

Amicus *Curiae*

The Journal of the Society for Advanced Legal Studies



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'Reflecting on
Blackstone's
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EDITOR'S INTRODUCTION

MICHAEL PALMER

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Welcome to the third issue of the second volume of the new series of *Amicus Curiae*. We appreciate the support that contributors, readers and others have given the journal, assisting the progress that the relaunched journal has made.

Much of this issue consists of a collection of essays, kindly organized and edited by Professors Fiona Cownie and Emma Jones, which explore questions about English legal education and its development in the light of Professor William Twining's seminal study delivered as the Forty-sixth Hamlyn Lectures and published as *Blackstone's Tower: The English Law School* (1994; see also Twining 1997). An earlier and more general appreciation of Professor Twining and his work offered the observation that he 'has been (still is in my view) the most influential figure in British legal education over the last half century' (Arthurs 2011: 3). A subsequent characterization described him as 'an intellectual who is a pre-eminent Renaissance man among legal scholars: a bricoleur ... [who has made an] ... outstanding contribution to legal education as a pedagogue, an innovative educational practitioner

and an activist reformer' (Baxi & Ors 2015: vii-viii). I first met William at a workshop, kindly organized by his UCL colleague Professor William Butler, held in late 1988 at Peking University Law School, where he introduced his audience to *Alice in Wonderland's* Cheshire Cat. Understanding the Cat, he explained, will help us all appreciate better the fugitive nature of evidence law. The Cat keeps

disappearing and fading away, so that sometimes one could see the whole body, sometimes only a head, sometimes only a vague outline and sometimes nothing at all, so that Alice was never sure whether or not he was there or, indeed, whether he existed at all. In practice, our rules of evidence appear to be rather like that (2006: 211-212).

This insight was well-understood and appreciated by a local audience in Beijing that was more accustomed to carefully regimented lectures delivered in the spirit of constructing a perfect socialist legal system with Chinese characteristics. Our workshop was part of an 'academic tour' of China involving visits to a range of local legal institutions, and Professor Twining was quick to grasp the

importance of the point that ‘people’s mediation committees’ did (as they still do) a lot more work than the ‘people’s courts’. Back in the UK, he gave much kind support and encouragement to Professor Simon Roberts and I in the development of the University of London Intercollegiate LLM programme of (very likely), the first degree course in the UK dedicated to ‘alternative dispute resolution’. This innovation has been ‘blamed’ from time to time for facilitating the introduction of Lord Woolf’s access to civil justice reforms of the late 1990s (see also Twining 1993). Subsequently, in a volume celebrating the SOAS Law School’s Fiftieth birthday and its continuing engagement with comparative legal studies, Professor Twining contributed an insightful essay that argued for a more global and inclusive vision for comparative law—one which would free itself of the dominance of the ‘country and western’ tradition (Twining 2000). Over the past two decades, his inspirational scholarship has continued to flourish, drawing not only on his early intellectual engagement with the work of Hart, Collingwood, Llewelyn and Mentschikoff but also the voices of Boaventura de Sousa Santos, Amartya Sen, Abdullahi An-Na’im,

Upendra Baxi, Francis Deng and Yash Ghai. His unwavering commitment to legal education and its reform, and to his role as a mentor, institution-builder and supporter of younger scholars (Lacey 2019), continues to motivate us ‘more than somewhat’.

The Special Issue is supplemented by an important Note contributed by Professor Patrick Birkinshaw on the findings of the Panel launched in July 2020 to consider options for changes to the process of judicial review through an Independent Review of Administrative Law. The Report of the Panel (CP 407) was published in March 2021. The Review’s findings have been responded to by the Ministry of Justice in *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law* (CP 408), and Professor Birkinshaw, *inter alia*, points to a number of issues in the response of the Government as well as the Review.¹

In addition, Professor Carl Stychin, Director of IALS, contributes a short Note on the University of London’s new Refugee Law Centre. This body provides legal advice for refugee clients on a *pro bono* basis, is based on a model of Clinical Legal Education, and is located in

¹ Professor Birkinshaw is the author of a number of important studies including (2020) *European Public Law: The Achievement and the Brexit Challenge* Alphen aan den Rijn: Wolters Kluwer; (2010) *Freedom of Information: The Law, the Practice and the Ideal* 4th edn Cambridge: Cambridge University Press (Law in Context); and with Mike Varney (2019) *Government and Information Rights: The Law Relating to Access, Disclosure and their Regulation* 5th edn London: Bloomsbury Professional.

Charles Clore House. The Clinic is supported by the Central University and by ten of the University's Member Institutions, operates in partnership with Macfarlanes and Clifford Chance, two leading international law firms based in London, and provides opportunities for lawyers to undertake *pro bono* work. The new initiative seeks also to bring together the shared interests of refugee law scholars and practitioners, and to encourage

collaboration between academics and non-academics in the field.

The Visual Law contribution in this issue is offered by Lin Yang, a young scholar who is currently working on online dispute resolution and its regulation, primarily with reference to developments in the People's Republic of China. His note introduces us to China's three innovative online courts and explains their growing role in the PRC's justice system.

References

- Arthurs, H W (2011) 'Introduction to the Symposium in Honour of William Twining' 18(1-2) *International Journal of the Legal Profession* 3-5.
- Baxi, Upendra, Christopher McCrudden & Abdul Paliwala (2015) *Law's Ethical, Global, and Theoretical Contexts: Essays in Honour of William Twining* Cambridge: Cambridge University Press.
- Lacey, Nicola (2019) 'Forward' in *William Twining Jurist in Context: A Memoir* Cambridge: Cambridge University Press.
- Twining, William (1993) 'Alternatives to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics' 56(3) *Modern Law Review* 380-392.
- Twining, William (1994) *Blackstone's Tower: The English Law School* London: Sweet & Maxwell.
- Twining, William (1997) *Law in Context: Enlarging a Discipline* Oxford: Clarendon Press & New York: Oxford University Press.
- Twining, William (2000) 'Comparative Law and Legal Theory: The Country and Western Tradition' in Ian Edge (ed) *Comparative Law in Global Perspective: Essays in Celebration of the Fiftieth Anniversary of the Founding of the SOAS Law Department* Leiden: Brill & New York: Transnational Publishers.
- Twining, William (2006) *Rethinking Evidence: Exploratory Essays* 2nd edn Cambridge: Cambridge University Press.
- Twining, William (2019) *Jurist in Context: A Memoir* Cambridge: Cambridge University Press.

BLACKSTONE'S TOWER IN CONTEXT

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Abstract

This article contextualizes the contribution of *Blackstone's Tower* within the discipline of law, arguing that its publication was both significant and radical at a time when research into legal education was much less well-developed within the legal academy than it is today. Twining's approach, acting as a 'tour guide', was also important in a period when the 'private life' of the English university law school was virtually unexamined. This article also highlights the ways in which the other contributions to this special edition demonstrate the continuities and changes that have occurred within legal education since *Blackstone's Tower* was published.

Keywords: legal education. law schools; legal scholarship; legal research; William Twining.

[A] THE CONTEMPORARY CONTEXT

When William Twining delivered the Hamlyn Lectures in 1994, under the title 'Blackstone's Tower: the English Law School', it was an event which not only reflected his own eminence as a scholar, but one which held considerable significance for the sub-discipline of legal education. The prestigious Hamlyn lectures, of which Professor Twining's was the 46th series, were established in 1948 to fulfil the terms of the Hamlyn Trust, created by Miss Emma Hamlyn in memory of her father, a solicitor in Torquay. Essentially, the objectives of the Trust are to further the knowledge of the general public about the law of the UK and other European countries. The lectures are always delivered by a judge, legal practitioner, legal academic or other eminent speaker. They are also published in book form (Hamlyn Trust).

The opening sentence of *Blackstone's Tower* tells us that: 'The purpose of this book is to suggest that the study of law is becoming re-absorbed

into the mainstream of our general intellectual life, as it was from Blackstone's time until the late nineteenth century, and that this is a welcome development' (Twining 1994: xix). Professor Twining goes on to suggest that law as a discipline has been somewhat marginal to the mainstream of intellectual life, not just within the academy, but also in what he terms 'middlebrow culture', exemplified, for example, by *The London Review of Books* (Twining 1994: xix).

This theme is further explored in the first lecture: 'Law in Culture and Society' (Twining 1994: 1-22), which includes the 'Fantasy in a Bookshop' (Twining 1994: 11-13). Here, Professor Twining regales us with a conversation overheard in a second-hand bookshop, between the manager and a new assistant. The message was: 'We don't want specialist works ... only those with some appeal for the general reader.' By this test, says Professor Twining, English literature, sociology, politics, Penguin philosophy and works on oriental religions were 'in'. However, technical and scientific books, law, business studies, medicine and Christian theology were 'out'. History, anthropology, classics and modern languages were tricky—if in doubt, don't buy. Professor Twining commented that in his view this was a fair precis of contemporary ideas of general middlebrow culture and went on to imagine how he would persuade the bookshop manager why and in what respects his attitude to law was wrong. Essentially, the argument would actually be: you already stock many books which are about law; you just don't recognize them as such. For instance, you have Dickens' *Bleak House*; you have whole sections devoted to 'true crime' and detective novels; you have biographies of political prisoners, criminals, policemen, even lawyers and judges. You put Kant and Bentham under philosophy, Walter Bagehot under politics and *The Trial of Socrates* under classics. Each of these deals with important law-related themes. In addition, your idea of law books is outdated; law is now studied in its social, economic and political context, making much legal literature more accessible to ordinary readers: 'Law is far too important, too far-reaching and too interesting not to be part of general culture' (Twining 1994: 13).

Looking back more than a quarter of a century later, it is clear that the opening sentence of *Blackstone's Tower* might be regarded as somewhat over-optimistic. Indeed, Professor Twining himself still has some of the same concerns which troubled him in 1994. Writing to the authors about this special edition, he said of the invitation to deliver the lectures:

I was, of course, pleased to be asked. I approve of the aims of the Hamlyn bequest and saw it as an opportunity both to summarise my then views on the scene in England and Wales and to make the case for

the discipline of Law being better integrated into general (intellectual) culture in the spirit of Hamlyn. I feared at the time that it would not reach such an audience and my fears were justified ... the lectures were delivered orally in the Law Faculty at Manchester University and as far as I know only one non-lawyer attended (because he wanted to buttonhole me on another matter). Since then the Hamlyn Trustees have made efforts to reach wider audiences ... but with what success? I tried to write for non-specialists, but ... (Twining 2020).

Professor Twining's reflections point to his continuing concern that law as an academic discipline is not at the forefront of public engagement activity, a theme to which he returned when he delivered the Society of Legal Scholars Centenary Lecture in 2009 (Twining 2009). Under the title 'Punching our Weight? Legal Scholarship and Public Understanding' he notes that legal academics are already making contributions to public life (as legal advisors, as grass-roots activists, as arbitrators, magistrates and tribunal members, for example). However, he continues, there is very little systematic knowledge of the extent or nature of that contribution. And when it comes to legal writing, very little that is published, whether in the form of books or journal articles, is read by anyone other than academic lawyers (Twining 2009: 524). So, for Professor Twining, academic law has still not been 'absorbed into the mainstream of our general intellectual life' in the way in which he clearly wishes it had (Twining 1994: xix).

However, for the discipline of law, arguably the most significant aspect of *Blackstone's Tower* was that it focused almost exclusively on legal education. This is a topic which is often neglected by lawyers, whether academics or practitioners, and, in that context, it is unsurprising that, in the 45 series of Hamlyn Lectures preceding *Blackstone's Tower*, there had been none which had addressed legal education, and that remains true of all the subsequent series of lectures (Hamlyn Archives). This state of affairs may partly reflect the terms of the trust deed of the Hamlyn Trust, but it is equally likely that it reflects the suspicion with which research into legal education has been routinely regarded by the legal academy.

Legal scholars have written about legal education since the mid-19th century when law was becoming established as a discipline in English universities (Sugarman 1986: 29). There are, for example, multiple contributions on legal education in the first ten years of publication of the *Law Quarterly Review* (first published in 1885) and in the first ten volumes of the *Journal of the Society of Public Teachers of Law* (initially published in 1924). However, many of these contributions were largely (sometimes entirely) descriptive, lacking references to the relevant academic literature and failing to provide any analysis of the issues involved

(Cownie & Bradney 2017). Arguably, that approach has continued to be characteristic of much writing about legal education ever since. Gower, writing in 1950, remarked that: 'The subject of legal education is one which has aroused singularly little interest in England in recent years and the general professional attitude to it is one of complacent apathy' (Gower 1950: 137). By 1982 there did not seem to be much progress, with Professor Twining himself commenting that '[v]irtually no serious research on legal education has been undertaken in this century' (Twining 1982: 212). In this context, Professor Twining's Hamlyn lectures were all the more important, representing a serious effort to demonstrate that legal education, if correctly approached, was just as rigorous an intellectual field as any of the more traditional areas of substantive law which formed the subjects of the other Hamlyn lectures.

[B] AN INSIGHT INTO AN OPAQUE FIELD

In his seminal work, *Academic Tribes and Territories* (1989) Tony Becher mapped the territories of academic knowledge and explored the characteristics of those who inhabit them. In the second edition of the book, co-authored with Paul Trowler in 2001, the authors note that when they turned to the discipline of law 'with the exception of an interesting discussion by Campbell and Wiles (1976), the attempt at a literature search drew a complete blank' (Becher & Trowler 2001: 53; see also Cownie 2012: 63). This is a somewhat surprising statement, given that it post-dates much of Professor Twining's own work and that *The Law Teacher* journal was already well-established by this point. However, taken together with Professor Twining's example of the bookshop manager, it clearly illustrates a general lack of insight into the scope and breadth of the discipline, suggesting that law, and particularly legal education, has traditionally been perceived as a specialist, somewhat opaque, area of scholarly interest. More recently, Stolker refers to there now being a myriad of work on legal education generally (without reference to the quality of said work), but notes that 'law schools *as such* [author's italics] – their research, education and governance – have not often been the topic of an entire book' (Stolker 2014: 2). For Professor Twining to have proposed acting as a 'tour guide', providing an introduction to the realities of English university law schools, a full 20 years earlier, can thus justifiably be described as radical and groundbreaking (1994: xxi).

In *Blackstone's Tower*, Professor Twining performs his duties as tour guide by providing an introduction to both the 'public' and 'private lives' of the law school (Twining 1994: xx; Trow 2010: 369). He does this using the device of an imaginary English university law school within

the fictitious University of Rutland (Twining 1994: chapter 4). We are introduced to Rutland as a ‘civic university of the middling sort, founded in 1930’ (Twining 1994: 66). Since then both the university and the law school have expanded, with the law school now comprising 33 staff (including five professors) and 600 students on LLB, joint honours and postgraduate programmes (1994: 67). We are given an insight not only into its formal structure and composition, but also into its physical components (buildings, office layout), its staff, its events and the complex web of hierarchies, relationships and attitudes, all of which feed into its culture and both internal and external perceptions of its role and functions. Writing from an American perspective, Schlegel suggested that: ‘Together the pieces give an American reader a sense that, if plunked down in an English law school, though one might not know exactly how to act, one could at least have a reasonable idea of what the game was’ (1996: 983).

The opportunities for dispute resolution offered by the race for limited parking spots, the name and title of the school, the neatly presented noticeboards, the more individualistic office spaces, the busy corridors, the decor and ambience, the secretaries, students and academic staff, faculty appointments and open days are all touched upon within this lecture. The notion of a tension between liberal and vocational perspectives within legal education is also referred to, with the adherence of the school’s staff to ‘the academic ethic’, the vocational nature of student culture, the contents of the undergraduate law degree and the emphasis of the recruitment literature all hinting at the performance of a complex balancing act between the academic and the vocational, despite a ‘professed belief’ on the part of the school that no incompatibility exists (1994: 78). The lecture ends by referring to the school as being in a state of ‘transition’, seeking to diversify but struggling to find a clear pathway. Professor Twining comments that, as a result, ‘a narrow and probably deluded set of vocational attitudes’ seems set to doom Rutland to be ‘little more than a mediocre nursery school for the profession’ (1994: 85).

Although the idea of a case study, a snapshot of one particular initiative or intervention within a law school, has become almost ubiquitous in legal education publishing, this more holistic overview of a law school was a radical approach in 1994 and remains little-used today. Often it is the very focus of a case-study approach on a single initiative or intervention within a law school which means the resulting work is more accurately characterized as scholarship rather than research (Cownie 2020). The narrow focus makes the results of limited applicability and (in some cases) interest—a common criticism of contemporary research into

higher education (MacFarlane 2011: 127). Instead, Twining used a single example to tease out the constituent elements which form and shape the notion of legal education itself, as well as the role and function of a law school. He took the minutiae, and sometimes the apparently mundane, contained within his observations on Rutland and used them to provide an accessible, yet illuminating, way to begin to explore the discipline of law and legal education as a whole, and to challenge the notion of it as opaque and remote from public engagement.

The 'tour guide' approach is one that Professor Twining returns to several times in subsequent publications which are more clearly aimed at a legal audience (1995: 1998). In his later paper on 'Rutland Reviewed' (1998: 3), he conceptualizes this approach as one which is focused on 'institutions' rather than 'process' (see also 1995: 292). This is on the ground that '[a] process perspective, however liberal, almost inevitably focuses discussion of legal education on the early stages of professional formation – as happens with most official committees and reports because of their remit' (1998: 3). This might seem a somewhat surprising comment given that the 1996 report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) had clearly prioritized the provision of a form of liberal legal education (Arthurs 1997; Bradney 1998). However, in doing so, it was arguably swimming against the growing tide of neoliberalization in higher education. The 1997 National Committee of Inquiry into Higher Education report (commonly known as the 'Dearing Report') strongly emphasized the economic and vocational importance and benefits of a degree. This was followed by developments such as the introduction of university tuition fees (Brown 2010), an increased reliance on market forces to provide quality assurance (Maisuria & Cole 2017: 605) and the introduction of the Teaching Excellence Framework (Gunn 2018). Given the focus and impacts of the Legal Education and Training Review (LETR), the effects of which have yet to be fully realized, Professor Twining's comment continues to be an accurate one (LETR 2013).

In focusing on 'institutions' instead of 'processes', Professor Twining is at pains to note that an 'institutions' approach cannot be viewed as homogeneous or static, and that it is important to acknowledge the wider university, national and international context. However, in 'Rutland Reviewed' he suggests that 'individual law schools are significant units in respect of finance, prestige, culture, student choice and forward planning' (1998: 4). He uses his somewhat dismal prediction of Rutland's future as a 'mediocre nursery school' as a springboard from which to argue that it is necessary for law schools to effectively transition to, or reinvent themselves as, 'a more self-conscious multi-functional model that serves

a varied clientele, while maintaining a balance between educational, scholarly and social objectives' (1998: 4). In other words, the type of institute which is, as Professor Twining termed it in *Blackstone's Tower* itself, 'the legal system's ... House of Intellect' (1994: 54). This means, as he wrote a year later, less prioritization of undergraduate students and an expansion into new markets, from 'legal literacy to judicial training' (1995: 292). In one sense, therefore, Professor Twining is suggesting a way to navigate through, and possibly even reconcile, the tensions between the liberal and vocational, notably by 'undermining the assumption that the only function of law schools is to teach undergraduates (the primary school model) and that the only law students are those taking single-subject first degrees in law' (Twining 1996: 1010). In presenting extracts of Rutland's new mission statement, Twining is effectively suggesting practical ways in which this new approach can be applied to one 'middle-ranking English law school' (1998: 11). Unfortunately, as Vaughan implies in his contribution to this special edition, it is questionable whether this suggestion has taken root. As he suggests, there has remained within law schools a reliance on the law degree as preparation for the legal profession, despite the Solicitors Regulation Authority's lack of regulatory interest in undergraduate legal education.

Of course, the limitations of Professor Twining's focus on 'institutions' (which he himself acknowledges) cannot be ignored. Since *Blackstone's Tower* and those visits to Rutland there have been significant developments within the wider landscape of higher education, with neoliberal marketization, narratives around students as consumers and the introduction of processes involving high levels of managerialism, such as the Research Excellence Framework (REF) and Teaching Excellence Framework (Giroux 2010; Ball 2015; Gunn 2018). All of these developments try to exert influence over legal education, law schools and higher education more generally, with varying degrees of success (see, for example, Thornton 2011; Collier 2013). However, whilst such wider factors are arguably more significant than ever, it is within the individual law schools that the implications of these will be teased out, their influence mediated (and perhaps moderated—Bradney 2003; Cownie & Bradney 2005: 283) and the consequences experienced. As Professor Twining himself describes it: 'The fault seems to me to lie in how our discipline is institutionalized and the stereotyped thinking that underlies that. My remedy is a radical rethinking of the premises of the law school enterprise' (1996: 1016).

[C] THE CONTEMPORARY CONTEXT

Blackstone's Tower was significant and radical in its time both in terms of its 'institutions' approach and as an example of high-quality legal education research. When revisiting it in the contemporary context, it prompts two questions in particular. Firstly, to what extent has the rethinking of legal education which Professor Twining advocated taken place? Secondly, how has research into legal education fared in the subsequent 27 years? In the following section, we look at these two important questions in turn.

