the teaching of legal skills and doctrine.

1. INTRODUCTION (Problem Definition)

There is a long-held concern that legal education focuses too heavily on doctrine and insufficiently on the skills required for practice.[1] In the United States, for example, a recent assessment by the Illinois Bar Association concluded that:[2]

> Law school graduates must be equipped with practice-ready skills to succeed in today's legal marketplace. It is no longer sufficient for law school graduates to

* Research Fellow in Law, Victoria University of Wellington, Barrister and Solicitor of the High Court of New Zealand, and BEnvSc (Newcastle). The author would like to thank Rt Hon Sir Geoffrey Palmer QC, A/Prof Alberto Costi, Wendy J Risely and Elena Mok for discussions and input into developing this article.

1 For a summary of this ongoing discussion, see John Lande "Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice" (2013) 2013(1) Journal of Dispute Resolution 1.

2 *Report and Recommendations of the Special Committee on the Impact of Current Law School Curriculum on the Future of the Practice of Law in Illinois* (Illinois State Bar Association) at 6.

> merely think like lawyers; they must be able to perform the basic tasks central to legal practice.

This dichotomy of skills versus doctrine is an over-simplification of the basic substance of a legal education, and each of those elements are also over-simplified. For example, the push for "practice-ready skills" presumes that at least a majority of graduates will practice and end up in litigation, despite the increasing trend towards alternative forms of dispute resolution, and despite the fact that many graduates employ their qualification in other areas, such as policy. On the other hand, a heavy reliance on doctrinal teaching overlooks the ever-increasing and often-amended volumes of statutes and regulations, and the resulting need for greater emphasis on the methods of statutory interpretation.

Whilst acknowledging that legal education is much more than simply skills and doctrine, the focus here is on what else is at stake in a law degree other than graduates' capabilities for resolving disputes. As Sir Geoffrey Palmer says, "[l]aw must respond to social and economic changes and provide a framework for future development. Law reform is attached to the idea of progress."[3] For such reasons, Twining described the idea of:[4]

> [T]he lawyer as Pericles—the law-giver, the enlightened policy-maker, the wise judge [with] intellectual discipline, detachment, breadth of perspective, an interest in human nature and a capacity for independent and critical thought.

Twining is critical of both ideas of lawyer as plumber ("competent technician")[5] and lawyer as Pericles, but the latter reveals the essential thesis of this article. Most environmental, social, cultural and economic policy issues are perpetual challenges and they are enabled by the law in some way. For this reason, law graduates should be equipped to play constructive roles in addressing those challenges. This need is not, however, met with a predominance of Langdellian case method teaching, nor increasing lawyering skills. Graduates should, of course, have the essential capabilities, but two other substantive elements are needed. First, they need to understand the natural and human phenomena that intersect with the law; that is, they need the context of the law,

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3 Geoffrey Palmer "The Law Reform Enterprise: Evaluating the Past and Charting the Future" (2015) 131 Law Quarterly Review 402 at 404.

4 William Twining "Pericles and the Plumber" (1967) 83 Law Quarterly Review 396 at 398

5 At 397.

which brings its assumptions into light. Secondly, they need to be introduced to the skills and processes for policy-making, and to the respective bodies of knowledge and methods that other disciplines bring to that process.

In reaching this conclusion, a principal purpose of universities is restated and the orthodox 'skills versus doctrine' debate is summarised. Then, instead of skills and doctrine, four broad dimensions of an LLB are employed: basic skills, deep skills, basic knowledge and deep knowledge. These dimensions are used as a framework to assess a four-year New Zealand undergraduate law programme against the purpose of a university. The key findings are, first, that policy-making and interdisciplinarity are essential deep skills that were almost entirely absent. Secondly, deep knowledge was not a systematic objective and so gaps remained. The risks from these gaps are outlined and recommendations are made for how they might be filled in ways that have minimal impact on the space required for teaching the essential skills and doctrine.

Regarding method, the article is based on the first-hand observations of the author, who undertook a four-year undergraduate Bachelor of Laws (LLB) at the Victoria University of Wellington (VUW) in 2011–2014 as a "mature-aged" student. My prior science education and policy career gave me a particular perspective on the programme that ultimately led to the observations documented in this article, and the ideas developed through that period and since.[6]

2. THE PURPOSE OF A UNIVERSITY (Intervention Logic)

This article has one key assumption, which is that a university's fundamental purpose is to develop graduates with a rounded understanding of the world, and with the skills and yearning for independent and objective fact-finding and analysis. More colloquially, it is to create "citizens of the world" who "know how to think". The assessment of the author's legal education is relative to this purpose. Whilst universities also have to equip graduates with certain basic skills and

[6] The author's LLB entailed 21 subjects, of which 10 were compulsory and 11 were electives. Some of the electives are undertaken by a large proportion of the student cohort, such as *Company Law* and *Commercial Law*, whilst others had a more specialist interest, such as *Comparative Law* and *Climate Change and the Law*. It is clear, then, that the findings herein are not the result of comprehensive survey and analysis, and this weakness is duly noted. However, the universality of the Langdellian method (doctrine) and the debate to increase workplace readiness (skills) indicate that the observations herein are very likely to have wider relevance.

knowledge relevant to their respective professions, creating citizens of the world should not be lost to creating participants in the marketplace.

3. THE SKILLS DISCUSSION (Counterfactual)

Since this article proposes a different perspective on the debate about increasing the skills content of undergraduate law programmes, a summary of those arguments is helpful. Rabkin describes this as being:[7]

> [A]bout vocational training on the one hand (how to draft a will or a set of pleadings, keep good accounts and form a company, for example) versus academic training on the other (the theoretical and moral underpinnings of the law, how to analyse critically, how to undertake research, how to understand the world more broadly and the law's role in it).

This skills versus doctrine debate has been the subject of expert reports dating back to at least 1879 and "[t]hese reports and other analyses repeatedly faulted law schools for over-emphasizing instruction in legal doctrine and analysis at the expense of practical legal training".[8] Those analysts argue for students to be taught a wider range of skills for legal tasks, such as "diagnosing and planning solutions for legal problems, instilling others' confidence, negotiation, fact gathering, drafting legal documents, counseling, obtaining and keeping clients, … [and] managing legal work."[9] According to Glesner Fines, the reasons behind a dearth in developing practice skills include "a general scepticism about skills instruction" and a perceived need to cover a growing body of law, which she describes as "the curse of coverage".[10]

One outcome of the debate on the ratio of skills to doctrine has been the reinvention of apprenticeship-style learning. For example, clinical legal education—including experiential clinics—aims to teach skills and doctrine

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7 Franny Rabkin "Ill-equipped law graduates 'not ready for practice'" (16 January 2014) Business Day Live <www.bdlive.co.za>; and Peter Brooks "Why Law Students Need the Humanities" (8 May 2016) The Chronicle of Higher Education <www.chronicle.com>.

8 Lande, above n 2, at 4.

9 At 4.

10 Barbara Glesner Fines "Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills throughout the Curriculum" (2013) 2013(1) Journal of Dispute Resolution 159 at 161.

simultaneously.[11] When the experiential teaching method focuses primarily on stakeholders who are not lawyers, such as Borrows' teaching with members of indigenous communities, it is particularly apparent that an "on-the-ground" reality is absent for the vast majority of undergraduate courses, that is, they are primarily taught within a legal silo.[12]

4. A RE-FRAMING OF LEGAL EDUCATION'S DIMENSIONS (Indicators)

An assessment of the efficacy of a law programme must be done against certain objectives. The objective being examined is the abovementioned purpose of universities: creating "citizens of the world" who "know how to think". If we translate that to the law school, it is much wider than problem-solving for particular clients' particular issues. It means applying the unique skills of a lawyer to tackling wider policy challenges, particularly since enacting or amending legislation is often an option.

In an era of major issues like climate change, growing social inequality, reduced government transparency, child poverty and so on, a university education fails graduates and society if it is little more than a traineeship. It must be about developing deep foundational learning and thinking skills that enable the growth of real wisdom, so we have a culture of understanding, ethics and progress. These are the types of qualities that engender a rounded understanding of the world and the appetite for knowledge.

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11 "Clinic Projects" The University of Chicago Law School <www.law.uchicago.edu>, and for a case study, see Becky Beaupre Gillespie "The Hardest Stories to Tell: What an Intense New Clinic Project is Teaching Seven Students About War, Mercy, and the Frailties of the Human Mind" *The University of Chicago Law School Record* (Spring 2016) at 9. See also Francina Cantatore "Boosting Law Graduate Employability: Using a Pro Bono Teaching Clinic to Facilitate Experiential Learning in Commercial Law Subjects" (2015) 25(1) Legal Education Review 147; Rachel Spencer and Matthew Atkinson "Towards a Pedagogy of the Integration of Clinical Legal Education within the Law Curriculum: Using De-identified Clinic Files within Tutorial Programs" (2015) 25(1) Legal Education Review 121; and Andrew Mitchell and others "Education in the Field: A Case Study of Experiential Learning in International Law" (2011) 21(1) Legal Education Review 69.

12 John Borrows "Learning from the land: indigenous law in context" (lecture, Victoria University of Wellington, 11 February 2016; and John Borrows "Outsider Education: Indigenous Law and Land-Based Learning" (forthcoming).