The Subsequent Development of Legal Education: Has There Been a Substantial Rethink?

Looking at the growth in popularity of legal education in the UK since 1994, it is tempting to conclude that there has been a substantial level of change. In 1994 there were 86 providers offering undergraduate and/or postgraduate provision in law (Harris & Jones 1997: 44). In 2021 there are 121 providers offering Qualifying Law Degrees (SRA 2021c). According to the Higher Education Statistics Agency (HESA) in 1994–1995 there were 32,424 undergraduate students in England, 1,809 in Wales, 3,305 in Scotland and 529 in Northern Ireland studying a first degree in law (HESA 1995). In 2018–2019, this had risen to 61,600 in England, 3,140 in Wales, 6,585 in Scotland and 1,770 in Northern Ireland (HESA 2020). This suggests a further expansion of the sector comparable to the post-war expansion detailed in *Blackstone's Tower*. In terms of legal practice courses, there has been a more modest increase from 'about 20' in 1993 (Twining 1994: 40) to 27 providers now listed (SRA 2021b).

Despite this growth in the student population, if we are to take Professor Twining's 'institutions' approach to analysing the contemporary law school, it is arguable that any changes which have taken place have been relatively slow-paced and minor. A useful starting point for evaluating the extent of shifts and changes within legal education is to consider the later work of Professor Twining himself. He acknowledges that in the late 1990s he 'virtually deserted' the field of legal education for 'about 15 years' (Twining 2018: 244). However, since his return he has raised a number of key critiques (Twining 2009; 2015; 2018), characterizing himself as 'mainly an activist rather than scholar' (Twining 2019: 269).

In fact, much of Professor Twining's later commentary has focused upon the role of legal academics (Twining 2011; 2014). In terms of numbers, in 1994 *Blackstone's Tower* indicated that there were 'slightly under 2,000' full-time academic lawyers (1994: 39). The Society of Legal

Scholars notes that in early 2017 it had 3,000 members (Society of Legal Scholars 2021). This suggests an increase of around a third. In addition, it seems likely that the make-up of this group has shifted as the expectation that academics will have a PhD and be research-active has increasingly become established, with fewer having a legal practice background (Twining 2011: 167; Bradney & Cownie 2020: 239). Despite these shifts, Professor Twining argues that ‘law teachers both collectively and individually have not attained the mature professionalism that is needed to maintain a balance between the demands for excellence in law, education, scholarship, and politics–administration’ (Twining 2011: 166). In other words, there is a sense of the legal academy as a work in progress, evolving but not yet having reached its full potential. This is perhaps unsurprising given the extent of the demands of contemporary higher education outlined above, including the need to demonstrate specific forms of excellence in both teaching and research and the emphasis on evidencing their fulfilment within the neoliberal university. Collier explores this theme in his article in this volume, considering the ways in which wellbeing has become increasingly acknowledged, but also increasingly compromised, in the legal academy in recent years.

In terms of the content of legal education, in his later work Professor Twining has raised again his concerns over the ‘heavily over-loaded curriculum’ of undergraduate law degrees (Twining 2018: 246). He attributes this, at least in part, to the interpretations law schools have placed on the ‘Joint Statement on the Academic Stage of Training’ issued by the Law Society of England and Wales and the General Council of the Bar under the Courts and Legal Services Act 1990 (SRA 2021a). Despite the relatively permissive nature of the statement, it appears that many law schools implement the requirements in a relatively rigid and uniform manner. A survey by Vaughan (2019) suggested that out of 86 providers (at that time) only 12 made a Qualifying Law Degree optional for students and that most providers taught in modules or blocks based around the foundation subjects. Sanders also suggests that the focus of law schools remains largely doctrinal, rather than embracing socio-legal and other critical perspectives (Sanders 2015: 144), although this is disputed by others, with a range of examples of socio-legal approaches being integrated into both foundation and optional subjects (Hunter 2012). In this special edition, Adebisi develops a richer critique, suggesting that doctrinal legal education has been, and remains, an example of ‘disciplinary decadence’ due to its lack of acknowledgment and exploration of its own history and subjectivities and its failure to examine its role in wider societal epistemologies.

Although there has been much speculation about the potential impact of the proposed Solicitors Qualifying Examination (SQE) on the undergraduate curriculum (see, for example, Morrison 2018), recent research has suggested that the impact is likely to be less radical than initially speculated. In his survey of the websites of providers of Qualifying Law Degrees, Gilbert (2020) found that 'three-quarters of websites do not currently indicate that the SQE will have any impact on law courses offered from autumn 2021'. Although he notes that some changes will be awaiting formal approval and that other institutes may be 'biding their time', this does suggest that for a majority it will effectively be a form of 'business as usual', perhaps partly because a law graduate will still require a Qualifying Law Degree for entry into the barristers' profession (Bar Standards Board 2021). As of yet, there appears to be little discussion of, or appetite for, the lengthening of law degrees to four years, the solution proposed by Professor Twining to allow students a more balanced and in-depth curriculum (Twining 2018: 247).

A notable change has been the growth in the number of law schools providing undergraduate students with training in professional legal skills (as opposed to academic legal skills) (Harris & Jones 1997; Harris & Beinart 2005), although this appears to mirror the wider shift in the sector as a whole towards vocationalism (discussed above), rather than representing a specific departure for law. Professor Twining himself notes that the 'heavily over-loaded' undergraduate curriculum in law is added to by 'constant inflation of the concept of "graduateness", now going beyond intellectual skills to include such concerns as employability, teamwork, elementary technical skills, IT literacy and so on' (2018: 246). However, the Quality Assurance Agency (QAA) Subject Benchmark Statement for law remains firmly committed to academic legal skills, referring to 'skills and qualities of the mind', despite references to 'self management' and 'professional development' (QAA 2019: 5-6).

In terms of delivery of teaching, existing large-scale surveys of law schools also suggest a focus on continuity rather than radical change (Harris & Jones 1997; Harris & Beinart 2005; Bone 2009). There are individual case studies of innovative pedagogical approaches (for example, the problem-based learning approach of York Law School). However, overall there has been no sense of a whole-scale shift in approaches to delivery since 1994. Interestingly, it is perhaps only in 2020 that a more significant shift has occurred, through the current (at the time of writing) move within higher education to online and blended learning necessitated by the worldwide Covid-19 global pandemic (see, for example, Watermeyer

& Ors 2020). The impacts of this are touched on by Collier (in relation to legal academics) within this volume.

In many ways, the shifts that have occurred since 1994 suggest that changes within law schools have largely emanated from much wider trends and changes within higher education, in particular the neoliberalization process discussed above. It is arguable that such trends and changes have had significantly more impact upon law schools, particularly the law degree, than those reports specifically focused upon legal education and training, such as ACLEC (1996) and the LETR (2013). It is difficult to quantify the impact of the learned societies in law (which include the Society of Legal Scholars, the Socio-Legal Studies Association and the Association of Law Teachers) upon legal education. However, the events, funding and dialogue they offer, together with *The Law Teacher* and *Legal Studies* journals, suggest there is the potential for the associations to have an impact upon the culture surrounding legal education and within law schools. Whether this is sufficient to fill the gap left by the dissolution of the UK Centre For Legal Education (UKCLE) is unclear (Twining 2011: 169; Twining 2014: 99). Professor Twining argues for the creation of a 'national (preferably UK-wide) Institute for Legal Education and Training (or Learning about Law), with sustainable funding' (2018: 247) to replace the current procession of one-off reports and assist the legal academy in their role as educators. It is unfortunate that one of the significant changes since *Blackstone's Tower*, the discontinuation of UKCLE, has been a negative and retrograde one, rather than a positive and constructive step forward.

It is arguable that more radical change has occurred through an increasing acknowledgment of some issues which are not present in *Blackstone's Tower* itself. Within this special edition, this is illustrated not only by the work of Adebisi in her discussion of decolonization, but also by the contributions of Ashford and Pearson. Ashford discusses the ways in which gender and sexuality have become established areas of legal discourse and scholarship and notes their powerful potential to have a much wider impact upon legal education as a whole. Pearson argues for the importance of recognizing disability and promoting inclusivity within legal education, including its incorporation into the legal curriculum. It would be almost unthinkable for a contemporary law school 'tour guide' to omit to refer to these topics given the contemporary recognition of the importance of equality, diversity and inclusion issues (even if the achievement of these aims is as yet incomplete). Similarly, the inclusion of Guth's contribution in this special edition reflects the fact that, since the publication of *Blackstone's Tower*, an increasing amount of attention

has been paid to the views of students about their experience of higher education, including in particular the growth of initiatives involving students as partners or co-creators (see, for example, Seale & Ors 2015). All these topics, together with Collier's contribution (focusing on wellbeing) reflect topics which have come to the fore as subjects of interest within the legal academy in the decades since the publication of *Blackstone's Tower*. While the attention paid to these issues does not amount to a 'substantial rethink' of legal education in the way that Professor Twining was suggesting, they do reflect significant additional concerns which must be taken into account by any law school aspiring to take up the challenge of becoming the legal system's 'House of Intellect'.

How Has Research into Legal Education Fared in the Subsequent Twenty-seven years?

Turning to the second question prompted by our reflections on *Blackstone's Tower*, it might be thought, looking at the volume of publications alone, that research into legal education in England and Wales has flourished since 1994. In terms of monographs, several of the major legal publishers have demonstrated that they are open to publishing legal education research. Hart has several legal education titles on its current list, as does Cambridge University Press, and Routledge currently has two book series dedicated to legal education (*Legal Pedagogy* and *Emerging Legal Education*). *The Law Teacher* continues to be the main outlet for legal education articles, and since 2017 the number of issues published each year has increased from three to four, suggesting confidence on the part of its editors and publishers of the availability of additional material worthy of publication. Other general law journals also publish legal education research from time to time; for example, between 2014 and 2018 both *Legal Studies* and the *Journal of Law and Society* published multiple articles on legal education (five and four respectively). The Society of Legal Scholars and the Socio-Legal Studies Association both have conference streams dedicated to legal education research, while the Association of Law Teachers' Annual Conference is always wholly dedicated to the topic of legal education. The Legal Education Research Network provides a range of training opportunities for academics interested in researching legal education, especially for those wishing to enter the field. In many ways, it would appear that legal education research has taken its place alongside more traditional areas of legal research, and that it has been absorbed into the mainstream activities of the legal academy.

However, the question which lies behind these snippets of empirical data is the extent to which the nature or quality of legal education research

has developed from being ‘obsessively repetitious’, ‘inward-looking’ and ‘cocooned’, as Professor Twining characterized it in *Blackstone’s Tower* (Twining 1994: 27). Can it now be regarded as contributing ‘serious research’ (something that Professor Twining himself doubted in 1982, as we indicated above (Twining 1982: 212)). To be regarded by the academy as ‘serious’, research into legal education must be judged by the same standards as those which are applied to other areas of the discipline, and not be found wanting. Arguably, the best means of comparison is to consider the performance of legal education research in the REF (acknowledging that the REF is by no means perfect, but for present purposes is a reasonable way to compare the quality of research in different legal areas). The most recent iteration of the REF to report was the 2014 exercise. In its post-audit Overview Report, the Law Sub-Panel commented: ‘the sub-panel was pleased to receive submissions relating to legal education, but the methodological rigour and significance exhibited by some of these outputs was uneven’ (Law Sub-Panel 2014: 71, paragraph 6). The key criteria used to judge the quality of research in the REF are originality, significance and rigour (REF 2014a), so this comment is hardly a ringing endorsement, suggesting that, in Professor Twining’s terms, much legal education research is still not regarded as ‘serious’ by the legal academy.

This is an issue which is not unique to writing about higher education within the discipline of law. It is one which is shared by scholars from a range of disciplines who research and write about the processes, institutions and people involved in higher education. The REF Education Sub-Panel signalled in its Overview Report that ‘The sub-panel found growing strength in research on HE (sic)’ but commented that ‘weaker work tended to be focused on provision or student experience in particular universities and to lack analytical rigour’ (REF 2014b). This criticism was clearly directed at the type of case-study approach which is potentially a limitation of the approach taken by Professor Twining in his visit to the law school at Rutland. Rowena Murray, a specialist in the area of academic writing, is blunt in her assessment of the situation: ‘higher education journals have moved beyond descriptive accounts of innovation. “Show and Tell” is no longer enough’ (Murray 2008: 128). However, as we have indicated above, in *Blackstone’s Tower* as a whole, the ‘institutions’ focus taken is far broader than the traditional case studies which critics such as Murray have in their sights.

So, what is it about so much legal education research which suggests it is still not generally accepted by the academy as ‘serious research’? It is undoubtedly the case, drawing on the evidence provided by the

REF sub-panels in law and in education, that *some* research into legal education shares the weaknesses identified in higher education research generally. Essentially, it is descriptive, rather than analytical, does not pay sufficient attention to method (and in particular, fails to justify use of a case-study approach) and tends to repeat existing knowledge (albeit sometimes in a new context) rather than contributing new knowledge. The continuing existence of this type of output has serious consequences for legal education research as a whole; there is a tendency for *all* research into legal education to be characterized in this way. As Macfarlane has commented: 'The only important distinction is between good research and poor research. However, it is hard to undo the now widespread perception that research about "learning and teaching" *of any kind* exists in some kind of separate box marked "second rate"' (MacFarlane 2011: 128; emphasis in original).

Research into legal education needs to throw off this mantle of inferiority if it is to succeed in being taken as seriously as subject-based research. For this to happen, arguably both authors and assessors of research about legal education need to reach higher standards of expertise in the area than is currently the case. It is clear that legal education researchers must situate their work in the academic literature and engage with current intellectual debates in such a way as to contribute new knowledge, as is the case with researchers who focus on substantive legal topics. However, what is often neglected is the need for assessors of legal education research to understand that research into legal education is a sub-discipline which draws on a range of academic literature outside the discipline of law. Anyone assessing legal education research needs to be familiar with this literature, which, as Tight has shown, covers a range of topics, from the student experience (including the 'on-course' experience, success, non-completion, the experience of different student groups and the transition from higher education to work) to what he terms 'system policy', which includes the policy context, national policies, comparative policy studies, historical policy studies and funding relationships (Tight 2003: 7). All in all, Tight identifies eight broad themes which between them capture the main topics of contemporary research into higher education. The methods and methodologies used to explore these themes are very varied, encompassing all those commonly used by social scientists. Assessors of legal education research need to understand these too. Finally, the theoretical frameworks used by legal education researchers can range from those related to method (such as grounded theory or phenomenology) to those more particularly associated with education (the work of Vgotsky or Dewey, for example). It is *not* the case that just

because an academic lawyer has themselves done *some* teaching, they are able to accurately assess the quality of legal education research. There must be at least some familiarity with the relevant literature, method/methodology and theories before an accurate assessment can be made, so that, as Macfarlane argues, good research can be distinguished from poor research (Macfarlane 2011: 128). Without assessment being informed by the relevant expertise, it is impossible to see how an accurate judgement can be made, and the danger is that assessors will fail to recognize high-quality research into legal education, thus perpetuating the myth that all such research is second rate.

[D] CONCLUSION

The publication of *Blackstone's Tower* in 1994 was important in drawing attention to the need to take seriously the English law school and its tribe of scholars and students, to ask fundamental questions about the discipline of law and to make suggestions about its future. In 'Reflecting on Blackstone's Tower' the contributors have risen to the challenge laid down by William Twining all those years ago, which still remains relevant today. Their contributions prompt us to reflect on aspects of the law school which are sometimes similar to, sometimes very different to, those which Professor Twining brought to our attention in 1994. However, their fundamental purpose is one that they share with Professor Twining. It is to prompt a serious consideration of the legal academy from a number of different perspectives, in the hope that this will stimulate debate which will bring about the intellectual development of their discipline, whether this is at the macro level of relations with the legal profession, when considering the curriculum and its relationship to decolonization, or in the exploration of the lived experience of individual students and academics and the collective experiences of cohorts.

What it means to engage in serious consideration of our position as members of a university law school is particularly clearly reflected in Anthony Bradney's article on the concept of the tower. Professor Twining eschewed a detailed analysis of the concept because his focus was primarily on an analysis of the law school rather than the idea of a tower. He explained that he had chosen the metaphor of Blackstone's Tower for a number of reasons, including its ability to be 'argumentative, dialectical, filled with lively debate; but ... not as chaotic as Babel' (Twining 1994: 3). But Bradney has used the concept to demonstrate how 'towers, whether real or figures of speech, may be useful in thinking about what our lives as academics and people should be' (Bradney, in this volume). Bradney's contribution is in many ways a call to action, an invitation to all readers to

reflect on *Blackstone's Tower*, and, having reflected, do what is needed, in the context of the English university law school, to enhance and develop the discipline of law. That is the purpose of this extended reflection on *Blackstone's Tower*, and we hope that all readers will find that this special edition prompts them to engage in that reflection ... and that it will help them to contribute to the development of their discipline.

References

- Advisory Committee on Legal Education and Conduct (1996) *First Report on Legal Education and Training* London: ACLEC.
- Arthurs, H W (1997) 'Half a League Onward: The Report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct' 31(1) *The Law Teacher* 1-12.
- Ball, S J (2015) 'Living the Neo-liberal University' 50(3) *European Journal of Education Research, Development and Policy* 258-261.
- Bar Standards Board (2021) '[Academic Component of Bar Training](#)'.
- Becher, T (1989) *Academic Tribes and Territories: Intellectual Enquiry and the Culture of Disciplines* Milton Keynes and Bristol: PA, SRHE & Open University Press.
- Becher, T and P Trowler (2001) *Academic Tribes and Territories: Intellectual Enquiry and the Culture of Disciplines* 2nd edn London: Routledge.
- Bone, A (2009) 'The Twenty-first Century Law Student' 43(3) *The Law Teacher* 222-245.
- Bradney, A (1998) 'Law as a Parasitic Discipline' 25(7) *Journal of Law and Society* 1-84.
- Bradney, A (2003) *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* Oxford and Portland OR: Hart Publishing.
- Bradney, A and F Cownie (2020) 'The Changing Position of Legal Academics in the United Kingdom: Professionalization or Proletarianization?' 47(2) *Journal of Law and Society* 247-243.
- Browne, J (2010) [Securing a Sustainable Future for Higher Education: An Independent Review of Higher Education Funding and Student Finance](#).

- Collier, R (2013) 'Privatizing the University and the New Political Economy of Socio-Legal Studies: Remaking the (Legal) Academic Subject' 40(3) *Journal of Law and Society* 450-467.
- Cownie, F (2012) 'Law, Research and the Academy' in P Trowler, M Saunders and V Bamber (eds) *Tribes and Territories in the 21st Century* Abingdon and New York: Routledge chapter 5, 57-67.
- Cownie, F (2020) 'The Reception of Legal Education Research in the (Legal) Academy' in B Golder, M Nehme, A Steel & P Vines (eds) *Imperatives for Legal Education Research: Then, Now and Tomorrow* Abingdon and New York: Routledge.
- Cownie, F & A Bradney (2005) 'Gothic Horror? A Response to Margaret Thornton' 14(2) *Social and Legal Studies* 277-285.
- Cownie, F & A Bradney (2017) 'An Examined Life: Research into University Legal Education in the United Kingdom and the Journal of Law and Society' 44 (SI) Special Supplement: Main Currents in Contemporary Sociology of Law *Journal of Law and Society* S129-S143.
- Gilbert, A (2020) '[Preparing for the Exam? – Law School Websites and the SQE](#)'.
- Giroux, H A (2010) 'Bare Pedagogy and the Scourge of Neoliberalism: Rethinking Higher Education as a Democratic Public Sphere' 74(3) *The Educational Forum* 184-196.
- Gower, L C B (1950) 'English Legal Training: A Critical Survey' 13 *Modern Law Review* 137-205.
- Gunn, A (2018) 'The UK Teaching Excellence Framework (TEF): The Development of a New Transparency Tool' in A Curay, L Deca & R Procopie (eds) *The European Higher Education Area: The Impact of Past and Future Policies* Cham: Springer chapter 31, 505-526.
- [Hamlyn Archives](#).
- [Hamlyn Trust](#).
- Harris, Phil & Sarah Beinart (2005) 'A Survey of Law Schools in the United Kingdom, 2004' 39(3) *The Law Teacher* 299-366.
- Harris, Phil & Martin Jones (1997) 'A Survey of Law Schools in the United Kingdom, 1996' 31(1) *The Law Teacher* 38-126.
- Higher Education Statistics Agency (1994/1995) '[Higher Education Statistics for the UK 1994/5](#)'.