To consider the efficacy of the author's LLB programme against these goals, four broad content dimensions are proposed instead of simply 'skills versus doctrine'. Before setting them out, it is prudent to acknowledge that discussing the content of a law degree under any such broad labelling is reasonably open to criticism.[13] However, while acknowledging potential weaknesses, a framework remains a helpful tool for assessing whether various objectives are being met.

The framework proposed here includes *basic skills* and *deep skills*, which are the *training* dimensions, plus *basic knowledge* and *deep knowledge*, which are the *education* dimensions. As conceived here, *training* is the development of skills and methods required in the various professions of law graduates. *Education*, on the other hand, is about the world as it is known and understood through natural sciences, humanities and social sciences, including law. These dimensions are explained further below.

A. Training Dimensions

For law, *basic training* entails some of the day-to-day skills, such as researching the law, and drafting opinions and submissions. The development of these skills in the author's LLB programme was largely a function of a compulsory course, *Legal Research, Writing and Mooting*. They were reinforced in an elective, *Civil Procedure*, and in the post-degree *Professional Legal Studies* course that is run by separate institutions.[14] With few exceptions, other courses were assessed by traditional means of essays and exams.

Deep training, as advanced here, relates to those skills that are more unique to lawyering, such as statutory interpretation, case analysis, dialectic argumentation, and "thinking like a lawyer". Some might argue that these skills are part of education because there is an element of knowledge to them. For example, you have to know and understand the rules of statutory interpretation to apply them. However, it is the skill aspect that matters most. Basic knowledge—such as the mischief rule—can sometimes be mostly about developing a skill, albeit a deeper and more unique skill—such as statutory interpretation.[15]

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[13] See Twining, above n 4, at 421–422.

[14] The *Professional Legal Studies* course is mandatory in New Zealand for graduates wishing to be admitted as barristers and solicitors, and is delivered by specialist training providers.

[15] Whether statutory interpretation was taught well is out of scope for this article, except to suggest that the focus on archaic rules, such as *ejusdem generis* and *expressio unius*, seemed

The importance of distinguishing these deep skills from basic skills is that it highlights the fact that, although the deep skills mentioned here are more profound and particular to law, they do not increase a graduate's understanding of the world at large. Deep skills, such as thinking like a lawyer, do not give students a full context for thinking about specific laws' roles in society. They are part of the traineeship; not the education.

B. Education Dimensions

As noted above, education is about developing knowledge and understanding of the world through, amongst other things, the natural sciences and the humanities and social sciences, including law. The difference between education's *basic* and *deep* dimensions will be illustrated using an example from a natural science, ecology, and then applying the concept to legal education.

In science, basic knowledge includes snippets like "the harlequin gecko (*Tukutuku rakiurae*) is endemic to Stewart Island". It would also include other, relatively straightforward facts, such as the environmental characteristics that define its ecological niche. Deep knowledge is knowing and understanding what else is going on for the species that results in it being classified as 'nationally vulnerable'.[16] This might include its slow reproductive strategy and other evolutionary adaptations to the harsh climate of Stewart Island, the immediately-proximate threats such as pest species, and wider phenomena such as climate change, as well as the compounding relationships between those phenomena. For the practicing conservation biologist, deep knowledge will go further into the relevant local and national policy issues that create or enable these environmental problems, such as what is going with local land-holders and what is going on with pest management regimes. Deep knowledge is understanding the species' biology and ecology in its complete environmental system, and being able to intuit and compute likely outcomes of multiple changes in its habitat, both positive and adverse. Whilst this systems thinking is in part intuition, *accurate* intuition relies on an education that covered enough factual matters to enable the science

misdirected. See Ross Carter *Burrows and Carter on Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015).

16 Rod Hitchmough and others *Conservation status of New Zealand reptiles, 2012* (Department of Conservation, New Zealand Threat Classification Series 2, June 2013) at 8.

graduate to conceptualise and synthesise the "whole" in their minds. This is going much further than straightforward facts about the animal.[17]

How does this idea from ecology translate to an example in law? In the LLB, the law itself is just basic knowledge. The volume of rules does not alter this fact, just as basic knowledge of the vast number of plant, animal and fungi species does not translate into deep knowledge. Deep knowledge is about wider phenomena and interrelationships. It might start with the ability to see interrelationships between various laws, but it must go further. It is knowing and understanding the natural and human phenomena that intersect with the law, and that bring the law's presumptions into light and perhaps into question. For example, when local authorities develop plans to comply with the Resource Management Act 1991 (RMA) and the Local Government Act 2002, or central governments seek to amend those statutes, are the main actors and decision-makers actually aware of how the legislation intersects with issues like biodiversity conservation? Furthermore, are they aware of the web of issues that affect biodiversity; not just a statute? Since all indicators for biodiversity have gotten worse since the RMA was enacted, there is clearly a major disjoint between this principal piece of environmental law and scientific reality. For some policy-makers, this will be a conscious decision. For others, this disconnection will be incidental or, in fact, undesirable.

Why are these natural and human phenomena so important to deep knowledge? The laws of statute books are not "made of star stuff" according to certain "laws of nature".[18] They do not exist in the pure, natural form of the harlequin gecko. Certain legal rules are universal and appear to have a naturalism basis, such as the prohibition of genocide, but these comprise such a miniscule fraction of all the rules in all the constitutions, statutes, codes, regulations and cases, that it is self-evident that law is a human construct. As such, the myriad of synthetic laws may very well be in contradiction with objectively-identifiable laws of nature and laws of human nature. This might, of course, be a result of

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[17] "In a society which accepts the existence of multiple human qualities, intuition occupies its central place. It helps us to act by seizing the swirl of uncertainty of which imagination and civilization are made. It allows us to express the organic nature of our world and our existence in it.": John Ralston Saul *On Equilibrium* (Penguin, Toronto, 2001) at 212.

[18] Carl Sagan *Carl Sagan's Cosmic Connection: An Extraterrestrial Perspective* (Cambridge University Press, Cambridge, 1973) at 189–190.

compromise between competing policy objectives. But it might be out of ignorance.

Deep knowledge is understanding how things work at a fundamental level. To put it simplistically, the laws of nature (including human nature) just "are", and that is part of what scientists try to understand. If a population of harlequin gecko can only survive in certain habitats, then that is just the way it is. Convert those habitats to farms and the gecko population will decline, migrate, evolve, or die. Humans can, of course, change how rules of nature play out by fiddling with a natural system, but the underlying laws of nature remain unchanged: a species has evolved and adapted to a certain ecological niche and if conditions in that niche alter, changes to the species are inevitable.

Deep knowledge enables the LLB student to understand the broader context and see reality intersect with the law. This reality is not merely a discrete fact pattern. It is the bigger picture, drawn by data that is not conjecture and opinion but withstands peer-review in its own discipline or disciplines. It overcomes a concern of Saul's, which is about universities "separat[ing] intellectual inquiry from reality by adopting a relentlessly abstract approach".[19]

It is not being suggested here that LLB graduates should have a comprehensive understanding of all other disciplines. The argument is, however, that they should have enough understanding to know that there are further questions to be asked: of experts in the relevant field.

5. GAPS (Evidence)

The following subsections explore how, in the author's legal education, there were two main gaps relative to the abovementioned purpose of universities. The first was that there was no introduction to basic policy skills that would enable students to "ask the right questions", except in two niche electives. The second gap was that the law was often presented with minimal, if any, contextual data or key policy debates.

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[19] John Ralston Saul *The Doubter's Companion: A Dictionary of Aggressive Common Sense* (Penguin Canada, Toronto, 1994) at 263.

A. The Training Gap

It is repeatedly reinforced in legal education that the State holds all the power, and that lawyers and the judiciary are a bulwark against abuse. But arguing in a Plaintiff v Respondent paradigm is not the only means of checking that power. Influencing the development of policy is central, whether or not it directly results in legislative change. In light of his life-long law reform enterprise, Sir Geoffrey Palmer has come to the conclusion that:[20]

> Legal analysis and legal reasoning are not enough in the policy world. Lawyers and judges and their tool kit are a necessary condition in the world of policy-making, but they are not a sufficient condition. Both these worlds can learn from each other. … Lawyers have much to contribute but many other disciplines are needed.

Three ideas are particularly discernible from this conclusion. The first is the need for "the law reform enterprise". Obviously in a world with ongoing and systemic problems, law reform is a necessary and continual enterprise. Law schools should be facilitating the development positive players in this enterprise, that is, "citizens of the world" who "know how to think".[21]

Following on from this, the second idea is that lawyers need policy skills: there is a training gap in legal education. Matthew Palmer has pointed out that "[l]egal analysis is analysis of what the law is [whereas] [p]olicy analysis is analysis of what the law should be."[22] To respond to policy challenges:[23]

> The concentration has to be on the design of statutes and that raises a whole range of different issues that common law methodology cannot address. How does one decide the policy that will be contained in the statute? How does one assemble the support to get it passed? How can one demonstrate that what is proposed will be better than what went before?