- Higher Education Statistics Agency (2018/2019) '[Higher Education Student Statistics: UK, 2018/19 – Subjects Studied](#)'.
- Hunter, C (ed) (2012) *Integrating Socio-Legal Studies into the Curriculum* Basingstoke and New York: Palgrave Macmillan.
- Law Sub-Panel (2014) '[Research Excellence Framework 2014: Overview Report by Main Panel C and Sub-Panels 16 to 26](#)' [2015].
- Law Teacher, The.*
- Legal Education and Training Review (2013) *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* London: Solicitors Regulation Authority/Bar Standards Board/Ilex Professional Standards.
- MacFarlane, B (2011) 'Prizes, Pedagogic Research and Teaching Professors: Lowering the Status of Teaching and Learning through Bifurcation' (2011) 16 *Teaching in Higher Education* 127.
- Maisuria, A & M Cole (2017) 'The Neoliberalization of Higher Education in England: An Alternative is Possible' 15(5) *Policy Futures in Education* 602–619.
- Morrison, D (2018) 'The SQE and Creativity: A Race to the Bottom?' 52(4) *The Law Teacher* 467-477.
- Murray, R (2008) 'Writing for Publication about Teaching and Learning in Higher Education' in R Murray (ed) *The Scholarship of Teaching and Learning in Higher Education* Maidenhead: Open University Press, chapter 13, 128-138.
- National Committee of Inquiry into Higher Education (1997) *Higher Education in the Learning Society* (Dearing Report).
- Quality Assurance Agency (2019) [Subject Benchmark Statement Law](#) 4th edn London: QAA.
- REF 2014 (2014a) [Assessment Framework and Guidance on Submissions](#).
- REF 2014 (2014b) [Education Overview Report](#).
- Sanders, A (2015) 'Poor Thinking, Poor Outcome? The Future of the Law Degree after the Legal Education and Training Review and the Case for Socio-legalism' in H Sommerlad, S Harris-Short, S Vaughan & R Young (eds) *The Futures of Legal Education and the Legal Profession* Oxford and Portland OR: Hart Publishing 139-168.

- Schlegel, J H (1996) 'Talkin' Dirty: Twining's Tower and Kalman's Strange Career' 21(4) *Law and Social Inquiry* 981-1000.
- Seale, J, S Gibson, J Haynes & A Potter (2015) 'Power and Resistance: Reflections on the Rhetoric and Reality of Using Participatory Methods to Promote Student Voice and Engagement in Higher Education' 39(4) *Journal of Higher and Further Education* 534-552.
- Society of Legal Scholars (2021) '[Welcome to the Society of Legal Scholars](#)'.
- Solicitors Regulation Authority (2021a) '[Joint Statement on the Academic Stage of Training](#)'.
- Solicitors Regulation Authority (2021b) 'Legal Practice Course (LPC) Providers'.
- Solicitors Regulation Authority (2021c) '[Qualifying Law Degree Providers](#)'.
- Stolker, C (2014) *Rethinking the Law School: Education, Research, Outreach and Governance* Cambridge: Cambridge University Press.
- Sugarman, David (1986) 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in W Twining (ed) *Legal Theory and Common Law* Oxford: Basil Blackwell chapter 3.
- Thornton, M (2011) *Privatising the Public University: The Case of Law* Abingdon and New York: Routledge.
- Tight, M (2003) *Researching Higher Education* Maidenhead: SRHE & Open University Press.
- Trow, M (2010) *Twentieth-Century Higher Education. Elite to Mass to Universal* Baltimore MA: John Hopkins University Press.
- Twining, William (1982) 'The Benson Report and Legal Education: A Personal View' in P Thomas (ed) *Law in the Balance: Legal Services in the 1980s* Oxford: M Robertson.
- Twining, William (1994) *Blackstone's Tower: The English Law School* London: Stevens & Sons/Sweet & Maxwell.
- Twining, William (1995) 'What Are Law Schools for?' 46(3-4) *Northern Ireland Legal Quarterly* 291-303.
- Twining, William (1996) 'Rethinking Law Schools' 21(4) *Law and Social Inquiry* 1007-1016.
- Twining, William (1998) 'Thinking about Law Schools: Rutland Reviewed' 25(1) *Journal of Law and Society* 1-13.

-
- Twining, William (2009) 'SLS Centenary Lecture: Punching our Weight? Legal Scholarship and Public Understanding' 29 *Legal Studies* 519-533.
- Twining, William (2011) 'Professionalism in Legal Education' 18(1-2) *International Journal of the Legal Profession* 165-172.
- Twining, William (2014) 'LETR: The Role of Academics in Legal Education and Training: 10 Theses' 48(1) *The Law Teacher* 94-103.
- Twining, William (2018) 'Rethinking Legal Education' 52(3) *The Law Teacher* 241-260
- Twining, William (2019) *Jurist in Context. A Memoir* Cambridge: Cambridge University Press.
- Twining, William (2020) 'Private Correspondence with the Authors' (published with permission from Professor Twining)
- Vaughan, Steven (2019) 'How Law Schools are Letting Down Law Students' Presentation, CILEx Legal Education Round Table Event.
- Watermeyer, R, T Crick, C Knight & J Goodall (2020) '[COVID-19 and Digital Disruption in UK Universities: Afflictions and Affordances of Emergency Online Migration](#)' *Higher Education* [online].

TWINING'S TOWER AND THE CHALLENGES OF MAKING LAW A HUMANISTIC DISCIPLINE

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Abstract

This article provides a survey of the life and scholarship of William Twining, focusing largely on his contribution to the broadening of legal education and scholarship. Part I reviews his background, personality and education, then explores the significance of Africa and his anti-colonialism, the inspiration of American legal realism, his teaching in Africa, Belfast, Warwick and UCL, his law reform efforts and his scholarly output. Part II examines his intellectual hallmarks and his struggle to recast law as a humanistic discipline. Part III considers the current efficacy of the notion of law as a humanistic discipline with law schools as purveyors of humanistic education.

Keywords: William Twining; legal education; legal biography; intellectual history; colonialism; postcolonialism.

INTRODUCTION

The trailblazing contribution of William Twining to the broadening of legal education and scholarship has been pivotal, and barely needs any introduction. He has served as an exceptional mentor, role model and friend to many from Australia to Zimbabwe, been an international leader in fields as diverse as jurisprudence (Twining 1973; 2009a), evidence (Twining 1985; Twining & Hampsher-Monk 2003; Anderson & Ors 2005; Twining 2006), globalization (Twining 2000; 2011) and legal education (Twining 1967; 1994b; 1997; 2002; 2018; 2019), and an activist reformer and polemicist (Twining 2019). Paradoxically, his

¹ This article is for Phil Thomas on his 81st birthday. I would like to thank William Twining for his helpful comments and Léonie Sugarman, who made valuable points about the way in which this article was expressed. All interpretations are mine, unless otherwise indicated.

engagement with law and legal education is so eclectic, multilayered but seemingly specialized—and in important respects, technical, intellectually demanding and occasionally labyrinthine—that it is difficult to gauge in the round, especially as his work has evolved and some of his views changed over time. Seen in this light, William's record as an intellectual and activist constitutes 'Twining's Tower', analogous to 'Blackstone's Tower' the metaphor he used to describe English law schools (Twining 1994b).

William has inspired many law students, practitioners and academics, myself included, by doggedly and perceptively giving voice to our baffling disillusionment with our own legal education, to why so much English legal education and scholarship has been overly narrow, unadventurous and boring, to why law is important and fascinating, and how it might achieve its potential as a humanistic discipline. William's influential inaugural lecture of 1967, 'Pericles and the Plumber', animated by these concerns (Twining 1967), challenged the prevailing assumption in the UK that law was a hermetically sealed discipline, separate from society and the operation of law in practice. He further argued that the comparison between US and UK legal education was invidious, advocating that some American developments should be taken seriously in the UK (cf. Twining 2019: 219). It was in this context that William sought to rehabilitate Karl Llewellyn and the American legal realist movement, specifically their efforts, some successful, to treat law in its social context, to study 'law in action' and to integrate law within the social sciences. This contradicted the one-dimensional or inaccurate treatments of American legal realism that characterized Anglo-American scholarship at the time—something he would develop in more detail subsequently. He championed the idea of law as a potentially excellent vehicle for liberal education, and how a liberal education is crucial for intending practitioners. He encouraged us to 'look outward' and incorporate non-legal methodologies and insights into our work.

PART I

A biographical approach will help us to understand William's longstanding effort to challenge the legal orthodoxy and recast law as a humanistic discipline.

William was born in Kampala in 1934 into a middle-class family. He spent his first ten years initially in Uganda and then in wartime Mauritius. For the subsequent ten years, while his parents remained abroad, he was educated in English boarding schools and at Oxford University

(Twining 2019: 7-30). His mother had forced her way into medical school just after the First World War (Twining 1994a). His father, a distantly related member of the Twining tea family, was first an army officer and subsequently a colonial civil servant who was knighted in 1949. His highly successful career culminated in being appointed governor of Tanganyika and becoming one of the first life peers. William stressed that his family life differed significantly from what might be assumed from his father's career within the British establishment: 'I come from a family [who] ... on the whole ... were ... not inclined to accept authority' (Twining 1994a).

William saw his own anti-authority and anti-regimentation tendencies as instinctive rather than political. They were mediated, I would suggest, by what I discern to be his early education in diplomatic survival skills: 'I wasn't rebellious at school ... I saw it as a jungle of rather hostile forces in which I had to survive and develop techniques of survival ...' (Twining 1994a).

It was these diplomatic skills, allied to his belief in dialogue, open-mindedness, inclusivity and pluralism, that would subsequently enable him to mobilize and work with people of many different backgrounds and beliefs without being labelled as overtly left-wing, communist or radical.

In terms of background, personality and education, there is a strong sense of William's developing autonomy, aided and abetted by a love of reading and a fascination with things intellectual. His relative autonomy was allied to the fact that, feeling both an insider and an outsider, he experienced a degree of estrangement from his own society and from Anglo-American parochialism: 'I really felt like an expatriot for [much of my life] so I never looked at the context of my professional life through the eyes of someone who is solely a local' (Twining 1994a). He continues to regard East Africa 'as an important reference point' (Twining 1994a).

In discussing his father, I sensed that William felt he had a lot to live up to. After some sharp differences as to William's future career this was eventually resolved:

Why did I become an academic? It was to get out of the shadow of my father ... He wanted me to be an administrator ... He was rather upset that I got a First which, as it were, opened the door to following an academic career. In fact, he once said that it was the worst thing that ever happened [to me] ... And the answer was that I would have [followed an academic career], but I wouldn't have thought that I could have had one. But ... [the First] opened the possibility and I grabbed it (Twining 1994a).

Despite his lengthy separation from his parents, their careers and lifestyle nonetheless modelled the importance of public service, and the

recognition that professional status carried with it the obligation of civic service and *noblesse oblige*.

William arrived in Oxford in 1952 to read law with a modest academic record, no special interest in the subject and no thought of an academic career. He did not enjoy the first two years of his legal studies, in no small part because of the dominance of doctrine-only textbooks:

I was not in the least engaged or interested [in law] until I went to Herbert Hart's lectures and [read] his inaugural ... It was ... the first time that I'd come across something in law that was exciting as ideas ... Basically, I wanted to return to Africa and do something ... about education (Twining 1994a).

The pull of Africa was underpinned by an anti-colonialism that had gripped him since adolescence. As he would subsequently observe: 'I had a colonial childhood, an anti-colonial adolescence, a neo-colonial start to my career and a post-colonial middle age' (Twining 2019: 8; cf. Twining & Sugarman 2020: 199-200).

By 1956 he decided to learn more about jurisprudence and see something of the United States before pursuing an academic career teaching law in Africa. Following a suggestion from Harry Lawson (Oxford's Professor of Comparative Law and William's mentor) that he work with an American jurist, William secured funding from the University of Chicago to work with Karl Llewellyn. William's year at Chicago (1962-1963) proved pivotal. He learned much from Llewellyn's down-to-earth approach, his concern to relate theory and practice, and his emphasis on skills and what lawyers do as serious subjects of study. Llewellyn's anthropological *The Cheyenne Way* (Llewellyn & Hoebel 1941) deepened William's interest in 'law jobs' and social and legal rules, while fostering his engagement with legal pluralism. Above all, perhaps, William was inspired by Llewellyn's insistence on developing one's own ideas and beliefs towards something approaching a personal 'whole view' reflecting Llewellyn's main realist precept: 'see it fresh, see it whole, see it as it works' (Twining 2019: 36-37).

Llewellyn and his wife, Sonia Mentschikoff, were 'the two most important people in my professional life' (Twining 2019: 38). Nonetheless, whilst he became a disciple of Llewellyn, and Llewellyn influenced his subsequent teaching, William never jettisoned his admiration for, and commitment to, Hart and the skills associated with analytical jurisprudence and analytical thinking more generally.

During the late 1950s and 1960s, a cadre of fledgling British law teachers, inspired by legal realism and their experience of American or other legal education, elected to teach law in Africa, frequently along

with American expatriates supported by the Ford Foundation. William was one of these. The experience of teaching, researching, writing and institution building, alongside grappling with an alien legal system and culture, demonstrated that law could only be understood in the light of history, culture, politics and economic conditions. This 'US–African moment' also fostered an interest in legal education and its politics. On returning to Britain, these expatriates adapted for British audiences the intellectual and pedagogical innovations fashioned for African audiences. The broadening of legal education and scholarship in England from *circa* 1965 onwards, and the establishment of a generation of radical law schools in the 1970s and beyond, owes much to the North American and African experience of several of its leading lights (Sugarman 2011; Harrington & Manji 2017; Twining 2019: 39-77; Sugarman 2021).

In 1958 William applied to the law faculty of the University of Khartoum. He was appointed to a lectureship, and his three years in Sudan served as an important preliminary stage in his apprenticeship as an academic lawyer. It challenged what he had learnt and the way he had been taught at Oxford, heightened his sensitivity to the importance of context, reinforced his fascination with archives, and provided vital space to experiment and innovate substantively and pedagogically under the mentorship of Patrick Atiyah (Twining 2019: 39-56).

William moved to Tanzania in 1961, where he helped to establish a law school at the new University College in Dar es Salaam (UCD). As Acting Dean for 18 months, William relished the opportunity to shape the direction of the law school, to experiment with law teaching, to research and teach local (customary) law and resolve controversies, not least whether the professors should wear their Oxford MA gowns (Twining 2019: 57-77). Although he found it immensely exciting, managing his colleagues was both enjoyable and challenging:

Inevitably, over time there were tensions between elitism and egalitarianism ... and between safeguarding security and national sovereignty and liberal ideas of the rule of law. ... Later ... UCD became a centre of Marxist critiques of [President] Nyerere's pragmatic socialism ... Indeed in one period from 1975 the faculty was sharply divided between Marxists and others and there was a rapid turnover of staff (Twining 2019: 59).

William left Dar in 1965 to spend six months at Yale Law School, mainly working on his book on Llewellyn. And it was there that Robert Stevens and William dreamt up a new series of books called 'Law in Context' that would challenge the 'expository orthodoxy' of the 'doctrinal tradition' of legal writing in England and Wales. They persuaded Weidenfeld & Nicolson

to take the series, thereby breaking the near monopoly of law publishing then held by Butterworths and Sweet & Maxwell (Twining & Sugarman 2020: 211-215). In important respects the Law in Context series is a product of the 'US–Africa moment'. In half a century, over a hundred books have been published in the series, starting with Patrick Atiyah's pathbreaking, *Accidents, Compensation, and the Law* (Atiyah 1970).

In January 1966, William took up the position of Chair of Jurisprudence and Head of the Department of Law and Jurisprudence at Queen's University, Belfast, at the exceptionally young age of 31. As luck would have it, Queen's had a four-year undergraduate honours law degree and a strong commitment to legal theory. William found himself responsible for three compulsory theory courses—an almost unprecedented opportunity for a Professor of Jurisprudence. These courses became the main vehicles for developing his knowledge, thinking and teaching about jurisprudence (Twining 2019: 93-103). The first-year course on juristic technique provided an arena for developing ideas about rules, interpretation and reasoning that became over time *How to Do Things with Rules* (with David Miers), the first of William's several important contributions to the 'skills revolution' in legal education (Twining & Miers 1976). Queen's also offered him the space both to consider 'What might a legal theorist contribute to the project of broadening the study of law from within?' (Twining & Sugarman 2020: 201)

Towards the end of his time in Belfast during 'the Troubles', he became involved in public debates about emergency powers and torture, something which linked closely with his growing interest in Jeremy Bentham's utilitarianism and normative jurisprudence, that is, questions about values such as law and morality, justice, rights and legitimacy. It proved an important part of his intellectual journey (Twining 2019: 96-98).

The Queen's four-year undergraduate degree persuaded William that the Achilles' heel of primary legal education in England and Wales was, and remains, the three-year degree for 18-year-olds, and that most of the unsatisfactory polemics about legal education have been due to trying to squeeze too much into a three-year course. He concluded that: 'There is little hope for undergraduate legal education in UK until four-year degrees become the norm' (Twining & Sugarman 2020: 103).

It was during this period that William was involved in several efforts to reform law, legal education and training, including his membership of the Armitage Committee on Legal Education in Northern Ireland (1973) and submissions to the Law Commission and the Ormrod Committee

(1971), the Society of Public Teachers of Law (SPTL)² and the Statute Law Society.

After six years in Belfast (1966-1972), and together with several colleagues from Dar es Salaam, William was presented with the opportunity, to help shape a second new law school, this time in the UK.

William and Geoffrey Wilson had recognized each other as allies since their first meeting in 1966. They viewed English legal education as narrow, insular and rule-bound. When Wilson was appointed the founding Chair at Warwick Law School in 1968, he set about the project of ‘broadening law from within’, constructing a curriculum that was both radical for the times and exciting (Twining 2019: 147-156). William joined him at Warwick in 1972 and immediately became Acting Chair and then Chair of the Law School—roles he did not enjoy.

Much of my energy as chairman was devoted to keeping the law school running, though not always smoothly ... [The] teaching went well, research less so. Some of my younger colleagues were more interested in micro-politics than serious research: there was even a suggestion that research and publication were ‘careerist’, an idea quite contrary to ... my own ethos ... Some saw committee work as a source of power (Twining 2019: 151-152).

Having spent a decade at Warwick (1972–1982), William was appointed Quain Professor of Jurisprudence at the University of London, based at University College London (UCL), from 1983 until 1996 (Twining 2019: 190-205). After a period as Research Professor, he became Emeritus in 2004. From the outset, he sought to reconstitute the undergraduate and postgraduate programmes at UCL and the London LLM in a more innovative, challenging, interdisciplinary fashion, but with mixed results. He successfully revamped the undergraduate course on jurisprudence at UCL in a way that was progressive; but his efforts to overcome intercollegiate rivalry on the LLM ultimately failed. He chaired the Bentham Committee (1982–2000) and his main writings on Bentham date from this time. From 1983 he chaired for almost a decade the Commonwealth Legal Education Association. During the same period, he also published extensively on legal education, notably his 1994 Hamlyn Lectures, *Blackstone’s Tower* (Twining 1994b). This period also saw the publication of his principal work rethinking evidence (Twining 2006)—combining ‘skills’ and ‘context’ to transcend traditional rule-based approaches—with the commencement of his ‘Globalization and Law’ project (Twining 2000). He continued to

² William played a signal role in the transformation of the SPTL from something of a gentleman’s Conservative club towards a scholarly society that aims to promote equality, diversity and inclusion across legal academia (Cownie & Cocks 2009: 104-109, 124-129, 138, 156-160, 161).

travel widely and regularly to facilitate his research, as a consultant and advisor, in his capacity as a legal education activist and to teach, notably, his regular stints of teaching Evidence with Terry Anderson at the University of Miami Law School (Twining 2019: 214-216).

Finally, at UCL, in 1984 William initiated an optional postgraduate programme for present and intending law teachers, the Law Teachers Programme, that proved much more successful than initially anticipated (Twining 2019: 225). Avrom Sherr attended some of William's lectures, which he recollects thus:

An avuncular senior professor appeared at the lectern, as if by magic, at the appointed hour, wearing the expected pullover, which might have escaped from 'Xmas festivities. A motley collection of UCL Masters students assembled in readiness to learn the secrets of teaching law, of teaching anything, and getting a Certificate for Attendance ...

The Professor treated them as equals. There would be no exam, though there would be some take-away exercises. It would be a mixed programme of learning about legal education and learning how to do legal education ... There would be some readings. There were few such courses at that time [and it proved] innovatory. Twining invited students to think about their own legal education up till then and consider what was good and what was not; who they liked as teachers and why; what they thought they might do as teachers. And then it gave them an opportunity to write about their thoughts, learn about the literature on legal education, and practice a few possible approaches which were different from either the lecture or the seminar. The atmosphere was somewhere between an Oxford tutorial, a Warwick Socratic lecture and afternoon tea with the friendly vicar. William was well loved and admired by those students attending; and by and large, all had fun (Sherr 2021).

Following his retirement in 1999, William's scholarly output has increased exponentially. He has continued to make important contributions to evidence as a multidisciplinary field, legal education, globalization, law in general and the de-parochialization of our juristic canon (Twining 2012). His 'unfinished agenda' includes a project on 'Linguistic Diversity and Social Justice'; broadening the concept of 'legal reasoning' (or judicial reasoning on questions of law); follow-up activities on his 'Human Rights: Southern Voices' project; and his ongoing involvement in the preservation and management of 'Legal Records at Risk' (Twining 2019: 259-273).