The policy skill set is broader than is encapsulated in this summary. As Scott and Baehler explain, "[p]ublic sector analysis and advisers require the particular bodies of knowledge and the specific skills and competencies to allow

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20 Palmer, above n 3, at 413.

21 Martha Nussbaum "Our Interdisciplinary Legacy: The University of Chicago at 125" (Spring 2016) *Chicago Law Record* 24 at 25.

22 Matthew S R Palmer *Thinking about Law and Policy: Lessons for Lawyers* (Crown Law, December 2006) at [2].

23 Palmer, above n 3, at 413.

them to deliver high-quality, value-adding advisory services".[24] In reality, policy advice happens in many varied (often haphazard) ways, depending on a very wide range of factors including, inter alia, whether it originates from a policy shop (a government ministry, for example) or from a political source.[25] Regardless, there are certain processes that can improve the rigour of policy development: from the problem definition and intervention logic, to data collection, to the development and assessment of options, to the drafting of legislation (if required). On top of that, there is thinking about how to ensure policies across government are integrated and complementary.[26]

In New Zealand, at least, the policy process always involves consultation: within a government agency, between agencies, with portfolio Ministers, and with non-government stakeholders, such as Māori, interest groups and businesses. The consultation process, in particular, is where Sir Geoffrey's third major point, interdisciplinarity, is most obvious. Hence, including policy into legal education would introduce students to the understanding that:[27]

> Policy analysis by its nature is multi-disciplinary, interdisciplinary, and pragmatic – good policy design draws on a wide range of skills and competencies to create new approaches and frameworks as needed from the raw materials of existing disciplines.

The University of Chicago has recently celebrated its 125th anniversary and the Law School's event was a celebration of its "interdisciplinary legacy".[28] Faculty staff includes philosophers, historians and economists, and the Law School has a statistics laboratory. By contrast, in the author's LLB, only two of 21 courses were explicitly multidisciplinary. The *Law and Economics* elective was taught predominantly by an economist, with back-up from lawyers. The *Climate Change and the Law* elective was taught by Sir Geoffrey who brought his education and hands-on experience in both law and political science, along with

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24 Claudia Scott and Karen Baehler *Adding Value to Policy Analysis and Advice* (UNSW Press, Sydney, 2010) at 241.

25 For a demonstrative and entertaining flow diagram of such a process, see Scott and Baehler, above n 23, at fig 2.2 at 68–69.

26 See Girol Karacaoglu *The New Zealand Treasury's Living Standards Framework – Exploring a Stylised Model* (New Zealand Treasury Working Paper 15/12, August 2015).

27 Scott and Baehler, above n 23, at 23.

28 Edited transcripts of the event are at "Our Interdisciplinary Legacy: The University of Chicago at 125" (Spring 2016) *Chicago Law Record* 24.

many guest lecturers: a scientist, an economist, a former diplomat, and national and local government planners and policy analysts.

There are at least three reasons why legal analysis skills are critical to legal education. First, for those many graduates who go into policy-related careers, the benefits of teaching at least some law through policy and multidisciplinary lenses are clear. Secondly, advocacy for many law firms is not only about litigation; it is also about lobbying, law reform and other means of influencing national government and local government policy.[29] Thirdly, "[l]egal analysis does often inherently involve policy considerations."[30] Introducing policy skills would give all students insight to the rigour of the process. By extension, those skills and their demand for interdisciplinarity should put law in its context and highlight to students that laws are based on certain assumptions that can and should be brought into light and into question. It is a skill set that can also show that existing laws have certain outcomes, including unintended consequences, and these are not often understood in any systematic and explicit fashion. Finally, policy skills would equip law graduates with a robust set of tools that enable them to ask more driving questions about societal problems and about the law's role in them. This "know how to think" method can and should be another aspect to the *deep skills* dimension of legal education.

B. The Deep Knowledge Gap

If the deep knowledge dimension is given insufficient attention, then students might finish law school with the foundations of a fine trade but without a rounded education. So, to assess whether a university's purpose was met, the inquiry includes: Are LLB students learning about the world in which the law operates? Are students learning about how factual matters influence the development of the law or—for some subjects, such as transgenderism[31] and

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29 Mai Chen *Public Law Toolbox* (1st ed, LexisNexis, Wellington, 2012).

30 Palmer, above n 21, at [12].

31 In New Zealand, to alter one's sex on their birth certificate, an applicant must have had medical treatment: Births, Deaths, Marriages, and Relationships Registration Act 1995, s 28(3). This is in spite of the fact that transgendered people may not be able to undergo surgery (see "Decades-long wait for gender reassignment surgery" (14 May 2016) Stuff.co.nz <www.stuff.co.nz>) or may not wish to ("Transgender FAQ" The Human Rights Campaign <www.hrc.org>). For further discussion, see Emily Blincoe "Sex markers on birth certificates: replacing the medical model with self-identification" (2015) 46 VUWLR 57.

climate change[32]—not? Are they seeing any reason to question the assumptions embedded in the law? It was the author's observation that the answer to these questions was, "yes and no, but not in a systematic fashion". Hence, it is argued here that there is a gap in the LLB programme of deep knowledge.

This will be illustrated with two examples from courses in the degree undertaken by the author. First, *Ethics*. When the author undertook this course in 2013, it focused on the primary rules governing lawyers' behaviour and relevant cases, and it was taught using a light Socratic method of teaching legal rules.[33] There were readings and discussion in the first week on the meaning of "ethics", but it quickly went into duties to the court, duties to clients, and so on. As *Ethics* is compulsory for students intending to be admitted as a barrister and solicitor, this subject should be taught on an assumption that its students will go on to become officers of the court.[34] As such, ethics as an academic discipline should be treated seriously. Instead, many students treated it as a necessary interruption to "more important" rules of law, and they were not actively disabused of this idea. Indeed, the reputation of a zero fail rate reassured students that they could be slack and not take it seriously. There were discussions in lectures on whether some behaviour was or was not appropriate for a fit and proper person to be an officer of the court. However, those discussions were based almost entirely on peoples' opinions and not in the context of any theories of ethics or philosophical frameworks for contemplating such issues. The course was taught mainly as just another set of rules.

In the next example, *Property Law*, six (of 24) weeks were dedicated to jurisprudence and a number of important concepts were introduced. Central to that was introducing Wesley Hohfeld's bundle of rights theory and Tony Honoré's ownership bundle. There was also an introduction to historical contexts of

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[32] As with many countries, New Zealand's climate change policy setting is continually criticised for its lack of scientific basis and accountability. See Jan Burck, Franziska Marten and Christoph Bals *The Climate Change Performance Index: Results 2016* (GermanWatch, Bonn, December 2015); Eric Frykberg "NZ's climate change target condemned" (13 July 2015) *Radio New Zealand* <www.radionz.co.nz>; and Jan Wright *Emissions Trading Scheme Review 2015/16: Other matters: Submission to the Minister for Climate Change Issues* (Parliamentary Commissioner for the Environment, 28 April 2016).

[33] Although the Socratic method was intended, what was implemented was little more than class discussions.

[34] See "Information Regarding Admission to the Legal Profession in New Zealand" at [1] in *Certificate Application Form (New Zealand Degree Holders Only)* (Council of Legal Education, Wellington, 15 March 2016) at sch 1.

property law. This was all important, but a major gap remained. The actual starting premise of property law was never mentioned: the laws of nature. Because of its historical genesis, property law starts with a presumption of protecting individuals' absolute property rights to protect them from the abuse of those in power. From that starting point, caveats, such as nuisance and trespass, have developed as problems were identified. In a contemporary context, that starting presumption means that certain legal persons continue to have rights to (for example) undertake activities that directly or inevitably result in the injection of vast amounts of greenhouse gases into the atmosphere. And when attempts are made to curb these activities, it is controversial because of that simplistic starting point of absolute rights and the concomitant right against uncompensated takings. This is a fundamental flaw.[35]

The teaching of what is or is not "property" was devoid of the objective data about the elements of nature required to "make" property: the sources of natural resources, and the impacts of extracting those resources, turning them into value-added products and ultimately disposing of them and their by-products. To talk of property without an understanding of its actual interactions with the natural world does not just *leave* a gap in students' awareness. It *creates* a gap. It gives a fundamentally incorrect impression of what "property" is, and hence the bizarre controversy around the simple premise that you cannot use property in a way that is as harmful as climate change. The starting presumption was absolute rights, not the laws of physics.

If universities are helping to develop citizens of the world, then the law must be seen in its context, not in isolation.[36] This was done successfully in some of the undergraduate subjects undertaken by the author, including *Climate Change and the Law* and the Treaty of Waitangi component of *Public Law*.[37] Since international and domestic efforts to abate climate change fail so miserably, it is unsurprising that the lecturer of the *Climate Change and the Law* course would want students to understand the context and critique major policy responses. For that purpose, lectures were given by a range of non-legal experts. In addition, the

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35 See David Grinlinton and Prue Taylor Nijhoff (eds) *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff Publishers, Leiden, 2011).

36 Borrows (forthcoming), above n 12.

37 The Treaty of Waitangi (1840) is a treaty between the British Crown and various Māori iwi (tribes) and is considered to be the founding document of contemporary New Zealand.

entire class of students took part in a compulsory moot negotiation, where pairs of students represented 20 or so nations (with false names but well-known diplomatic positions) so they could experience the challenges for developing international climate change law and understand why it is so ineffective. Following this essential context, the key international agreements, and domestic statutes and cases were taught and concurrently critiqued relative to that initial data.