PART II

The picture that emerges from the interviews with William, together with his scholarship, is of an intellectual whose reading and sources of inspiration are exceptionally eclectic. His writing, like its author, is

generous, humane and rational. His analysis tends to be sharp and analytical, demanding and challenging. He draws on a range of disciplines including intellectual history, educational research, social anthropology, psychology, and contemporary ideas about globalization. His ‘gurus’ include Italo Calvino, R G Collingwood, Herbert Hart, Karl Llewellyn and Jeremy Bentham (Twining & Sugarman 2020: 203-204).

William’s considerable involvement in legal education reform has spanned much of his life. In addition to his initiatives in Khartoum, Dar es Salaam, Belfast, Warwick and UCL, he has served as a member of several advisory bodies that honed his ideas and extended his experience of the politics of legal education reform, while also shaping contemporary debates about legal education. Of particular importance is his participation in the International Legal Center (ILC) Report, *Legal Education in a Changing World* (ILC 1975). In 1972 the New York-based ILC asked an international group of legal scholars, distinguished in part for their contributions to legal education in one or more countries in Asia, Africa or Latin America, to examine the progress and problems of legal education in those regions of the world. The Committee reviewed a considerable body of material and delegated the preparation of this report to a five-person task force that included William. This opportunity allowed William, in the company of an impressive international team, to stand back, draw on his experience of legal education on three continents and conjure ‘blue sky thinking’ at a time when law and legal education reform was in the air in the UK and elsewhere. From its outset the Report warned that it:

may disturb some because its portrayal of the present situation – the existing characteristics of legal education in many countries – is cast in critical terms, and because it seems to call for a rather drastic re-thinking of objectives and methods ... [and] may require a ‘new breed’ of law teachers who will bring new perspectives and skills to the discipline. In spelling out ‘the case for legal education’ the report argues the importance of conceiving and developing law as a sophisticated discipline with strong links to others, and as a vehicle for examining many problems of social change as well as new ideals of justice. The report stresses the importance of multi-disciplinary research to facilitate better understanding of legal cultures, law and the actual workings of the legal system, and it faults legal education for the limited scope of most legal research undertaken by law teachers today (ILC 1975: 9).

Membership of the ILC, says William, ‘was a game-changer ... During the next twenty years I used it as the starting point and framework for analysing legal education policy and for several specific projects’ (Twining 2019: 219).

Building on the ILC Report, *Blackstone's Tower* advocated a model of law schools 'as multi-purpose centres of learning ... as the legal system's, as opposed to the legal profession's, House of Intellect'—what William called 'the I.L.C.'s model' (Twining 2019: 54; see further, Twining 1994b: 52, 58-60, 85, 195-98; cf. Bradney 2003: 76-78)—that is distinctive for its diversification of the constituencies that legal education might serve. In preparing and delivering *Blackstone's Tower*, William knew that the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC) review of legal education and training, on which he served as a consultative panel member, was under way and it was partly written with the review in his sights. Ambitious in aim although modest in tone, *Blackstone's Tower* was incisive in its dissection of what is wrong with legal education and what needs to be put right. It proved something of a milestone. Love or loathe it (Goodrich 1996), it immediately became the go-to account of the modern English law school—its history, ambiguous role, peculiar culture and, crucially, the model it could and should imbibe.

ACLEC's first report reflected important elements of *Blackstone's Tower* as the foundation for a fundamental reform of legal education and training at both the academic and professional stages.³ Yet, like its predecessors and successors, the report enjoyed a distinctly qualified success, more welcomed in academia (although not without qualification) than by the legal profession.⁴

William's involvement in the Legal Education and Training Review (LETR) was less high profile (LETR 2013)—although his scholarship proved influential, and it is rumoured that he was invited in the final stage of the Review to comment on the recommendations.

Although he regards the report as in some important respects an improvement on its predecessors in England and Wales, he has expressed dissatisfaction not only about the report and the periodic review process in legal education but also the general discourse in the field as a whole. Since about 2016 he has begun to develop ideas about how the whole field of 'learning about law' might be reframed to provide a basis for thinking,

³ William's scholarship was expressly used to underpin the views of the Committee: see ACLEC (1996) at paragraph 2.5 and note 21; paragraph 2.6 and note 22; paragraph 2.8 and note 25; paragraph 3.26 and note 48; paragraph 4.3 and note 51; and paragraph 6.7 and note 90. In his account of the ACLEC review, Sir Bob Hepple, a leading member of the Committee, singled out *Blackstone's Tower* for particular mention, saying that the Committee had benefited from it: Hepple 1996: 470 note 2.

⁴ However, they frequently influence future events and contribute to the ways in which academics see their position *vis-à-vis* the legal profession and *vice versa*.

research and policy making in the coming years, building on the ILC Report (Twining 2014; 2019: 270).

Whilst he stands by most of his detailed arguments on legal education, William has begun to address what he regards as a major flaw in his own thinking since ‘Pericles and the Plumber’. In essence, he advocates a broader conception of ‘legal education’ and of the role of university law schools within it than what he terms ‘the primary school model’ of legal education:

Learning about law is lifelong, from cradle to grave, and nearly all of that learning is informal in the sense that it takes place outside institutionalized ‘formal’ instruction. On the other hand, nearly all research, public discourse, debate, and policy making about Legal Education has focused on law schools, law teaching, law teachers, and law students. To an extraordinary extent, as academic lawyers, we have focused obsessively, sometimes narcissistically, on primary legal education and initial professional admission to private practice – one quite small part of a total picture of formal learning about law, let alone learning about law through all of the seven ages of man (and belatedly woman) in society as a whole ... I am not saying that formal primary legal education or law schools are unimportant although that might be true in the greater scheme of things ... [But] I now want to look at the whole field from a different perspective and set particular topics in a much broader context (Twining & Sugarman 2020: 214, see, further 213-215; Twining 2019: 270-173—this builds on William’s earlier work championing ‘law for non-lawyers’ and ‘public understanding of law’: Twining 2005a; 2009b).

PART III

Jurist in Context (JIC) (Twining 2019), William’s rich and detailed intellectual memoir, his recent book on *General Jurisprudence* (Twining 2009a) and his interview of 2019 (Twining & Sugarman 2020) together provide the best entry point to his life and thought, illuminating the continuities and changes in his views since *Blackstone’s Tower*. As I read it, JIC argues that ‘much legal scholarship is normative and opinionated ... partly because it is weak contextually, empirically and theoretically’ (Twining 2019: 105), and that theorization, centrally important to the health of the discipline of law and socio-legal studies, needs refinement on matters such as legal reasoning. William’s theoretical originality and importance is illustrated by his application of some of the best facets of analytical jurisprudence, Llewelyn-inspired legal realism, legal pluralism and perspectives that eschew insularity and Eurocentric universalism. In effect, JIC makes the case for the added value that this mix brings to socio-legal research and the discipline of law and their ability to respond

to the new challenges posed by globalization and the like. This is directly related to William's long-standing crusade to widen and deepen Oxford-style analytical jurisprudence, and to build a bridgehead between it and socio-legal studies, bringing benefit to both sides. Its central theme is that all academic lawyers should be concerned with, and take responsibility for, the health of our discipline. JIC introduces new audiences to William's ideas and aims to enlist them to the cause of turning the field of law into a humanistic discipline.⁵

JIC continues William's efforts to decentre legal doctrine as a core to the discipline of law and look seriously at the system as a whole. He restates his view that rules are as central to the study of law as they are in disciplines which describe and interpret human behaviour, such as anthropology, sociology, psychology, or linguistics. However, his idea of rules is much wider than 'legal doctrine'. JIC demonstrates the value of the analytical tradition and analytical approaches in the study and teaching of law in society. Rather than an adjunct of legal positivism and doctrine-centred teaching and scholarship, JIC demonstrates how the analytical tradition can play a vital role in transcending the idea that legal doctrine delimits or differentiates the discipline of law.

So, where, almost two decades since the publication of *Blackstone's Tower*, now stands the notion of law as a humanistic discipline with law schools as purveyors of humanistic education?

Academic law in the UK is livelier and more diverse than ever (Cownie 2004). Law and socio-legal review articles and textbooks have come a long way since the 1960s, mostly for the good. Although socio-legal studies has yet to become an accepted and established feature of all university law schools, it nonetheless is flourishing as never before, exhibiting an intellectual self-confidence and ambition which at its best addresses big questions of identity and power, for example, on a much greater scale than hitherto (Wheeler 2020). Law teachers are not so different from other academics in the humanities and social sciences. Postgraduate studies have grown overall, and the interdisciplinary turn has constituted a 'dangerous supplement' to the doctrinal mainstream, whilst fostering closer ties between law schools and the rest of the university.

And yet, much of William's vision remains unfulfilled. As I have argued elsewhere (Sugarman 2020), law schools and legal scholarship are still overwhelmingly preoccupied with doctrine, case law and the judge-

⁵ For a succinct overview of, and a critical engagement with, JIC, see Sugarman 2020; Twining & Sugarman, 2020.

centred model of the legal process, albeit, in an attenuated form. The core subjects remain greatly over-represented in the curriculum (Bartie 2010). The tendency toward organizational, cultural, demographic and financial homogeneity within the discipline of law persists, as does its dependence on student numbers and tuition income.⁶ Despite important changes since the 1990s, much remains the same. Law schools, like the universities and the societies within which they operate, continue to be hierarchical and ethnocentric. Importantly, the conditions that sustain current models of university legal education have remained constant: notably, student demand and finance; the cost of education; and the need for legal education to be sufficiently harmonious with the interests of the legal profession, of their principal clients, universities and government. Innovation in legal education operates within these confines (Gordon 2002); and most are beyond the control of legal academics (Arthurs 2019: 136-138).

The restructuring of universities and academic identities by corporatization and commodification has been subject to a welter of different interpretations (Collier 2005). Socio-legal studies may have benefited more than most other disciplines from the new political economy governing academic life (Wheeler 2020), but this is not writ in stone and could easily change in the future.

The alienating tendencies within contemporary higher education have been replicated in the legal services industry. Disconcerting trends include the McDonaldization, commodification, corporatization, excessive specialization and bureaucratic routinization of legal services; and the privatization of legal education (Sommerlad & Ors 2015b; Sommerlad & Ors 2020; Dunne 2021). Arguably, these trends render *de facto* redundant much of the common platform of legal knowledge underpinning academic and profession legal education. Whilst they may represent both an opportunity and a threat to the law as humanistic model, their consequences for this model have, with notable exceptions (such as Tamanaha 2012 and Sommerlad & Ors 2015a) yet to receive serious attention. Although fewer law students than ever are entering the legal profession, the character and culture of legal practice is important. As Robert Gordon observes:

In the precincts of ordinary law practice, tolerance for anything but the most bread-and-butter instrumental approaches to practice is at what may be a historic low. Especially in corporate practice, the

⁶ On the tendency towards isomorphism and its detrimental impact on US legal education, see Coquillette & Kimball 2015; Kimball & Coquillette 2020.

stresses of competition and around-the-clock client demands, and the extreme pressures to produce profits and billable hours, have created a very hostile climate for self-critical reformist lawyers committed to reflection on the broader contexts and objectives of practice and the long term. The problem of how to remake professional environments such as law firms into more hospitable environments for constructive 'lawyer-statesmen' should be high on the profession's agenda, including the legal academy's. There will not be much point to the law schools turning out broad-based and reflective humane professionals if all their humane instincts are going to be squashed once they get into practice (Gordon 2006: 166).

There remain several branches and niches of professional practice where 'broad-based and reflective humane professionals' may seek fulfilment. But the cut-backs in legal aid and state funding of the justice system, the curtailment of access to justice, proposed restrictions on judicial review, and the 'culture wars' demonizing personal injury, human rights and allied lawyering have diminished the opportunities for and challenged the legitimacy of humane professionalism in legal practice.

Meanwhile, the perennial clash between what students want and expect and what their teachers want to give them has probably intensified as the financial cost of higher education, the level of student debt, and job insecurity have all mushroomed.

Are law schools principally for producing lawyers; knowledge for its own sake (Bradney 2003); useful knowledge; 'the advancement and dissemination of understanding and knowledge about law in all its aspects' (Twining 2005b: 670-671)? Or, is the ultimate goal 'to cultivate humane, independently-minded individuals, alert to the impact of law and the legal system on society and involved in reforming them so that they operate more effectively and justly' (Gordon 2006: 158); or, some or none of the above? What might be feasible, as distinct from desirable? William's conception of law as a humanistic discipline and of multifunctional law schools turns on the achievement of sufficient independence from the legal profession and practice-bound LLB students, something law schools have yet to actualize.

Given this challenging and paradoxical juncture, a reconsideration and re-evaluation of *Blackstone's Tower* is timely. How does it speak to us today; which of its strengths remain inspirational and relevant; what were its blind spots; and how could we do better? If this special issue prompts further debate about these questions it will have achieved a great deal.

References

- Advisory Committee on Legal Education and Conduct (1996) *The Lord Chancellor's Advisory Committee on Legal Education and Conduct: First Report* London: ACLEC.
- Anderson T, D Schum & W Twining (2005) *Analysis of Evidence* 2nd edn Cambridge: Cambridge University Press.
- Armitage Committee on Legal Education in Northern Ireland (1973) *Report of the Committee on Legal Education in Northern Ireland* (Armitage Report) Cmnd 579 London: HMSO.
- Arthurs, H W (2019) *Connecting the Dots: The Life of an Academic Lawyer* Montreal-Kingston: McGill-Queen's University Press.
- Arthurs Report (1983) *Law and Learning: Report by the Consultative Group on Research and Education in Law* (chair: Harry Arthurs) Ottawa: Social Sciences and Humanities Research Council.
- Atiyah, P (1970) *Accidents, Compensation, and the Law* London: Weidenfeld & Nicholson.
- Bartie, S (2010) 'The Lingering Core of Legal Scholarship' 30 *Legal Studies* 345–369.
- Bradney, A (2003) *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* Oxford: Hart.
- Collier, R (2005) 'We're All Socio-legal Now?' 26(4) *Sydney Law Review* 503-536.
- Coquillette, D R & B A Kimball (2015) *On the Battlefield of Merit: Harvard Law School, the First Century* Cambridge, MA: Harvard University Press.
- Cownie, F (2004) *Legal Academics* Oxford: Hart.
- Cownie, F & R Cocks (2009) 'A Great and Noble Occupation!' *The History of the Society of Legal Scholars* Oxford: Hart.
- Dunne, N (2021) 'Liberalisation and the Legal Profession in England and Wales' First View *Cambridge Law Journal* 1-34.
- Goodrich, P (1996) 'Of Blackstone's Tower' in P Birks (ed) *What Are Law Schools For?* Oxford: Oxford University Press 59-68.
- Gordon, R W (2002) 'Modes of Legal Education and the Social Conditions that Sustain Them' *SELA Papers* Paper 5: 9.

- Gordon, R W (2006) 'The Law School, the Profession, and Arthurs' Humane Professionalism' 44(1) *Osgoode Hall Law Journal* 157-166.
- Hepple, B (1996) 'The Renewal of the Liberal Law Degree' 55 *Cambridge Law Journal* 470-487.
- International Legal Center (ILC) (1975) *Report: Legal Education in a Changing World* New York: ILC.
- Kimball, B A & D R Coquillette (2020) *The Intellectual Sword: Harvard Law School, the Second Century* Cambridge MA: Harvard University Press.
- Legal Education and Training Review (2013) *Final Report* London: LETR.
- Llewellyn, K & E A Hoebel (1941) *The Cheyenne Way* Norman OK: University of Oklahoma Press.
- Manji, A & J Harrington (2017) 'The Limits of Socio-legal Radicalism' 26 *Social and Legal Studies* 700-715.
- Ormrod Committee (1971) *Report of the Committee on Legal Education* Cmnd 4595 London: HMSO.
- Sherr, A (2021) Email to David Sugarman 25 January.
- Sommerlad, H & Ors (eds) (2015a) *The Futures of Legal Education and the Legal Profession* Oxford: Hart.
- Sommerlad, H & Ors (2015b) 'The Futures of Legal Education and the Legal Profession: An Introduction' in H Sommerlad & Ors (eds) *The Futures of Legal Education and the Legal Profession* Oxford: Hart chapter 1.
- Sommerlad, H & Ors (2020) 'England & Wales: A Legal Profession in the Vanguard of Professional Transformation?' in R L Abel & Ors (eds) *Lawyers in 21st-Century Societies* vol 1 Oxford: Hart chapter 4.
- Sugarman, D (2011) 'A Special Relationship'? American Influences on English Legal Education, c. 1870-1965' 18(1-2) *International Journal of the Legal Profession* 7-57.
- Sugarman, D (2020) 'William Twining: The Man Who Radicalized the Middle Ground' 16 *International Journal of Law in Context* 475-480.
- Sugarman, D (2021) 'How America Did (and Didn't) Influence English Legal Education, circa 1870-1965' in Susan Bartie and David Sandomierski (eds) *American Legal Education Abroad: Critical Histories* New York: New York University Press.

- Tamanaha, B Z (2012) *Failing Law Schools* Chicago IL: Chicago University Press.
- Twining, W (1967) 83 'Pericles and the Plumber' 83 *Law Quarterly Review* 396-426.
- Twining, W (1973) *Karl Llewellyn and the Realist Movement* London: Weidenfeld & Nicolson.
- Twining, W (1985) *Theories of Evidence* Palo Alto CA: Stanford University Press.
- Twining, W (1994a) 'Interview with David Sugarman' 29 April.
- Twining, W (1994b) *Blackstone's Tower: The English Law School* London: Sweet & Maxwell.
- Twining, W (1997) *Law in Context* Oxford: Clarendon Press.
- Twining, W (2000) *Globalisation and Legal Theory* London: Butterworths.
- Twining, W (2002) *The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories* Aldershot: Ashgate.
- Twining, W (2005a) 'The Role of Academics and the Legal System' (Parts I & II) in M Tushnet & P Cane (eds) *The Oxford Handbook of Legal Studies* Oxford: Oxford University Press 920-929.
- Twining, W (2005b) 'Review of Cownie *Legal Academics* and Bradney *The Liberal Law School*' 32 *Journal of Law and Society* 667-672.
- Twining, W (2006) *Rethinking Evidence* Cambridge: Cambridge University Press.
- Twining, W (2009a) *General Jurisprudence* Cambridge: Cambridge University Press.
- Twining, W (2009b) 'Punching our Weight?' 29(4) *Legal Studies* 519-533.
- Twining, W (2011) *Globalisation and Legal Scholarship* Nijmegen: Wolf Legal Publishers.
- Twining, W (2012) *Human Rights: Southern Voices* Cambridge: Cambridge University Press.
- Twining, W (2014) 'LETR: The Role of Academics in Legal Education and Training: 10 Theses' 48 *The Law Teacher* 94-103.
- Twining, W (2018) 'Rethinking Legal Education' 52 *The Law Teacher* 241-259.

Twining, W (2019) *Jurist in Context: A Memoir* Cambridge: Cambridge University Press.

Twining, W & I Hampsher-Monk (2003) *Evidence and Inference in History and Law* Evanston IL: Northwestern University Press.

Twining, W & D Miers (1976) *How to Do Things with Rules* London: Weidenfeld & Nicholson.

Twining, W and D Sugarman (2020) 'Jurist in Context: William Twining in Conversation with David Sugarman' 47(2) *Journal of Law and Society* 195-220.

Wheeler, S (2020) 'Socio-legal Studies in 2020' 47(S2) *Journal of Law and Society* S209-S226.

THE TOWER

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Abstract

The image of the tower is a potent symbol in many cultures. In the 'Epilogue' in *Blackstone's Tower*, Twining referred to the Eiffel Tower with respect to his book. This article will instead look at the Tower of Babel, the concept of the ivory tower and the tower in which Montaigne composed his essays. It will ask what lessons universities and their law schools can learn from reflecting on these mythical and real towers.

Keywords: Tower of Babel; Montaigne's Tower; ivory tower.

[A] INTRODUCTION

The image of the tower has long been a potent symbol in many cultures.¹ In *Blackstone's Tower*, Twining focused on ideas arising from consideration of the Eiffel Tower, specifically denying any attempt to conjure the notions of 'an ivory tower or a Victorian folly or the Tower of Babel' (Twining 1994: 190). In this article I will take a different approach, looking first at the story of the Tower of Babel, then at the tower in which Montaigne wrote his *Essays* and finally at the idea of an ivory tower. In each instance I will look at the background to the relevant tower and then at the various ideas that have arisen from consideration of the towers. I will argue that both the historical sources of the images and the way that each has come to be used in subsequent discourse offer a rich resource for reflection both on what university law schools are and, much more importantly, on what they can become.

¹ This article will focus on images of the tower in Western culture but, more widely, see, for example, Mandujano-Salazar on the tower in modern Japanese culture and Guo on the tower in Chinese culture from the late Eastern Han dynasty to the Qing dynasty (Mandujanu-Salazar 2016; Guo 2004).