Whilst the policy issue is an intrinsically interdisciplinary one, the approach in the *Climate Change and the Law* subject is more widely applicable. The ethos was, in effect, that the efficacy of the law was directly related to the objectively-analysed problem and its consequences, the economic and other policy challenges, and the various human and political behaviours. This approach is clearly not unique to this one policy issue.

Another example where the context was provided was for the Treaty of Waitangi. A good history of the Treaty is told in the case law.[38] A school-leaver-aged student commented to the author about his frustration that he had not learned that fuller Treaty history at school. He believed that that gap had left him susceptible to racist views, which he now understood were wrong. This was a prime example of the 'citizen of the world' outcome that results from deep education: not just the law, but the law in context.

6. DODGING CONTEXT AND ENTRENCHING POSITIONS (Risks)

The deep knowledge that good social science, humanities and natural science education facilitates—along with the skills and rigour of their respective methods—are employed to facilitate a thorough understanding of human beings and nature, including intersections between related phenomena. In the LLB programme, the training, basic knowledge, and discussions on right and wrong risk inadvertently serving the opposite ends; they risk entrenching existing views.

Class discussions about the appropriateness of a behaviour or piece of law were held without any meaningful data of the environmental, social, cultural, historical, economic or ethical phenomena at play. The only data were the discrete

[38] See Matthew S R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, 2009).

fact patterns and their relevant laws. When the wider context for the law is absent, discussions on the rights and wrongs happened, at best, in the abstract, or worst, in a data vacuum. In such situations, it was left to chance as to whether students' ideas really were challenged. What seemed more likely, however, is that they entrenched an existing opinion, bias or prejudice due to psychological phenomena such as confirmation bias. Confirmation bias is:[39]

> The tendency to test one's beliefs or conjectures by seeking evidence that might confirm or verify them and to ignore evidence that might disconfirm or refute them. This bias … helps to maintain prejudices and stereotypes.

In the Socratic model, students are presented with topics as if they are entirely open to debate; as if all rules and legal decisions reflect subjective positions. As such, there is no objective or rigorous mechanism for shaking students out of confirmation bias, irrespective of whether there is established or extensive agreement on something within the topic's relevant discipline. This does not facilitate objective and critical thinking.

Dialectical argumentation is a powerful tool, but it should be distinguished from critical thinking. Critical thinking is driving for more data to get to more facts, to get more intersectional relationships, to get a better understanding of the true nature of an issue or policy solution, thereby battling against ideology and other forms of bias. Employed properly, the Socratic discussion is a powerful tool for sharpening students' wits and developing their ability to "think like a lawyer", but it is principally about how opinions shift as more hypothetical shifts or nuances are added in fact patterns. Because this is limited to discrete fact patterns (commonly), the absence of wider context means that it is not as robust as critical thinking for considering legal policy and efficacy.

Ultimately, whether law students allow themselves to be challenged or whether they entrench their positions, the Langdellian case method and Socratic discussions would have done little on their own to educate students about the true nature of the world and human behaviour because of the common absence of objective data and systems thinking.

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[39] Andrew M Colman *A Dictionary of Psychology* (4th ed, online edition, Oxford Univeristy Press, Oxford, 2014) at "confirmation bias".

7. DELIVERING POLICY AND DEEP KNOWLEDGE DIMENSIONS (Options and Recommendations)

How can the purpose of a university and a law school be achieved whilst meeting other core objectives that enhance graduates' career prospects? Maranville argues that experiential learning has the potential to expose students to four types of context in legal education: the people in cases that students read and their real-life circumstances; the institutions and practices that give rise to disputes; the institutions and processes in which doctrine is applied; and the tasks lawyers perform and how doctrine is integral to those tasks.[40] Mitchell and others have demonstrated benefits from an experiential approach for international law, where students visit relevant organisations and meet with practitioners.[41]

These contexts are powerful, and still wider contexts are available. Borrows' practice of teaching law outside of the classroom and in the field evidences the potential of broad contextual comprehension.[42] He suggests getting students of both compulsory and elective subjects out of doors and immersing them in the contexts of legal issues. Rather than in courts, he observes, the law lives in physical and social relationships, and legal issues and obligations arise on site, not in chambers. When students learn on site, they have the opportunity to enhance their knowledge and understanding of different sources of law (and lore): the laws of nature, culture, genealogy, language. A more profound understanding of these contexts has a legal practice benefit, which perhaps has ethical implications for the practitioner as well.