[B] THE TOWER OF BABEL

The Tower of Babel is the oldest image of the tower of the three that I will examine. It is also the one that is most widely used in the academy and beyond. A simple Google Scholar search generates tens of thousands of results crossing a vast range of academic disciplines. At a most basic level the picture of the Tower of Babel is widely seen as having rhetorical significance; it has been variously said that it ‘*is ubiquitous*’; a ‘familiar story’ and ‘a well known episode in Genesis’ (Sherman 2013: 1, original emphasis; Walton 1995: 155; Sasson 1980: 211). In fact, as will be seen that, despite its manifest pervasiveness, whether the story of the Tower of Babel is either familiar or well-known is doubtful.

The first explicit reference to the story of the Tower of Babel in the Bible is to be found in Genesis (chapter 11, verses 1-9) which tell both of the building of the tower and the subsequent introduction to mankind of a multiplicity of languages by God. Historically, however, not all references to the biblical story of the Tower of Babel have been references to these verses. Major, for example, in his study of the Tower of Babel in Anglo-Saxon literature, notes that: ‘The association between Nimrod and the Tower of Babel was very common’ (Major 2018: 15). The Bible’s account of Nimrod (in Genesis 10, verses 8-10) makes no mention of the Tower of Babel. Flavius Josephus’ *Antiquities of the Jews*, written around AD 94 or 93, does however, stating that it was Nimrod who persuaded people not to fear God and to build the Tower (Josephus, Book I, chapter 4, 2-3). Josephus’ book, the first 10 volumes of which are a transliteration of the Jewish Bible, was not a simple copy of the original texts. His account of the Tower of Babel was ‘a political translation of the narrative of the tower’, being shaped in part by his attempt to make the language intelligible to the audiences for whom his book was intended and in part by Jewish commentaries on the Babel story (Feldman 1981; Inowlocki 2006: 172; Sherman 2013: 153 and 7). His book was widely read and was influential on ‘intellectual traditions of Late Antiquity and the Middle Ages’ (Kletter 2016: 368; Major 2018: 36). This impact continued in later periods. Hardin, for example, ascribes Milton’s use of the Tower of Babel in *Paradise Lost* to the story of Nimrod, whilst Mansbach makes a similar case for Pieter Bruegel the Elder’s 1563 Vienna painting of the Tower of Babel, in both instances citing the influence of Josephus (Hardin 1988: 38; Mansbach 1982: 44-45). The starting point for consideration of the Tower of Babel is thus, which tower are we looking at; that in Genesis, that in Josephus or both?

One relatively straightforward interpretation of either of the stories of the Tower of Babel is that they are cautions against arrogance, pride or hubris (Levine 1993; Klinger 2004). Hiebert has termed this ‘the pride-and-punishment reading of the story’, suggesting that it goes back to the earliest interpretations, remaining dominant even in the modern era (Hiebert 2007: 29). If this interpretation is straightforward, its application to either universities or their law schools seems to be similarly uncomplicated. Universities and university law schools ought to be cautious and even modest in the claims that they make about themselves. Such a suggestion may seem to be unproblematic in the light of normal academic practices. Standard academic axioms such as ‘always verify your references’ and ‘doubt everything’ do not betoken an aggressive culture of risk and assertiveness. Scholarly detachment is not consistent with self-aggrandizement. Yet ‘the pride-and-punishment’ interpretation may have more bite for universities than it at first seems. Goodhart’s contention that universities exaggerate the connection between the education they offer and employment prospects for their graduates and Sandel’s more general criticisms of the role of universities in ‘credentialism’ could be read as being precisely a call for universities to show less arrogance about their role in societies (Goodhart 2020: chapter 4; Sandel 2020: chapter 4). However, ‘the pride-and-punishment’ interpretation may not be just simple but instead be simplistic.

One thing that is plain in both the Tower of Babel stories is the scale of ambition involved. The people and Nimrod are convinced both of their existing achievements and what they may be able to do in the future. As Genesis 11 verse 4 puts it, building ‘a tower, whose top may reach unto heaven’ is a possibility.² Not all interpretations of the Tower scold this ambition. Mansbach, for example, argues that in Pieter Bruegel the Elder’s Rotterdam painting of the Tower of Babel, in which ‘a full two-thirds of the depicted tower is finished’, Bruegel ‘has shown us the greatness and power of human productivity’ (Mansbach 1982: 49). Bruegel’s earlier Vienna depiction of the Tower of Babel has a royal figure in the lower left (a figure absent from the Rotterdam painting) commanding the building of the Tower. Narusevicius amongst others sees that royal figure portrayed as ‘dim witted and vain’ (Narusevicius 2013: 37). Mansbach describes the Vienna painting as an account of royal hubris: ‘No level [of the Tower] is finished nor is there evidence that any ever will be.’ (Mansbach 1982: 48) Yet, despite this, the painting ‘is alive with human ingenuity’ whilst the manner of the painting ‘openly expresses the authorial pleasures of devising and depicting’; on both levels, even in the Vienna painting, human drive

² All references to Genesis are to the King James version.

is not condemned (Snow 1983: 42 and 44). In Mansbach's view, Bruegel's Vienna painting is faulting not ambition but royal, autocratic ambition (Mansbach 1982: 54). The reliance on Josephus and his introduction of Nimrod into the story rather than solely considering the Genesis account is vital for this interpretation. Such an approach suggests a somewhat different application of the Tower of Babel story to universities to that derived from the pride-and-punishment interpretation.

Seeley, treating the building of the Tower of Babel story as an historical event, using the internal evidence offered by analysis of the Genesis verses, dates the building of the Tower to between 3,500 and 2,400 BC (Seeley, 2001: 19). Ambition is thus seen as a longstanding feature of human nature. Marcin argues that historically towers 'were watchtowers, protections' (Marcin 2003: 121). The Tower of Babel, he goes on, had the task of safeguarding the institutions and social order in Babel, the sin being in humanity not relying on God for this protection. Niebuhr, in his discussion of the Tower of Babel, goes further in his positive appraisal of the Tower of Babel: 'Man builds towers of the spirit from which he may survey larger horizons than those of class, race, and nation. This is a necessary human enterprise. Without it man could not come to his full estate' (Niebuhr 1938: 29). An ambition to build towers, in Niebuhr's account, is not castigated; instead the concern is that towers will 'pretend to reach higher than their real height, and ... claim a finality which they cannot possess' (Niebuhr 1938: 29). Following this line of argument, universities and their law schools should strive for accuracy in their assessments of themselves, as the pride-and-punishment interpretation suggests, but in addition, and equally importantly, their projects ought to match the attempt to build a tower 'whose top may reach unto heaven'. To have too little ambition, to not seek a 'tower of the spirit', to avoid attempting 'a necessary human enterprise', is as much a flaw as overstating success in making the attempt.

Niebuhr's interpretation of the story of the Tower of Babel prompts cautionary reflections on the nature of projects that universities and their law schools should choose to pursue. There are a myriad of ways in which universities and their law schools can direct their resources, intellectual and otherwise, towards different tasks, but just because they can do so, and can do so successfully, does not mean that it is necessarily appropriate for them to do so. The question of how far they are building 'a tower of the spirit' is always to the fore. For example, 'knowledge transfer' by universities may well produce benefits to a range of people and institutions (Universities UK 2020). Yet, notwithstanding this, Niebuhr's comments prompt the question: should universities concern themselves

with such matters? It has been argued that knowledge transfer by universities in practice is done either as an ‘income-generation strategy’ or as a ‘local development strategy’ (Giuri & Ors 2019). How far does either of these things equate to building towers to ‘reach unto heaven’? Research is central to the university sector (Bradney 2003: chapter 5); it is something that universities are uniquely equipped to do. Any research, whatever its subject-matter, which attempts to work ‘from the known to the unknown’ is necessarily a ‘tower of the spirit’, seeking, in Niebuhr’s terminology, to touch ‘the fringes of the eternal’ (Niebuhr 1938: 29; Davies 1983: 108). Does ‘knowledge transfer’, making universities public sector versions of Deloitte, have the same aura? For law schools, the arguments here are particularly difficult. To suggest, for example, that those in law schools should use their time and legal skills in pursuit of efforts to enhance social justice may seem beguiling, especially given the general left/liberal political disposition of UK academics (Morgan 2017). But, following Niebuhr’s lead, is it appropriate to use the resources of a university law school through, for example, clinical legal education programmes ‘as an effective means of responding to the impacts of the cuts to legal aid’ (Vaughan & Ors 2018)? Volunteering as an individual to work in a Citizen’s Advice Bureau may be a worthwhile thing to do but that does not mean that the role of university law schools, as a Tower of Babel, is to be a Citizens Advice Bureau.

[C] MONTAIGNE’S TOWER

Even though there are no extant remains, the Tower of Babel probably has historical antecedents in Sumerian ziggurats (Williams 2007: 47-48). In contrast, the tower in which Michel de Montaigne withdrew from public life at the age of 38 in 1571, in order to write his book, *Essays*, still exists in much the same condition as it was in his time. Screech describes Montaigne as ‘one of the great sages of that modern world which ... began with the Renaissance’ (Screech 2003: xiii). His tower consists of a chapel with, above that, a bedroom and above the bedroom a library and small study (Ophir 1991: 169; Montaigne 2003: 933). The physical tower has long been of interest to people. It attracted visitors in the 18th and 19th centuries (Hoffmann 2006: 123). In the present day, 45-minute guided tours can be booked (Chateau-Montaigne.com). Over the centuries it has frequently been described in publications (see, for example, Barker 1893: 385). More recently, as a Google search will show, photographs of it have regularly been placed on the web. It has even been the subject of a poem (Grigson 1984: 11). A partial explanation for the sustained interest in Montaigne’s tower lies in the continuing fascination with his ideas

that has recently resulted in, amongst many other publications, Desan's 796-page biography, first published in 2014 and subsequently issued in English translation in 2017 (Desan 2017). Yet the physical circumstances in which other, even more famous, writers have worked have not tended to attract the same degree of attention. What is it that is special about Montaigne's tower?

Desan writes of 'the conventional image of the essayist [Montaigne] isolated in his tower, far from the agitations of his time, playing with his cat and inquiring [in his *Essays*] into the human condition' (Desan 2017: xix). Parts of this image are not relevant to this article. Montaigne's seemingly trivial question 'When I play with my cat, how do I know that she is not passing time with me rather than I with her?' can be read as a profound meditation on the traditional distinction made between animals and humans (Montaigne 2003: 505; Wallen 2015: 457-467). This in turn is important when considering the nature of Montaigne's humanism; this latter matter being something that has long been studied (see, for example, Logan 1975). However, it is neither the cat in the image of Montaigne nor the scope of his intellectual inquiries that are pertinent to this article. Instead, it is the picture of the solitary, isolated figure in the tower that matters.

Montaigne did not in fact completely retreat to his tower in 1571. After this date he was, amongst many other things, mayor of Bordeaux (Desan 1991: xxii). Desan's biography of Montaigne provides a very detailed account of the public life that Montaigne led until his death in 1592 (Desan 2017). Nonetheless, the image of the solitary figure in the tower does include a significant element of truth. Before his move to the tower Montaigne had been a political actor like many others in France at the time. Furbishing the tower in the way that was done constituted a recalibration of Montaigne's life.

The secession from the world ... figures as an inaugural act. It determines the site where Montaigne withdraws from the trade in deception; it establishes a frontier, consecrates a boundary line. The site in question is no abstract height; in Montaigne everything has substance. His separate place will be his tower library – a belvedere in the family manor which offers a commanding view of the surrounding countryside. It is no secret that Montaigne did not make this his permanent residence: he continued to devote much of his time to public affairs, to conciliatory negotiations. He did not shirk what he saw as his duty to the common weal. What mattered in his eyes was to have the possibility of occupying his own private territory, the *possibility* of withdrawing at any moment into absolute solitude, of quitting the game: the important thing was to establish a concrete as well as symbolic embodiment of the imagined distance between

himself and the world, a place always ready to receive him when he felt the need ... (Starobinski 1985: 6-7).

Montaigne's tower is a declaration of independence. It underlines the fact that, henceforward, in the final analysis, Montaigne's work will be on Montaigne's terms simply because those are his terms. Montaigne had established, in Virginia Woolf's phrase, a room, or in his case rooms, of his own; 'a quiet room' (Woolf 1945: 54). Desan is right to emphasise Montaigne's continued public life even after the tower became available to him. In addition to his period of office as Mayor of Bordeaux there was also 'his delicate role as intermediary between Henry III, the Catholic king of France, and the Protestant Henry of Navarre' (Guggenheim 1966: 365; Desan 2017: 495-508). Yet, during the same time, Montaigne was to publish three editions of his *Essays*; a work which was finally to grow, in Screech's modern English translation, to 1,283 pages (Montaigne 2003). At the beginning of the *Essays*, in a preface addressed to 'the Reader', Montaigne maintains that in writing the book he has 'no other end but a private family one' and that in it he does not 'seek the favour of the world'. Montaigne's public, political life continued after his withdrawal to the tower, but now there was also his private work out of the purview of the world. Desan insists that, even after his retreat to his tower, writing his *Essays* was for Montaigne only 'a secondary labor ... conceived as complement to his main political activity' (Desan 2017: 246). Nevertheless, notwithstanding his political activities, this book is Montaigne's 'main achievement' (Frame 1984: 266). It is therefore worthwhile considering what Montaigne thought was necessary in his tower if he were to accomplish this work.

The ground floor of Montaigne's tower is devoted to a chapel. Unsurprisingly, given the time in which he lived, religion figured highly in Montaigne's life. He himself was, in Screech's words, a 'practising Christian' who was 'superstitious' (Screech 2003: xlii). Much of his political life was dominated by the religious disputes in France between Catholics and Protestants (Desan 2017: 101-111). Bells tolling the *Ave Maria* marked dawn and sunset in the tower (Frame 1984: 120). A passage in the tower between his bedroom and the chapel allowed Montaigne to listen to services without actually being in the chapel (Barker 1893: 385). In itself the place of religion in Montaigne's life, and thus the chapel in his tower, will be of little personal relevance to the majority of modern academics in Great Britain given the prevalent and well-established trend of secularization (Bruce 2020). What is worth noting, however, is the care with which something which he valued is catered for in the

tower. Equally noteworthy is the fact that it is done in such a way that Montaigne's desire for privacy is respected.

Montaigne's desire for a library in his tower will be more easily understood by contemporary academics than will the value that he placed on having a chapel in it. Libraries have long been seen as being central to scholarly life in many cultures (Bennett 2009: 181). The precise place of libraries in contemporary universities is now something that is much debated (see, for example, Bennett 2007; Sennyey & Ors 2009). At the same time, to the regret of some, private libraries, like Montaigne's, are not as common as they once were (Steiner 2017). Nonetheless, legal academics will understand the need for recourse to books and will probably have at least a small collection of their own.

Montaigne's library is commonly thought to have totalled over one thousand books (Botton 1998: xv). Of these books only 101 survive, whilst the titles of 271 are known (Taylor Institution Library). Montaigne himself regarded his library as 'a fine one as village libraries go' (Montaigne 2003: 739). Some of the books in it he had inherited from his friend Estienne de La Boétie (Frame 1984: 93; Desan 2017: 117). Nonetheless, irrespective of his inheritance from La Boétie, Montaigne was himself already a 'lover and connoisseur of books' (Frame 1984: 110). His library was thus his personal collection reflecting his own tastes. In his *Essays* Montaigne says that he does not 'have much to do with books by modern authors, since the Ancients seem to me to be more taut and ample' (Montaigne 2003: 459). However, Montaigne then goes on to say that, amongst other books, Boccaccio's *Decameron* and Rabelais are 'worth spending time upon' (Montaigne 2003: 460). The collection was focused on classical authors who are much referred to in his *Essays*, but it is not exclusive in this regard. Josephus' *The Antiquities of the Jews*, discussed above, is one of the titles that he owned (Taylor Institution Library).

On first reflection, Montaigne's library might seem to be simply anachronistic in the context of the modern era. Academics in virtually any university law school now have access, through their library, to a vast range of materials not just in hard copy but also electronically. Even more importantly, this massive library will follow them wherever they choose to go. Mass higher education means that some academics elect to do some of their work at home (Trow 1973: 3). Remote access to electronic material will enable those academics to continue to use much of their library however far from their institution their home is. Montaigne liked to take books with him when he travelled (Frame 1984: 217). He could not take his whole library, but contemporary academics can come close to

doing so. Montaigne's library thus appears to have lost its utility. Whilst one can still understand Montaigne's need for a study in his tower, the library can be now replaced by a laptop.

It is necessary to acknowledge the huge increases that there have been over the last few decades in the amount of material available to academics both in their institutions and elsewhere. In this respect the conditions in which academics now work are immeasurably superior to those that once prevailed. Nonetheless, a pragmatic case still exists for Montaigne's library. This can be illustrated by reference to the response by universities to the Covid-19 pandemic. This reaction has meant that, amongst other things, most UK academics have had restricted access to their offices, and to the books in their offices, for nearly a year. Rules about access have changed frequently and unpredictably in various ways in different universities. This has also been true with regard to physical access to university libraries. The Covid-19 situation is unprecedented in recent decades in the United Kingdom. There is no evidence that it is likely to be a harbinger for the future. The reaction by universities to Covid-19 does, however, point to a structural weakness in individual academic's reliance on their universities both for library provision and for office space. Library provision is not determined by the wishes or even the needs of individual academics. Materials can be, and are, both allocated and withdrawn in ways which reflect a university's assessment of its changing priorities. Equally, universities will not always choose to provide individual offices for academics (Van Marrewijk & Van den Ende 2018). There is nothing inherently sinister in these things. It is simply a necessary concomitant of the fact that a modern university, as well as being a scholarly enterprise, is also a bureaucracy and a corporation (Barcan 2013: 72-76). 'Collection management' has long been a feature of the way in which university libraries are run, as has need for university libraries to fit in with university strategic plans (Brophy 2005: 118-120, 177). Providing office space for academics, particularly if they elect to work from home for some of their time, is an expensive matter. The value of personal libraries for academics in terms of protecting autonomy thus becomes clear. The nature of those personal libraries may change. Brownsword's wry observation, made when ruminating on the consequences of having to move to a smaller academic office, was that 'the vision for law school 2012 is one of offices that are not only paperless but also less populated by books' (Brownsword 2012: 296). Because of this, electronic copies of books rather than the traditional hard copy, although aesthetically less pleasing, may be more popular in the future. Nevertheless, as Montaigne found, the practical advantages of having one's own library remain.

The mundane benefits of access to one's own books, even when that collection is far inferior to a university library, are genuine. That should not lead us to forget the far greater symbolic importance that there is to Montaigne's library. Montaigne wrote that: 'We should set aside a room, just for ourselves, at the back of the shop, keeping it entirely free and establish there our true liberty, our principal solitude and asylum' (Montaigne 2003: 270). Heck describes this 'room ... at the back of the shop', 'as a disposition of mind which is capable of detaching us from everyone and everything else, wife, family, business, and wealth' (Heck 1971: 94). Green similarly refers to 'a symbolic retreat from the world into the seclusion of one's own home, library, or *arrireboutique* – spaces in which it is possible to live for or belong to oneself' (Green 2012: 2). Yet, for Montaigne, the room we should set aside is both a disposition of mind and a symbolic retreat whilst, at the same time, being very real. 'The library is detached ... in order to separate' (Ophir 1991: 169). Montaigne sought in his tower to create the physical conditions that would better allow him to accomplish his work. He wrote of his regret that fear of 'bother' and 'expense' meant that he did not have galleries built on either side of his tower because he thought better when he was walking (Montaigne 2003: 933). Ophir writes of 'the tranquillity provided by its [the tower's] unique physical construction' (Ophir 1991: 186).

Academics vary greatly in precisely what they prefer in terms of physical space in order to carry out their scholarship (Sword 2017; Dobelo & Veer 2019). In general it does seem that they 'highly value autonomy, freedom and solitary spaces for reading, writing and doing research' (Van Marrewijk & Van den Enden 2018: 1134). For this reason, most academics will have an immediate empathetic reaction to Montaigne's desire for his tower. It is this that may explain, at least in part, the longstanding interest that there has been in his tower as a place as well as the separate curiosity that there is about Montaigne's ideas.

[D] THE IVORY TOWER

In one sense the ivory tower is very different from both the Tower of Babel and Montaigne's tower. 'There never was an Ivory Tower. It was always a figure of speech.' (Shapin 2012: 1) Panofsky argues that to suggest that someone lives in an ivory tower 'combines the stigma of egotistical self-isolation (on account of the tower) with that of snobbery (on account of the ivory) and dreamy inefficiency (on account of both)' (Panofsky 1957: 112). Shapin, however, whilst agreeing that 'The modern monologue finds no worth in the Ivory Tower', adds that: 'The story it tells is historically uninformed ...' (Shapin 2012: 27).

The idea of an ivory tower has an ancient lineage. Thus, for example, in English translations of the *Song of Solomon* it is said of the bride: 'Thy neck is as a tower of ivory' (7:4). However, the first use of ivory tower in a figure of speech is usually ascribed to the French writer Charles-Augustin Sainte-Beuve who, in 1837, in his *Pensées d'Août*, wrote of his fellow writer Alfred de Vigny: 'Comme en sa tour d'ivoire avant midi retrait'; 'withdraws before noon as though into his ivory tower' (Panofsky 1957: 113). What is not clear is what, in his allusive few lines, Sainte-Beuve is saying about Vigny's withdrawal. Ziolkowski describes Sainte-Beuve's figure of speech 'as a term of opprobrium'; Murawska writes of the 'accusing tone' in the words but Panofsky suggests that Vigny is merely 'mildly reprov'd' (Panofsky 1957: 113; Murawska 1982: 160; Ziolkowski 1998: 29-30). The use of the term ivory tower focuses to an even greater extent than Montaigne's tower does on the notion of separation, detachment and retreat. The question then is what is to be made of any of these things.

One thing that is clear about a move to an ivory tower is that it does not involve leading a life of leisure. In the period after he moved to his country estate in 1837 Vigny continued to write until 'the day of his death' (Whitridge 1933: 151). During this time, however, he published very little, his final volume of poems being issued after his death, and he 'wrote only to please himself' (Whitridge 1933: 199). This combination of productivity with an insistence of control over their work is to be found in others who have sought an ivory tower. In 1872 Flaubert, in a letter to Turgenev, wrote 'I have always tried to live in an ivory tower' (Steegmuller 1984: 200). Yet both before and after this letter Flaubert wrote assiduously (Starkie 1971: 384-385). His remark is not, however, disingenuous; instead, it captures accurately his dislike of many aspects of French society during his life and, in particular, his distaste for the contemporary idea of writing in order to produce an income (Winock 2016: 368-369). Many people in ivory towers have lived busy lives. What they were doing and why they were doing it has determined their choice of an ivory tower as a place of abode.

Collingwood has provided one of the more detailed accounts of why it is wrong to take up residence in an ivory tower. In *The Principles of Art* he argued: 'If artists are really to express "what all have felt", they must share the emotions of all. Their experiences, the general attitude they express towards life, must be of the same kind as that of persons among whom they hope to find an audience' (Collingwood 1938: 119). Collingwood goes on to argue that 'the literature of the ivory tower is a literature whose only possible value is an amusement value by which persons imprisoned

within that tower ... help themselves and each other to pass their time ...' (Collingwood 1938: 121). Collingwood's arguments are premised on the notion that all artistic work, which he defines widely to include that done by actors, musicians, painters and writers, is collaborative and that the collaboration always involves an audience who have more than a simply receptive function (Collingwood 1938: 324). One interpretation of this is that Collingwood's view is that 'artists collaborate with their communities, acting as spokespersons for them' (Gonzalez 2011: 144). For Collingwood, the rejection of the ivory tower is not a political statement; it is a necessary feature of being an artist. Such a view would not be congenial to many of those who would describe themselves as artists.

Flaubert's preference for residence in an ivory tower rested on grounds antithetical to those of Collingwood. First, Flaubert's relationship with the French society in which he lived was at best equivocal. In his letter to Turgenev Flaubert describes a 'tide of shit' beating at the walls of his ivory tower, instancing a new government education programme that paid more attention to physical education than to instruction in French literature (Steegmuller 1984: 200-201). More broadly, he saw 'Man in general as mean, conventional, insensitive and selfish ... those who were gross, insensitive and self-interested always prospered, and were left in command at the final curtain' (Starkie 1971: 340). Perhaps most importantly: 'Life did not exist for him except as a substance for art, and he came to think of it solely as something which could be turned into literature' (Starkie 1971: 396-397). Collaboration with an audience was not what Flaubert sought; an ivory tower was his settled home. Much more recently the Zimbabwean writer Dambudzo Marechera has put the same position very plainly: 'The writer has no duty, no responsibility, other than to his art. Art is higher than reality.' (Marechera 1987: 103) 'Either you are a writer or you are not. If you are a writer for a specific nation or a specific race, then fuck you' (cited in Ashcroft 2013: 79). Marechera's story, *The Black Insider*, published after his death, is set in a Faculty of Arts where the protagonists shelter from a war outside (Marechera 1992). The similarity in the position adopted by a 19th-century Frenchman whose father was a wealthy surgeon and a late 20th-century Zimbabwean born to a hospital orderly and a nanny is striking (Starkie 1971: 6-7; Veit-Wild 2004: 78-79). Many other writers over several centuries have espoused positions similar to those of Flaubert and Marechera, insisting on the necessity of adherence to norms of artistic integrity rather than allegiance to matters such as class or nationality, sometimes explicitly referring to the notion of the ivory tower (see, for example, Forster 1938; Nerval 1968: 54). They

choose an ivory tower ‘precisely because they find reality within it and unreality or less pure reality outside it’ (Child 1948: 135).

Individual moments, such as the Spanish Civil War, have brought the arguments about the merits of either detachment or engagement for the writer to the fore (Orwell 1946: 2-6; Muste 1966). Nevertheless, the arguments have been a recurring feature of the history of art in general and literature in particular. But the image of the ivory tower used in this debate proved to be ‘too useful and too vivid to belong to one context ...’ (Shapin 2012: 6). It is thus unsurprising that the image has come to be part of debates about the proper role of academics in universities. Through the latter half of the 20th century and into the present day it has been increasingly easy to find those who would deny that the ivory tower should be or ever was part of the university (Shapin 2012: 13-17). In *Blackstone’s Tower*, Twining wrote that ‘Blackstone’s tower was and is not a tower of ivory’ (Twining 1994: 3). Yet the salience of the idea of the ivory tower in universities has also been commended and defended. In 2004, for example, Stanley Fish published an article ‘Why We Built the Ivory Tower’ in the *New York Times* (Fish 2004). His argument, later amplified in *Save The World on Your Own Time*, was that the academic’s task was to focus on their professional specialism in their teaching and in their academic writing and not to engage in wider social and political activity (Fish 2008). Others have made similar points (see, for example, van der Vosson 2015). As in the case of literature and the arts in general the debate is about what work should be done: ‘is it better, more virtuous, more authentically human to be engaged with civic affairs or is it better – from time to time or always – intentionally to live apart from the polis?’ (Shapin 2012: 26). Even some of those commentators who have argued that universities as a whole should not be ivory towers have accepted the legitimacy of individual scholars seeing the ivory tower as being the place where they can best do their work (Rosovsky 2002: 28-29). The question for some scholars will be, given the personal responsibility that they have for their work, to what degree, if at all, can they cede control over that work to others?

[E] CONCLUSION

Analysis of the three concepts of a tower discussed in this article make a number of things clear. First, whatever idea of a tower is being considered, care and clarity are necessary when the concept is being applied. Ideas of a tower can become little more than advertising slogans or playground terms of abuse. The ideas discussed here all have a history and patina of scholarship that is frequently ignored by those who refer to the ideas.

Outside the academy, in the mouths of government ministers for example, this is deplorable, but for academics themselves such behaviour is inexcusable. Merely regurgitating platitudes about the towers is not a suitable substitute for reflecting on how they can properly be a stimulus for thought. Secondly, interpretation of the images of the tower in this article and images of the tower more generally is complicated and contentious. Towers, whether real or figures of speech, may be useful in thinking about what our lives as academics and people should be. This does not mean, however, that such thinking then becomes straightforward. Indeed, if the thinking does become simple, this may be because it has degenerated into the rhetoric of political sloganeering. A third, final point is the one that is most significant. Each individual academic will select their own tower or towers as their guide and motivation. This article has touched upon some of the vast literature that is available when academics decide what their choice will be. There is also other relevant material such as the positions taken by academic associations and even the mission statements of individual universities. Not all the material available is of equal value. University mission statements, for example, have been described as 'identity narratives' (Seeber & Ors 2019: 239). One might wonder how far they can then ever differ from advertising material and thus how much real consequence they have when debating the nature of university work. Nonetheless, the more crucial point is the necessity of legal academics, whatever their specialist research or teaching areas, taking up a reasoned position as regards the role they think they and their law schools should have (Bradney and Cownie 2017: S129-S130). It is this that is what Twining's *Blackstone's Tower* was about, and its contribution to this debate is its ensuring legacy.

References

- Ashcroft, Bill (2013) 'Menippean Marechera' in Grant Hamilton (ed) *Reading Marechera* Woodbridge: Boydell & Brewer.
- Barcan, Ruth (2013) *Academic Life and Labour in the New University: Hope and Other Choices* London: Routledge.
- Barker, E Harrison (1893) 'On the Track of Montaigne' 99 *Temple Bar* 381-392.
- Bennett, Scott (2007) 'Libraries and Learning: A History of Paradigm Change' *Libraries and the Academy* 181-197.
- de Botton, Gilbert (1998) 'Foreword' in Michael Screech *Montaigne's Annotated Copy of Lucretius* Geneva: Libraire Droz.

Bradney, Anthony (2003) *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* Oxford: Hart Publishing.

Bradney, Anthony & Fiona Cownie (2017) 'An Examined Life: Research into University Legal Education and the Journal of Law and Society' 44 *S1 Journal of Law and Society* S129-S143.

Brophy, Peter (2005) *The Academic Library* London: Facet Publishing.

Brownsword, Roger (2012) 'Whither the Law and Law Books? From Prescription to Possibility' 39 *Journal of Law and Society* 296-308.

Bruce, Steve (2020) *British Gods: Religion in Modern Britain* Oxford: Oxford University Press.

Chateau-Montaigne.com.

Child, Harold (1948) 'Of Ivory Towers' in Harold Child *Essays and Reflections* Cambridge: Cambridge University Press.

Collingwood, Robin (1938) *The Principles of Art* Oxford: Clarendon Press.

Davies, Robertson (1983) *The Rebel Angels* Harmondsworth: Penguin Books.

Desan, Philippe (1991) 'Introduction' in Hugo Friedrich *Montaigne* Berkeley CA: University of California Press.

Desan, Philippe (2017) *Montaigne: A Life* Princeton NJ: Princeton University Press.

Dobele, Angela & Enhant Veer (2019) 'My Best Writing Space: Understanding Academics Self-professed Writing Spaces' 78 *Higher Education* 345-364.

Feldman, Louis (1981) 'Josephus' Commentary on Genesis' 72 *The Jewish Quarterly* 121-131.

Fish, Stanley (2004) 'Why We Built the Ivory Tower' *New York Times* 21 May.

Fish, Stanley (2008) *Save The World on Your Own Time* Oxford: Oxford University Press.

Forster, Edward (1938) 'The Ivory Tower' 39 *London Mercury* 119-130.

Frame, Donald (1984) *Montaigne: A Biography* San Francisco CA: North Point Press.

- Giuri, Paola & Ors (2019) 'The Strategic Orientation of Universities in Knowledge Transfer Activities' 138 *Technological Forecasting and Social Change* 261-278.
- Gonzalez, Alexander (2011) 'Evan Boland's "The Glass King" and R G Collingwood's Theory of Art' 76 *South Atlantic Review* 143-153.
- Goodhart, David (2020) *Head, Heart and Hands: The Struggle for Dignity and Status in the 21st Century* London: Allen Lane.
- Green, Felicity (2012) *Montaigne and the Life of Freedom* Cambridge: Cambridge University Press.
- Grigson, Geoffrey (1984) *Montaigne's Tower and Other Poems* London: Secker & Warburg.
- Guggenheim, Michel (1966) 'Montaigne: A Biography' 20 *Western Humanities Review* 364-366.
- Guo, Qinghua (2004) 'From Tower to Pagoda: Structural and Technological Transition' 20 *Construction History* 3-19.
- Hardin, Richard (1998) 'Milton's Nimrod' 22 *Milton Quarterly* 38-44
- Heck, Francis (1971) 'The Meaning of Solitude in Montaigne's "Essays"' 25 *The Bulletin of the Rocky Mountain Modern Language Association* 93-97.
- Hiebert, Theodore (2007) 'The Tower of Babel and the Origin of the World's Cultures' 126 *Journal of Biblical Literature* 29-58.
- Hoffmann, George (2006) 'Montaigne's Nudes: The Lost Tower Paintings Rediscovered' 110 *Yale French Studies* 122-133.
- Inowlocki, Sabrina (2006) 'Josephus' Rewriting of the Tower of Babel Narrative (Gen 11; 1-9)' XXXVII *Journal for the Study of Judaism* 169-191.
- Josephus, Flavius (nd) [*The Antiquities of the Jews*](#).
- Kletter, Karen (2016) 'The Christian Reception of Josephus in Late Antiquity and the Middle Ages' in Honora Chapman & Zuleika Rodgers (eds) *A Companion to Josephus* Chichester: Wiley Blackwell.
- Klinger, A (2004) 'Tower of Babel' 4 *Denison Journal of Religion* 34-44.
- Levine, Daniel (1993) 64 *Hebrew Union Annual* 51-87.

- Logan, George (1975) 'The Relation of Montaigne to Renaissance Humanism' 36 *Journal of the History of Ideas* 612-632.
- Major, Tristram (2018) *Undoing Babel: The Tower of Babel in Anglo-Saxon Literature* Toronto: University of Toronto Press.
- Mandujano-Salzar, Yunen (2016) 'Tokyo Tower and Tokyo Skytree: History and Symbolism in Contemporary Japan' 3(SI1) *Gremium* 11-21.
- Mansbach, Steven (1982) 'Pieter Bruegel's Towers of Babel' 45 *Zeitschrift für Kunstgeschichte* 43-56.
- Marcin, Raymond (2003) 'The City of Babel: Yesterday and Today' 6 *Logos: Journal of Catholic Social Thought and Culture* 120-130.
- Marechera, Dambudzo (1987) 'The African Writer's Experience of European Literature' XIV *Zambezia* 99-105.
- Marechera, Dambudzo (1992) *The Black Insider* London: Lawrence & Wishart.
- de Montaigne, Michel (2003) *The Complete Essays* London: Penguin Books.
- Morgan, John (2017) 'General Election 2017' *Times Higher Education* 1 June.
- Murawska, Katarzyna (1982) 'An Image of Mysterious Wisdom by Toil: The Tower as Symbol of Thoughtful Isolation in English Art and Literature from Milton to Yeats' 3 *Artibus et Historiae* 141-162.
- Muste, John (1966) *Say That We Saw Spain Die: Literary Consequences of the Spanish Civil War* Seattle WA: University of Washington Press.
- Narusevicius, Vytas (2013) 'The Labours of Translation: Towards Utopia in Bruegel's Tower of Babel' 4 *Wreck* 30-45.
- de Nerval, Gérard (1968) *Selected Writings* St Albans: Panther Books.
- Niebuhr, Reinhold (1938) *Beyond Tragedy* London: Nisbet & Co.
- Ophir, Adi (1991) 'A Place of Knowledge Re-created: The Library of Michel de Montaigne' 4 *Science in Context* 163-189.
- Orwell, George (1946) 'Why I Write' in Sonia Orwell & Ian Angus (eds) *The Collected Essays, Journalism and Letters of George Orwell* vol I London: Secker & Warburg.

- Panofsky, Erwin (1957) 'In Defense of the Ivory Tower' 1 *The Centennial Review of Arts and Science* 111-122.
- Rosovsky, Henry (2002) 'No Ivory Tower: University and Society in the Twenty-First Century' in Werner Hirsch & Luc Weber (eds) *As the Walls of Academia are Tumbling Down* London: Economica.
- Sandel, Michael (2020) *The Tyranny of Merit* London: Allen Lane.
- Sasson, Jack (1980) 'The "Tower of Babel" as a Clue to the Redactional Structuring of Primeval History' in Gary Rendsberg, R Adler & Afra Winter (eds) *The Bible World: Essays in Honor of Cyrus H Gordon* New York: KYAV Publishing House.
- Screech, Michael (2003) 'Introduction' in Michel de Montaigne *The Complete Essays* London: Penguin Books.
- Seeber, Marco & Ors (2019) 'Factors Affecting the Content of Universities' Mission Statements: An Analysis of the United Kingdom Higher Education System' 44 *Studies in Higher Education* 230-244.
- Seeley, Paul (2001) 'The Date of the Tower of Babel and some Theological Implications' 63 *Westminster Theological Journal* 15-38.
- Sennyey, Pongracz & Ors (2009) 'Exploring the Future of Academic Libraries: A Definitional Approach' 35 *Journal of Academic Librarianship* 252-259.
- Shapin, Steven (2012) 'The Ivory Tower: The History of a Figure of Speech and its Cultural Uses' 45 *British Journal of the History of Science* 1-21.
- Sherman, Phillip (2013) *Babel's Tower Translated: Genesis 11 and Ancient Jewish Interpretation* Leiden: Brill.
- Snow, Edward (1983) 5 *Anthropology and Aesthetics* 40-48.
- Starkie, Enid (1971) *Flaubert: The Making of the Master* Harmondsworth: Penguin Books.
- Starobinski, Jean (1985) *Montaigne in Motion* Chicago IL: University of Chicago Press.
- Steegmuller, Francis (ed) (1984) *The Letters of Gustave Flaubert 1857-1880* London: Faber & Faber.
- Steiner, George with Laure Adler (2017) *A Long Saturday: Conversations* Chicago IL: University of Chicago Press.

Sword, Helen (2017) *Air and Light and Time and Space: How Successful Academics Write* Cambridge: Harvard University Press.

[Taylor Institution Library](#).

Trow, Martin (1973) *Problems in the Transition from Elite to Mass Higher Education* Berkley: Carnegie Commission on Higher Education.

Twining, William (1994) *Blackstone's Tower: The English Law School* London: Stevens & Sons/Sweet & Maxwell.

Universities UK (2020) *Concordat for the Advancement of Knowledge Exchange in Higher Education* London: Universities UK.

Van der Vosson (2015) 'In Defense of the Ivory Tower: Why Philosophers Should Stay out of Politics' 28 *Philosophical Psychology* 1045-1063.

Van Marrewijk, Alfons & Leonore Van den Ende (2018) 'Changing Academic Work Places: The Introduction of Open-plan Offices in Universities' 31 *Journal of Organizational Change Management* 1119-1137.

Vaughan, Steven & Ors (2018) 'Clinical Legal Education Reimagined' in Thomas Linden & Ors *Reimagining Clinical Legal Education* Oxford: Hart Publishing.

Veit-Wild, Flora (2004) *Dambudzo Marechera: A Source Book on His Life and Work* Trenton NJ: Africa World Press.

Wallen, James (2015) "Our Natural and Original Illness": Tracking the Human/Animal Distinction in Montaigne and Nietzsche' 52 *Comparative Literature Studies* 449-478.

Walton, John (1995) 'The Mesopotamian Background of the Tower of Babel Account and its Implications' 5 *Bulletin of Biblical Research* 155-175.

Whitridge, Arnold (1933) *Alfred de Vigny* Oxford: Oxford University Press.

Williams, Stephen (2007) *Understanding the Bible* Boston MA: McGraw-Hill.

Winock, Michel (2016) *Flaubert* Cambridge: The Belknap Press.

Woolf, Virginia (1945) *A Room of One's Own* Harmondsworth: Penguin Books.

Ziolkowski, Theodore (1998) *The View from the Tower: Origins of an Antimodernist Image* Princeton NJ: Princeton University Press.

RUTLAND REVISITED: REFLECTIONS ON THE RELATIONSHIPS BETWEEN THE LEGAL ACADEMY AND THE LEGAL PROFESSION

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Abstract

This paper explores the multiple and multifaceted relationships between the legal academy and the legal profession in England and Wales. It does so by mirroring the approach of William Twining in his ‘Visit to Rutland’ in *Blackstone’s Tower*. In drawing on hypothetical happenings in two fictitious law schools and a fictitious law firm, the paper offers commentary on the many points of contact between lawyers and scholars. What is made clear is that these interfaces are often *ad hoc* and that the legal academy acts as if it needs the profession more than the profession needs it. This may well be the case. What we see then is the modern-day Blackstone’s Tower in the shadow of Cravath’s mansion.

Keywords: legal profession; legal education; Qualifying Law Degree; Solicitors Qualifying Examination; ‘core’ subjects; diversity; Blackstone’s Tower.

[A] INTRODUCTORY EXPLANATORY NOTE

This paper borrows an approach from chapter 4 of Blackstone’s Tower in which ‘tour guide’ William Twining explores Rutland – a ‘mythical middling law school in middle England’ – as a case study on law school culture. Below, I adopt a similar narrative style (and create a number of my own fictitious institutions and organizations) to reflect on the relationships between the legal academy and the legal profession. As in ‘A Visit to Rutland’, the ideas and data to which this paper speaks are partly drawn from existing studies of the legal profession and the legal academy, and on legal education. These scaffolding studies and datasets appear in a

¹ I am very grateful to William Twining, Richard Moorhead and Ellie Rowan, as well as to Fiona Cownie and Emma Jones as editors of this special issue, for helpful discussions about and suggestions on earlier drafts. The usual disclaimer applies.

'References' section at the end of the paper. Some of what follows also comes from a recent empirical project I have undertaken which looks at the 'core' of a Qualifying Law Degree (QLD): data taken from 86 law school websites (collected in 2018) plus 64 interviews with legal academics in a range of law schools in England and Wales during 2019.