The full environmental, social, cultural or economic field that each area of law rests simply cannot be accommodated within any degree. Such a 'Bachelor of Polymathy' model of teaching law would inflame Glesner Fines' idea of "the curse of coverage".[43] It is, however, possible to develop graduates' abilities to question the assumptions underlying the law.

The starting point is providing an introductory level policy methodology or framework. Then, for each course, it begins simply by alerting students to the fact

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40 Deborah A Maranville "Infusing Passion and Context into the Traditional Curriculum through Experiential Learning" (2001) 51(1) Journal of Legal Education 51 at 56–57.

41 Mitchell and others, above n 11.

42 Borrows (lecture), above n 12; and Borrows (forthcoming), above n 12.

43 Glesner Fines, above n 10, at 161.

that a context, or contexts, exist, and then provide some introductory data to evidence that. This data would outline the problem definition, set out the most common and/or controversial policy questions relating to the topic, and explore the various disciplines that would most likely have expert and different understandings of the issue and its solutions. This is the deep knowledge element.

This data can lead into the policy skills element. Students, utilising that data, can be trained to ask a suite of policy questions, such as: Was the law solving the right problem? How do you know; what was the evidence? What other disciplines would offer expertise? What were the main competing policy objectives and how should they be weighed up against each other? What alternative options were available? Did the law create unintended consequences that ought to be avoided? After including the contextual data, a course could largely be taught as it is now, except for using these types of questions for occasional reflections on these policy issues: just enough to keep alive the fact that everything is contestable.

Elective courses could dedicate a greater portion of teaching time to expanding the deep knowledge and policy skills content. This was done in the *Climate Change and the Law* subject, where the final exam asked whether a carbon tax was more or less attractive than an emissions trading scheme. Of course, there is also an option of having a separate elective on policy-making for lawyers. A dedicated course could explore the policy-making framework in greater depth and then look at specific roles for lawyers.

A legal education must cover basic and deep skills and basic knowledge. The argument here, though, is that students should be exposed to enough data and enough policy skills to know that there is much more to the law than their opinions and those of their lecturers and textbook authors. By using a concept like deep knowledge, lecturers might help students to develop the intellectual abilities needed to identify and answer policy questions, to cut through opinion and speculation, to criticise productively, to assess—based on real and objective data—what really matters for individuals and society, and to think creatively and constructively to help solve people's and communities' problems. The aim should be to foster a desire to find out more and know the always complex and almost-always elusive 'right answer'. This is creating a worldlier citizen than someone who knows the rules and how to use and argue them.

8. CONCLUSION

Nussbaum has reflected that:[44]

> Our society is not perfect, to put it mildly. Nor are its laws perfect. Lawyers should not just be instruments of the status quo, obeying its norms without reflection. … They should be independent and critical participants, who work to shape a future that is better than the past.

And it is more than just being independent and critical. It is delving into the data—the complex, interweaving labyrinth of truths, half-truths and everything but the truth—and having the yearning and capability of going beyond opinion and ideology. It is about enabling graduates to have more than a mere conjecture about what is a "better" future, but understanding that this, just like many other concepts, is contested but that there are objective and analytical measures. As Bertrand Russell said:[45]

> The fact is you cannot be intelligent merely by choosing your opinions. The intelligent person is not the person who holds such-and-such views but the person who has sound reasons for what they believe and yet does not believe it dogmatically.

Whether an LLB delivers on a university's traditional role of developing graduates with a rounded understanding of the world, or at least a familiarity with other disciplines, was largely left to chance. Graduates need to be equipped to see readily the difference between evidence-based policy and its nemesis of policy-based evidence. The question remains then as to whether, each year, students are completing the LLB as more than smart worker bees with a fine trade but an untapped capacity to learn. Are law graduates going into the world keen and able to contribute to solutions from an objective, fact-based and ethical starting point? Or are they looking at social and ecological problems with firm opinions that lack an objective comprehension?

Obviously there is a wide range of competing demands on law degrees and their courses and teachers. Some may argue that teaching students deep knowledge is the role of other faculties, but that confirms Saul's observation that a

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44 Nussbaum, above n 20, at 26.

45 Bertrand Russell *Mortals and Others: Volume II: American Essays 1931–1935* (Routledge, London, 1998) at 58.

university is "[a] place in which civilization's knowledge is divided up into exclusive territories."[46] If we are taking a wider perspective about graduates' various roles in society, LLB programmes are doing them a disservice to continually go through the motions of case analysis for every subject instead dedicating a small amount of time up front to contextual data and a small amount of time to do some policy thinking about the law and its wider, objective context.

[46] Saul, above n 18, at 301.