Bletchley University was established in the mid-1800s. A Russell Group university that consistently features in UK 'top 10' university league tables, it occupies a large number of Victorian Gothic, Tudor and Dutch Baroque buildings spread over various spaces close to Bletchley Park. Bletchley University Law School, founded in 1873, occupies the top three floors of a grand mansion on a leafy square. The Head of School, Professor Sarah Downey QC (hons), is a highly regarded expert on tax law. Almost 150 other people work in the School: 60 or so academics on permanent contracts; an army of 'law teachers' on fractional, non-permanent contracts; and (unlike many of its peers) a dedicated and large group of Law School UAs (university administrators). The academics in the School are recruited primarily on the basis of their research excellence although, of course, teaching is also important. In the main, these academics have led academic lives: progressing from certificate to certificate to certificate, from one degree to another, until they landed a permanent academic post. Maybe one-fifth qualified as solicitors or barristers before moving into academia. An even smaller handful still practise, advising on high-profile cases at the Bar. What is more common these days is that Bletchley staff (whether legally qualified or not) will advise non-governmental organizations and others in the third sector on lobbying and litigation.

Each year, the Law School at Bletchley University welcomes around 300 exceptional undergraduates onto its LLB (where they had to meet an A*AA offer) and around 150 postgraduates for study onto its LLM (which has a number of 'pathways', with the Finance and Business LLM the most popular). The Law School also accepts 20 or so doctoral students each year. Several years ago, the School ran a number of 'Law and [X]' programmes on its LLB; the common crop of language joint programmes (Law and French and Law and German) plus more unusual combinations (including Law and Social History). Dwindling student numbers on the joint programmes made them no longer economically viable. There has been some debate, over recent years, as to whether Bletchley should offer 'executive' postgraduate courses aimed at practising lawyers (having seen how successful and lucrative similar programmes have been in business schools in the UK—for accountants and others—and in law schools in

Australia). The topic comes up annually at School meetings, but little progress has been made. There are two ‘law for non-lawyers’ modules inside the School: both a mix of contract, tort and company law; and both offered not to those outside the walls of the university but instead aimed at first-year Bletchley accountancy and business school students.

The relationship between Bletchley University Law School and legal practice is probably best described as rather *ad hoc*: while there are various interfaces, there is no strategy which underpins these moments of contact. So, for example, a large number of practising solicitors and barristers undertake sessional teaching at Bletchley (a couple of LLB tutorial groups a year; a LLM seminar here and there—these lawyers existing as ‘law teachers’ in the School, with a separate email distribution list, not ‘faculty’) and there is a roll call of the great and the good (often from the Bar) who hold visiting fellowships (though it is not immediately clear what actual contribution they make to the School). The School is also well-known for its vibrant programme of extracurricular talks, and many practitioners speak at and also attend these events. Each year, a Supreme Court justice or Court of Appeal judge is asked to be President of the student law society, and they then judge the finals of the student mooting competition. The student law society is worth a closer look. It receives a healthy five-figure sum in total every year from a number of City of London law firms by way of sponsorship. This money goes into part subsidization of law society balls, into naming rights (including the Lavery and Dunn LLP Legal Technology Suite) and into putting on ‘career events’. Those events are almost exclusively aimed at students wanting to work in legal practice in the City. Every year, some students complain about the careers focus of the School and the student law society. Every year, the law society then puts on a couple of what it labels as ‘alternative’ careers talks: these tend to relate to high-profile social justice lawyering. While the talks from those practitioners in the City attract over 100 students at a time, the ‘alternative’ events are much less well attended. No one can remember the last time (if ever?) that a high-street solicitor came to talk to the students at Bletchley Law School. They certainly could not afford the fees the university careers service charges for a spot at the annual Law Careers Fair. A healthy minority of the students feel that Bletchley only wants its students to end up in the City; that the City is the ‘best’ or ‘preferred’ outcome. While this is factually untrue, and there is the occasional grumbling by certain academics about the presence of ‘big law’ inside the School, few of the Law School’s scholars take active steps to shore up the ‘alternative’ careers provision.

Bletchley Law School has a law clinic which provides free legal advice on housing and debt to local residents in and around Milton Keynes. There is also a business law and tax law clinic connected to the university's London outpost, established in 2005, which offers advice to the many start-ups that have office space in and around Old Street. The start-up part of the clinic is run in partnership with a large City firm, Stebbings Brooke, whose lawyers (dressed down in jeans and hoodies) give one afternoon a week *pro bono* to supervising the clinic students. As it happens, a start-up that received seed capital two years ago has taken off and is considering larger venture capital funding and a possible stock-market listing. Stebbings Brooke continues to advise the firm. The firm has suggested to Bletchley Law School that lawyers of the future will need to have 'law tech agility' and that the School should introduce hackathons, make strategic investments into 'law and artificial intelligence', and so on. The School only introduced essays (in addition to exams) into its assessments ten years ago. 'Hackathons' may be some way off.

The housing and debt clinic at Bletchley Law School is ran by Alex Lee. She qualified as a solicitor at a small, five-partner practice and made the move into academia, thinking it would give her more control of her work-life balance. While this has only been partly true, Alex loves her job and the students who take part in the clinic. She has worked at Bletchley Law School for eight years and not been promoted. She sometimes feels that she is an uneasy fit with the university's Pathways to Success career framework; while she has published a couple of (largely autoethnographic) chapters in edited collections on Law School clinics, she does not think of herself as 'research active' (nor does the School encourage her to be so). Alex also feels an uneasy fit with many of her colleagues. You would be unlikely to find Alex—who calls herself a 'pracademic'—at the monthly research seminars, or talking to others in the School about the work that she does. This is as much Alex's fault as that of her colleagues.

Bletchley Law School has a staff common room. Were you to sit quietly in the corner and listen in to the conversations taking place, several things would become apparent. The first is that little is said about education. Putting to one side the sort of office chat you would find in any working environment (mainly, at the moment, on the merits and demerits of *Bridgerton* and *Call My Agent*), the academics at Bletchley Law School spend a lot of time talking about their own research or about the administration of the university. Education, as a topic of conversation, manifests mainly in frustration about perceived ever-increasing bureaucracy. The second is that the legal profession is rarely mentioned by Bletchley Law School legal academics. You might occasionally hear shock at increasing newly

qualified salaries—‘*Have you seen that they’re giving 24-year-olds one hundred grand at Lavery and Dunn? That’s more than I’m on and I’ve been here 20 years!*’—and there is sometimes talk of guest lecturers coming in to certain modules from practice; but otherwise the legal profession is not a subject of much discussion. Dr Ellie Smith is the only person at Bletchley Law School whose research interests include the profession. This is not unusual. She is one of maybe 20 to 30 scholars in all of the UK who write about lawyers *per se* (there being a much larger group who do what we might call legal services-adjacent work; family law scholars interested in legal aid and access to justice and so on). Dr Smith was appointed as part of a general recruitment round and, she suspects, because (in addition to her excellent research and PhD from Oxford) she also has considerable experience of teaching multiple ‘core’ subjects. Bletchley Law School has never advertised for a legal academic post with a speciality in the legal profession and/or legal education. The university does, however, have a Professor for the Public Understanding of Economics.

As it happens, Bletchley Law School is currently in the middle of a ‘programme review’, reflecting on the size and shape of its LLB undergraduate law degree. This has been prompted by a number of factors: a new Vice Chancellor who is keen on ‘shaking things up’; student feedback asking for more space in the curriculum for optional modules; and year-on-year challenges in finding people to teach a number of the ‘core’ compulsory papers. In the first meeting linked to the review, Professor Downey, the Head of Department, says that all options are open to the School, that she is keen for some ‘blue sky’ thinking, and invites comments from her colleagues. Two hands are immediately raised. ‘It strikes me’, says Professor Ben York (who holds a chair in public international law (PIL)) ‘that there is a good case to be made, given Brexit, to drop EU law as one of our core subjects and to put PIL in its place. As some of you know, PIL was a requirement at this School until the mid-1960s.’ Dr Siobhan Fitzgerald speaks next: ‘I don’t disagree with Ben, but I should also like us to return to the question of whether we bring back jurisprudence as a compulsory module.’ Professor Downey smiles at her colleagues. ‘Programme reform doesn’t necessarily mean adding further modules to our current two years of compulsory subjects’. There are some furrowed brows at this. The meeting continues.

Less than a mile from Bletchley Law School’s Old Street start-up clinic is the London office of the law firm Lavery and Dunn LLP. Ranked in the top tiers (in every legal directory that counts) for its broad-base corporate and finance work, the firm employs somewhere in the region of 3,000 lawyers worldwide and has almost 1,000 partners. Though the

firm's financial data is a closely guarded secret, the legal press suggests that full equity partners take home more than £1 million per year. Each year, the London office (and its 700 lawyers) accepts 60 students onto its training programme. Those 60 students form a small part of the 50 per cent of all training contracts in England and Wales that take place in Greater London and with the largest law firms (a statistic that has been broadly static for the last 30 years). Lavery and Dunn LLP has a clear policy preference: that half of those incoming trainee solicitors are law students; and half are not. If you heard the firm's graduate recruitment team speak about this preference publicly, they would say two things. First, that the firm wants to be open to as wide a range of talent as possible, and that includes interest in 'non-law' as well as law students. Second, that the work that the firm does (complex, cross-border corporate and finance matters, supported by a range of specialist teams) is work which requires a range of skills (problem solving, logical reasoning, effective communication, team-work, critical thinking, attention to detail and so on) that can be developed through multiple subjects at degree-level study. In private, they might also add that the firm is in competition with its peers for the very best graduates, and it would be rather self-limiting to only look at law students when so many other students are also on offer. There is also some sense, from the partners who did not study law and have themselves advanced through the ranks, that there is no need for a law degree to work in the City. Most of what those firms require, by way of technical expertise, is knowledge and practice that can be developed *in situ*. Many of the partners, for example, find that trainees in their first seat straight out of the Legal Practice Course (LPC) (that the firm worked with Austin University Law School, a private university, to develop) simply are not up to standard.

Over time, Lavery and Dunn LLP has been working towards the diversification of its trainee solicitor intakes. What this meant, not so long ago, was accepting more and more women. What this means today is more complex: it is partly about diversity in terms of Equality Act 2010 characteristics; and it is partly about the spread of universities from which trainees are taken. The firm has, like many others, taken a bashing in the legal press for the many years in which 80 per cent or more of its trainee intake had studied at Oxbridge. Sara, one of their most recent trainees, is a graduate of Peninsula University London (PUL). She appears on the majority of the firm's recruitment webpages. Sara was highly strategic in her choice of Lavery and Dunn; many hours of careful research showing how the firm tended not to employ people like her and yet made many public statements about its commitment to diversity. Her application, in

effect, said, 'I am talented and committed, and I can help you with your image.' The firm had not taken a trainee from PUL previously.

PUL was established in 1967. It occupies a campus of light, bright modern buildings on the Greenwich peninsula in south-east London. Its School of Law, Business and Criminology was set up in 1972 and offers a range of law programmes: the LLB law degree (with around 175 students each year and an average UCAS entry tariff of 121) and a handful of variations (with business/with criminology and so on); a small LLM degree (with 30 students); the Common Professional Exam (CPE)/Graduate Diploma in Law (GDL); and the LPC. Had you the time and inclination to read the staff profiles of those legal academics working in law at PUL and compare them with the profiles of their peers at Bletchley Law School you would be struck by how many more of the PUL legal academics had been in practice before making the move into higher education. This is not, it should be said, universally true, and it is also telling how many of the more early-career legal academic staff at PUL now have PhDs (and how many more established PUL staff are working on their doctorates as part of a university-level 'ambition-raising' development programme). You would also see how many more PUL staff explicitly note teaching qualifications on their web profiles compared with Bletchley Law School staff and, if you peeked at the workload allocation model (which is a complex spreadsheet with multiple formulae at PUL and a single table Word document at Bletchley), how the PUL legal academics do many more hours of teaching each year. While it would be wrong to suggest that the two camps are separate but heterogeneous groups, there are some broad differences that are striking.

Mike is a law student at PUL. He wants to be a barrister. His grades are excellent. What he does not know is that existing evidence suggests he might struggle in 'making it'. Even if he is rated as 'outstanding' at bar school, those who attend 'top 10' law schools for their undergraduate law degrees are statistically more likely to gain pupillage than students who attend law schools in the next 40 of the top 100 (and they in turn are more likely than students who attend lower-ranked law schools). PUL is not a 'top 10' law school. Mike would have every reason to be perplexed by this data. He had done his preparatory work carefully; on their websites, chambers repeatedly say they are looking for strong academic credentials (which he has) and do not list publicly their university preferences. What Mike also does not know is that, for at least the last ten years, around 40 per cent of all pupils had not studied law at undergraduate level. Given only 568 pupillages commenced in 2019, there is a wealth of competition between law students for the 340 or so that went to those with QLDs.

These numbers are even more striking when you see how many law schools have spent a lot of money on a dedicated moot court inside their buildings and how many have dedicated Bar representatives inside their student law societies. There is also serious money spent by many law schools on mooting competitions. Bletchley, for example, each year spends up to £10,000 on The Jessup, the world's largest moot court competition (paying for fees, flights, mooting coaches and so on). Bletchley Law School students last won The Jessup in 1973. Those in charge of mooting at PUL and Bletchley would say that the preceding commentary misses the point. Mooting, they would say, develops a wide range of important skills in law schools. This may be true, but it must also be true that those skills could also be developed in other ways and without the associated (possibly unrealistic) career expectations that wigs and gowns bring with them. The moot courts do, however, always impress the Vice Chancellors when they occasionally make in-person visits to law schools as part of campus tours.

Were you to survey the partners of Lavery and Dunn LLP as to their views on the legal academy, the answers would, by and large, be positive, but they would also not show much active thought or connection between the firm and those employed in law schools. There are, for sure, copies of many textbooks written by legal academics in the firm's law library, and each year the firm spends many thousands of pounds having 'leading voices' (read: academics working in a handful of law schools) come in to do continuing professional development talks. The problem, perhaps(?), is that the firm does not do the sort of law that the majority of academics tend to be interested in. Simply ask any head of any law school how easy it is to find people able and willing to teach and research in 'corporate finance' broadly construed (and how much you have to pay them to do it, such is the small size of the market). It is not so much that the lawyers at Lavery and Dunn LLP lack respect for or have any animosity for legal academics. It is more that those academics very rarely ping on the radars of those lawyers. One would only need to compare Law Society data on practice areas with the databases of the Society of Legal Scholars and Socio-Legal Studies Association to see that that which occupies and interests practising solicitors does not perfectly align (both in terms of volume and in terms of intellectual and practical inquiry) with that which occupies and interests legal academics.

A few minutes' walk from Lavery and Dunn LLP is the London office of the Solicitors Regulation Authority (SRA). On the horizon for the Law Schools at Bletchley and PUL and for Lavery and Dunn LLP is the SRA's Solicitors Qualifying Examination (SQE). The London office of the SRA is

small and pales in comparison to the Birmingham HQ which takes up several floors of The Cube (a building name which has unfortunate Borg connotations that are sadly lost on the very many people who have not accepted *Star Trek* into their lives). From September 2021, those wishing to qualify as solicitors will need to take the SQE, a centrally-set suite of assessments (some focusing on skills, others on knowledge), in addition to doing two years' work experience and passing character tests. This will, so the SRA press briefings go, allow greater regulatory certainty about competence and provide for flexibility in where and how people qualify as solicitors. No longer will the SRA regulate the content or shape of the QLD (offered by 119 universities) or the one-year GDL. When the SQE was first raised as a possibility, much was made by the SRA of how diversity could be improved with a centrally assessed system of competence (in that employers would/should choose trainees based on performance in the SQE alone). The auxiliary verbs in that last sentence are doing a lot of heavy lifting. Over time, the possible diversity benefits of the SQE were muted by the SRA in its public statements and documents; and more made of the regulatory and quality assurance value of a centrally-set and assessed system of qualifying competence. This is not unimportant. A regulator that is unable to say exactly why or how someone is competent at the point that person is granted a licence to practise (and where that licence comes with a range of risks to the general public) may find that position hard to defend. The problem here, however, is that there was little data that incompetence was an *actual problem* for the SRA.

Perhaps three-quarters of the academics at Bletchley Law School have heard of the SQE. It was the subject of a School meeting several years ago and, since then, has been left in the hands of the School's education team. The situation is quite different at PUL where the department has met regularly to discuss and begin to implement changes to its LLB in light of the SQE and to ask harder questions about the future of its LPC (where there is a—only semi-accurate—perception that the 'Law School' partly cross-subsidizes the LPC). In the wider legal academy, there is a lot of busy activity in relation to the SQE both at the level of individual law schools and through professional associations: reports, blogs, conferences and the like. As part of a world view that sees the SRA as a key protagonist in relationships between the academic and practical, some legal scholars accuse the SRA of ignoring the negative diversity impacts the SQE may create and/or argue that multiple-choice questions are inappropriate means of assessment in law (although the full merits of this latter argument are not entirely clear). Others still suggest the SRA has been unethical in how it has responded to the consultations it ran

on the SQE and/or that the overall cost of the SQE to students will be equal to (perhaps even greater than) the current system (although other guesstimates/impact assessments suggest this is simply not true). The SRA is well aware of these, and other, pushbacks against the SQE. It carries on regardless.

In the nicest possible way, the SRA does not care about the members of the legal academy. They are not part of its regulatory remit as framed by the Legal Services Act 2007. They are simply irrelevant (in regulatory terms). A disinterested observer might find the level of energy and effort on the part of certain law schools and certain academics curious: isn't the whole point of the SQE that the regulator is saying it has *no interest* in undergraduate legal education, and so law schools can now do entirely what they like with their programmes? A more unkind disinterested observer might comment that this seems like one of those times where a relationship ends and the jilted lover is unwilling to accept that 'it's over'. Law schools have for years relied on the law degree being a step towards qualification as a solicitor. The SQE shows that the SRA does not think it is. It is certainly true that, for some academics in some law schools, the SQE is perceived and internalized as an existential threat; it being largely accepted that a prospective student (with aspirations of practice) might be more likely to choose University X over University Y where University X can speak convincingly to somehow preparing that student for the SQE. The likelihood that that particular student will, years in the future, actually sit the SQE and find employment in the space in which they think (at the age of 17) they want to find employment is largely missing from these discussions. It is also true that, for some legal academics, their concerns about the SQE are borne out of points of principle. While some see the SQE as the end of any significant role for the academy in the education and training of solicitors (and a flawed system of assessment), other academics are largely apathetic.

The partners at Lavery and Dunn LLP have been briefed on the SQE by the Head of Graduate Recruitment. The general thinking in the partnership, although few have devoted serious time to consideration, is that multiple-choice tests will not be enough for what is needed of their future lawyers. The firm is considering what would work instead, with some form of tailored lawyer preparation curriculum being discussed, although that option does have the unfortunate result of the initials 'LPC'. This course would, as in the past, likely be delivered by Austin University Law School, which allows Lavery and Dunn LLP to have significant control over the content of the programme. That control, over the soon-to-be defunct LPC, has been around for some time and, as noted above, the

partners each year complain about the knowledge and abilities of the ‘day one’ trainees. There is also some talk among the partners that the firm should actively speak with the many university law schools from which its trainees are sourced about the SQE. This has not happened yet. The new regime begins in eight months.

Very many of the law students who arrive each year at Bletchley Law School and at PUL Law School want to be lawyers of some kind. The ‘very many’ in that last sentence is intentionally vague, as was the use of the generic ‘lawyer’. Neither law school collects that sort of data on its students in any sort of meaningful way: on the reasons their students chose them and chose law; on the career aspirations of those students; how those career aspirations develop and change over time etc. Dr Ellie Smith has, for some time, been pushing for Bletchley Law School to do something similar to the longstanding US ‘After the JD’ study, but her requests have not gained much traction. Talking to first-year law undergraduates at both universities, it is clear that there are a common set of reasons for why they chose law over other subjects: the desire to be a lawyer (here, it is a given that the popular TV shows *Suits* and *How to Get Away with Murder* will be mentioned at some point), the feeling that law is a ‘safe bet’ (and will lead to good employment outcomes; a feeling that has a decent basis in Office for National Statistics data) and (for some) a lack of conviction about what else to study. The law students at Bletchley are much more likely to have a solicitor or barrister (or judge) in the family than the students at PUL. There are also more international students at Bletchley Law School than at PUL; a good number of whom are studying law in the UK because their national legal services regulator exempts or part exempts them from the lawyer qualifications in their home jurisdictions if they do so. For the students at Bletchley and PUL who became interested in law (even in part) by the glossy images presented to them in popular culture (thinking there might be greater opportunities for a powerful ‘I object’ every now and then in LLB tutorials), first year comes as somewhat of a shock.

It is rather odd, given how very different the two Law Schools are, that the websites for Bletchley Law School and PUL Law School look so similar. Both talk about the skills that someone studying a law degree will develop; both have law degrees that look almost identical (two years of compulsory subjects, with near identical names and module weights, and grouped into the same year groupings); both make rather vague references to employment after the degree (variations on ‘Many of our students go on to legal practice ...’ language); and both offer a wealth of external rankings as evidence of their excellence (although, it should be noted, the rankings that each

refers to are different; and a mean observer may wonder about the extent to which Bletchley Law School is interested in education given that the rankings it makes public mainly relate to research and the legacy of REF (2014). Where the two Schools differ is that the PUL Law School website makes explicit reference, in the third paragraph of its home webpage, to the SQE (although what is there doesn't add up to very much substance-wise) and the School has a separate, standalone 'Employability' tab (with photos of alumni who have gone on to legal careers). PUL also makes reference to a scheme it runs for those wishing to qualify as chartered legal executives ('CILEX' returning no results on a search of the Bletchley University website). Both Law Schools tell potential applicants that they will receive a 'liberal education'. Nothing more is said about this: what liberalism means in this context; or how it manifests in the choices the School has made about its educational offerings. While the websites of the Law Schools at Bletchley and PUL are both (ball-park) compliant with Competition and Markets Authority guidance, the possible futures they raise in the legal profession do not perhaps tell the whole truth. In the academic year 2018/2019, there were 73,090 law students enrolled on law degrees (as their first degrees) in the UK; 18,405 further students were studying law that year on postgraduate taught programmes; 16,499 law students graduated in the summer of 2019. In the same year, there were 6,344 new training contracts available. By 2014 (the last year in which we have data), more than half (51.2 per cent) of all those qualifying as solicitors had *not* studied a QLD as their first degree. This is for two reasons. The first is the popularity of the 'conversion course' (where the percentage of those qualifying having taken the CPE/GDL route more than doubled from 1990 (15 per cent) to 2014 (30 per cent)); and the second is the rise in overseas lawyers qualifying as SRA-regulated solicitors (almost certainly linked to the increasing globalization of the largest legal practices). In 1990, 67 per cent of new entrants to the solicitor's branch of the profession had taken a law degree. The pervasiveness of 'non-law' students (or, as they might call themselves, history and classics and mathematics graduates and so on) is also seen on the LPC. Since 2014, around a quarter of the 6,000–8,000 students enrolling onto the LPC each year studied something other than law for their first degrees. Putting all this together, it is not unreasonable to suggest both that only *circa* 3,000 training contracts in 2019 were held by trainees with law degrees and that many (many) thousands of law graduates (from undergraduate and postgraduate taught programmes) are disappointed that they cannot, and will not, qualify. One might also wonder what it says that the SRA chose, from 2014 onwards, to no longer collect data on the education of the solicitors to whom it granted licences to practise. It is not, of course, that working as a solicitor or barrister is

any better or worse than other roles, inside or outside the legal profession. That is not the point. But what does matter is whether law students are starting their degrees with aspirations about their futures which may not be especially realistic when one takes a sober look at the data; and where law schools are at best silent and at worst complicit in not managing those aspirations before the contract for education is entered into.

The SQE is also part of the conversation at Bletchley Law School's initial meeting on LLB programme reform. In her introductory comments on this topic, Professor Jan Sanderson, the School's education lead, makes reference to a conversation with a magic circle partner (an alumna of Bletchley) who said that the firm has faith that the Law School will keep producing intellectually curious and gifted graduates (whatever the LLB programme looks like). Jan then offers this thought to her colleagues:

I mean, I think ultimately, given as most of our income comes from teaching undergraduates, then it's incumbent on us to at least go some way to meeting their expectations. And, whether those expectations are reasonable or not, the reality is that a very great number of students who we teach at least begin a law degree with the ambition of becoming lawyers. And, it's not for us to totally frustrate that with a syllabus that would in no way prepare them for legal practice.

This causes a large degree of discussion over coffee. As a starting point, the vast majority of the academics at Bletchley Law School have no interest in preparing students for legal practice, whatever that preparation might be or look like.

'It's not what we do', says one.

'Yes, but it's partly what some of the students think we do', says another

'What if they all suddenly realize they'd be better off doing Classics or whatever? Don't we want students to maintain the idea that studying with us is a short cut to the money pit?'

This is an incendiary remark and the noise in the coffee room escalates. Part of the escalation comes from a sense (created more by urban legend than by actual experience) that students are now wholly consumeristic in their interactions with the university.

Later that evening, a group of Bletchley Law School academics heads out for drinks. As is often the case with certain academics, the conversation is a continuation of their work.

After one too many glasses of pinot noir, Jack, a reader in family law, says:

The thing is that we need them more than they need us. The firms, the chambers, they help make us look ... They make us look like we have this direct line to practice. Like it's a simple A, B, C. And it is, in a way. Or it sort of is. But I think they're largely indifferent to us. The firms, the Bar ... they want our students because they're gifted, but they could come from any good university and have studied any subject and they'd still take them. Academia is fungible to them in that way. And they're only really interested in the product; in the people we give bits of paper to. They don't care that I'm a world-leading authority on ancillary relief. They just don't care. But we care. We have to be nice to them. We need them to sanctify us as places worth coming to. But they don't care. They just don't. We service them. That's it. We're 'Blackstone's Tower' but in the shadow of Cravath's mansion ...

His colleague Jo pats him on the shoulder. 'I think perhaps you've had enough Jack. Time for a cab home'.

[B] POSTSCRIPT

Two things should hopefully be apparent having taken a tour of Bletchley, PUL and Lavery and Dunn LLP. The first is that, despite the many significant changes since *Blackstone's Tower*, the legal academy (generally) venerates the institution of the legal profession, with that veneration both misguided and one-sided and the profession (generally) largely apathetic about the academy. The profession is instead concerned about the quality of entrants (has the prospective trainee been to a 'good' university?; or, if not, do they have exceptional grades which perfects their poor university credentials?) and about the skills they possess (and also, somewhat, about diversity). While a handful of practising lawyer voices may proffer strong opinions on the undergraduate law degree, most law firms (and their equity partners) are focused on the 'day one' competencies needed the moment a trainee takes their first seat; which may be some time after their undergraduate legal education, and certainly many years after their first-year contract law classes. What I have also suggested in the above is that the many interfaces between the profession and the academy are often ad hoc. How many law schools, for example, have an explicit strategy that details their relationships with practising lawyers? And how many of those strategies are, in substance, about anything much more than income generation?

The second theme running through the above speaks to my concerns about how law schools 'sell' the profession to prospective students. The ongoing path dependency of the academy on the profession partly harks back to much smaller law student numbers and a stronger alignment between law degrees as the first steps for legal practice, but it is also partly

about kudos and about image. We legal academics want lots of students to study law at university, and we also want ‘good’ students to study law: numbers and quality being not unimportant indicators for when law school heads and deans are jostling in a tournament of influence with their peers in front of their vice chancellors. It also helps us that we do not have perfect/great/good/much data on what our students go on to do after they study with us so that we are unable to answer the question: ‘Exactly how many of each of your final year LLB students qualify as solicitors or barristers within X years of graduation?’ It seems to have passed us by that collecting such data is well within our gift.

The above tour was largely pessimistic and also, in many parts, quite unkind to legal academics. The latter was intentional; and the former a result of my reading of where we are. My perhaps naive hope is that what I say, and the data I have offered up, causes some of us to sit back and ask hard questions of our own roles (individual and institutional) in the machinery of law student recruitment and education; and to also ask to what extent it is incumbent on us to reject feeding or fuelling the unrealistic expectations of our students. Looking forward, I see the SQE as an opportunity and a risk. The SQE opens up a space for law schools to have a debate about the purpose and content of their law degrees (which subjects are made compulsory and why; how subjects are taught; and so on) and also the possibility that prospective students will say, ‘Thanks but no thanks, I’m off to study English.’ That risk has been around for some time and, while the majority of newly admitted solicitors (and 40 per cent of newly admitted barristers) have not studied law for their first degrees, law student numbers have grown year on year. My main concern, I think, is that there is a (return to) conservatism among the majority of legal academics (or some combination of conservatism, path dependency, and lack of interest) which means that if a ‘Rutland Revisited Once Again’ paper is written 25 years from now, little may have changed. Let me end, however, on a more positive note. The shadow cast by Cravath is simply that: a shadow, and nothing more substantial. We need to have a little more confidence about our place. Even if the vast majority of our students do not go on to become regulated members of the legal profession (and they do not), we need to remember that what we do—as legal scholars, as legal educators—has value that transcends the production of practice-ready graduates (i.e. that legal education, based on the highest quality scholarship, is necessary for members of a well-functioning society bound by the rule of law); and we can and should be better about articulating that value—to ourselves; to our current and prospective students; within our own institutions; and beyond.

References

- Ashley, Louise & Ors (2015) *A Qualitative Evaluation of Non-educational Barriers to the Elite Professions* London: Social Mobility and Child Poverty Commission.
- Bar Standards Board (2019) *Review of Pupillage Advertising and Selection Criteria* London BSB.
- Bar Standards Board (2020) *BPTC Key Statistics 2020: An Analysis of Students over Three Academic Years* London: BSB.
- Boon, Andrew & Julian Webb (2008) 'Legal Education and Training in England and Wales: Back to the Future' (2008) 58 *Journal of Legal Education* 79.
- Boon, Andrew & Julian Webb (2010) 'The Legal Professions as Stakeholders in the Academy in England and Wales' in F Cownie (ed) *Stakeholders in the Law School* Oxford: Hart.
- Bradney, Anthony (1992) 'Ivory Towers and Satanic Mills: Choices for University Law Schools' 17(1) *Studies in Higher Education* 5.
- Bradney, Anthony (2018) 'The Success of University Law Schools in England and Wales: Or How to Fail' 52(4) *The Law Teacher* 490.
- Broadbent, Graeme & Pamela Sellman (2013) 'Great Expectations? Law Schools, Websites and "the Student Experience"' 47(1) *The Law Teacher* 44.
- Central Applications Board (2019) *Annual Report 2019* London: Central Applications Board.
- Collier, Richard (2005) "'Be Smart, Be Successful, Be Yourself ..."?: Representations of the Training Contract and Trainee Solicitor in Advertising by Large Law Firms' 12(1) *International Journal of the Legal Profession* 51.
- Cownie, Fiona (2004) *Legal Academics: Culture and Identities* Oxford: Hart.
- Cownie, Fiona (2011) 'Twining, Teachers of Law and Law Teaching' (2011) 18(1) *International Journal of the Legal Profession* 121.
- Cownie, Fiona & Anthony Bradney (2017) 'An Examined Life: Research into University Legal Education in the United Kingdom and the Journal of Law and Society' 44 *Journal of Law and Society* 129.

- Davies, Mark (2018) 'Changes to the Training of English and Welsh Lawyers: Implications for the Future of University Law Schools' 52(1) *The Law Teacher* 100.
- Denvir, Catrina (2020) *Modernizing Legal Education* Cambridge: Cambridge University Press.
- Faulconbridge, James & Daniel Muzio (2021) 'Valuation Devices and the Dynamic Legitimacy-Performativity Nexus: The Case of PEP in the English Legal Profession' 91 *Accounting, Organizations and Society* 101.
- Gilbert, Andrew (2020) '[Preparing for the Exam? – Law School Websites and the SQE](#)' *Association of Law Teachers Blog*.
- Guth, Jessica & Kathryn Dutton (2018) 'SQE-ized out: SRA, Status and Stasis' 52(4) *The Law Teacher* 425-438.
- Guth, Jessica & Tamara Hervey (2018) 'Threats to Internationalised Legal Education in the Twenty-First Century UK' 52(3) *The Law Teacher* 350.
- Leighton, Patricia & Tom Mortimer (1995) 'How Important is Teaching to Law Teachers?' 29(2) *The Law Teacher* 152.
- Hall, Elaine (2017) 'Notes on the SRA Report of the Consultation on the Solicitors Qualifying Exam: "Comment is Free, but Facts Are Sacred"' 51(3) *The Law Teacher* 364.
- Hand, James & Charlotte Harrison (2019) 'Snapshots on Diversity in the Legal Academy' 25(2) *European Journal of Current Legal Issues* 1-24.
- Hardee, Melissa (2014) *Career Expectations of Students on Qualifying Law Degrees in England and Wales* Coventry: UKCLE Report.
- Harwood, Stephen (1991) *Law Annual Statistical Report 1990* London: The Law Society.
- Hook Tangaza (2020) *What Will the SQE Do for Us? An Impact Assessment* London: Hook Tangaza.
- Kennedy, Duncan (2007) *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* New York: New York University Press.
- Kirton-Darling, Edward & Antonia Layard (2020) *The Solicitors Qualifying Examination: Perspectives on the Proposed Changes to Legal Qualification* Socio-Legal Studies Association Report.
- Law Society (2020) *Trends in the Solicitors Profession: Annual Statistics Report 2019* London: The Law Society.

- Legal Education and Training Review (2013) *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* London: LETR Final Report.
- Mason, Luke (2018) 'SQEezing the Jurisprudence out of the SRA's Super Exam: The SQE's Bleak Legal Realism and the Rejection of Law's Multimodal Truth' 52(4) *The Law Teacher* 409.
- Nicolson, Donald (2015) 'Legal Education, Ethics and Access to Justice: Forging Warriors for Justice in a Neo-liberal World' 22(1) *International Journal of the Legal Profession* 51.
- Plickert, Gabriele (2014) *After the JD III: Third Results from a National Study of Legal Careers* Chicago IL: American Bar Foundation.
- Roper, Victoria & Ors (2020) 'Revisiting "Pressing Problems in the Law: What Is the Law School for?" 20 years on' 54(3) *The Law Teacher* 455.
- Rowan, Eleanor & Steven Vaughan (2018) "'Fitting in" and "Opting out": Exploring How Law Students Self-select Law Firm Employers' 52(2) *The Law Teacher* 216.
- Smith, Peter (2015) 'The Legal Education–Legal Practice Relationship: A Critical Evaluation' CPELER Working Paper 03/2015 Sheffield: Centre for Professional Legal Education and Research.
- Sommerlad, Hilary (2011) 'The Commercialisation of Law and the Enterprising Legal Practitioner: Continuity and Change' 18(1) *International Journal of the Legal Profession* 73.
- Sommerlad, Hilary (2014) 'The Social Magic of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession' 83 *Fordham Law Review* 2325.
- Stolker, Carel (2015) *Rethinking the Law School: Education, Research, Outreach and Governance* Cambridge: Cambridge University Press.
- Thomas, Linden & Ors (2018) *Reimagining Clinical Legal Education* Oxford: Hart.
- Thornton, Margaret (2011) *Privatising the Public University* London: Routledge.
- Thornton, Margaret (2014) 'Legal Education in the Corporate University' 10 *Annual Review of Law and Social Science* 19.

- Tomlinson, Jennifer & Ors (2013) 'Structure, Agency and Career Strategies of White Women and Black and Minority Ethnic Individuals in the Legal Profession' 66(2) *Human Relations* 245.
- Tomlinson, Jennifer & Ors (2019) 'Privileges and Penalties in the Legal Profession: An Intersectional Analysis of Career Progression' 70(3) *British Journal of Sociology* 1043.
- Twining, William (1994) *Blackstone's Tower* London: Sweet & Maxwell.
- Twining, William (1995) 'What Are Law Schools for?' 46 *Northern Ireland Legal Quarterly* 291.
- Twining, William (1998) 'Thinking about Law Schools: Rutland Reviewed' 25(1) *Journal of Law and Society* 1.
- Twining, William & Ors (2005) 'The Role of Academics in the Legal System' in M Tushnet & P Cane (eds) *The Oxford Handbook of Legal Studies* Oxford: Oxford University Press.
- Vaughan, Steven (2016) 'The State of the Nation: Diversity and the British Legal Academy' 50(2) *The Law Teacher* 255-263.
- Webb, Julian (2013) 'Preparing for Practice in the 21st Century: The Role of Legal Education and its Regulation' 24(2) *Stanford Law and Policy Review* 503.

EXPERIENCING ENGLISH LAW SCHOOLS: THE STUDENT PERSPECTIVE

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Abstract

This article examines *Blackstone's Tower: The English Law School* from the perspective of law students entering and studying in law schools 25+ years after the publication of the book. The article provides an alternative 'tour' of an English law school, the tour that might be given by students. In doing so it asks to what extent students now would recognize the tour on which Twining took us in 1994 and what key sites and debates are either missing or now redundant. In particular, the article aims to encourage us to think about both physical and digital aspects of campus life, the increasing role of marketing, the growing emphasis on student support (particularly relating to wellbeing) and the continuing tensions between the vocational and liberal legal education.

Key words: legal education; law students; student experience; student support.

[A] INTRODUCTION

This paper examines *Blackstone's Tower: The English Law School* (Twining 1994) from the perspective of law students entering and studying in law schools more than 25 years after the publication of the book. Its aim is to consider the extent to which things have changed for students studying law in English law schools. To do so, it will utilize the perspective of a student-led tour around the University of Rutland's modern-day campus for prospective legal scholars. This tour of campus will be used to highlight some of the key changes which have occurred within universities and in legal education, including an increased emphasis on marketing, careers and employability, a growth in capital

building projects, additional wellbeing provision and the role of social media. Replacing Twining's 1994 'tour guide' with a tour led by student ambassadors is significant in itself, representing the increase in 'student voice' and the emphasis on narratives around the 'student experience' and 'student satisfaction' since the publication of *Blackstone's Tower* (Budd 2017; Strevens 2020). It also affords the reader an alternative prism through which to view the contemporary law school (albeit one filtered through the academic lens of the authors).

[B] WELCOME TO THE RUTLAND EXPERIENCE

Rutland has grown. Twining imagined a university with around 8,000 students (Twining 1994: 66) and today's version provides education to around 15,000. It maintains its status as a middle-of-the-road sort of institution both in terms of size and in terms of rankings and league tables (Twining 1994: 66). Some of the growth has come from increased undergraduate law provision, and the intake of 120 new LLB students has grown to about 250 new entrants each year. The number of law undergraduates in English universities increased from 55,224 in 1994/95 to 76,610 in 2019/20 (HESA 2021), so Rutland's expansion is in line with the national trend. Accompanying this growth in size, Rutland's focus upon marketing its offerings has also increased. Although not referred to explicitly by Twining, we can assume that, by 1994, somewhere on campus there was the rather shadowy presence of a marketing team tucked away in the bowels of a building housing a range of administrative functions. Recruited largely in response to the award of university status to former polytechnics in 1992 (and the increased competition they represented) this team's *raison d'être* was to ensure Rutland's student numbers remained healthy (Naudé & Ivy 1999). By 2021, the Marketing and Student Recruitment Team occupies two floors of its building, and Rutland's Law School has a dedicated marketing assistant from the team who spends one day a week in the School, working on marketing and recruitment projects under the direction of the school manager. The marketing team is not only responsible for attracting students to the university, but also for Rutland's branding, ensuring (or at least trying to ensure) that its corporate identity and reputation are consistent and attractive to both domestic and international prospective students (Foroudi & Ors 2019).

Rutland's Marketing and Student Recruitment Team sells the Law School and its programmes as modern, student-centred and providing access to a wide range of employability skills which will equip students for a bright future in their chosen (legal) career. The pictures online are

of a diverse range of students in business attire, with gowns and wigs in the moot court room and in earnest conversation with each other and/or law staff. Student satisfaction is high if the National Student Survey is to be believed, but still only high enough for a ranking comfortably within the top half of institutions offering law programmes. Rutland is seemingly a destination for students who have done well at school but just not quite well enough to enter the so-called top tier and for students who live locally and do not want to or are unable to move.

Following the trend of universities generally, Rutland Law School offers a range of outreach activities in local schools and colleges, together with regular open days for prospective applicants and their families. Research consistently demonstrates the influence of families and (to a lesser extent) peers on university choices, making such events an important marketing tool (Krezel & Krezel 2017). The growing importance of social media as a determinant of student choice has added an additional layer of marketing to such applicants (Rutter & Ors 2016) but has not yet supplanted the importance of a physical visit to campus.

Rutland Law School's group of 20-odd student ambassadors play an important role within these events. Such ambassadors are now a common feature of university life, both in the UK and globally (Gartland 2015). Having been a staple of campus tours for prospective students for many years, the scope and profile of their role was enlarged in the UK during the 1997–2010 Labour Government's AimHigher initiative as a way of widening participation within higher education (Ylonen 2010). In some instances this is via the recruitment of ambassadors specifically from widening participation populations, whereas in others it is more about the general work the ambassadors do in outreach to schools and colleges (or some combination of both) (Gartland 2015; Baker & Sela 2018). The ambassadors are existing students who have usually undergone some form of application and/or selection process to receive hourly paid work promoting their institution in a range of ways. They are largely motivated by a desire to act as role models to aspiring applicants but are also alive to the potential the role affords for the acquisition of valuable employability skills, particularly communication skills (Ylonen 2010; Baker & Sela 2018). The Rutland Law School student ambassadors are standing near a main entrance, wearing brightly coloured branded t-shirts, clutching handfuls of campus maps and prospectuses, waiting to gather together small groups for the tour of the campus and Law School. Rather than start with the Law School itself, they have been instructed to begin by showcasing the wider campus, given the Marketing Department's view that the physical attractiveness of its geographical position and the wider facilities and

level of safety and security it offers are important factors in the choice of university (Ali-Choudhary & Ors 2009). The visit to the Law School itself will then represent the 'jewel in the crown' at the end of the tour.

[C] OUR MODERN AND SPACIOUS CAMPUS OFFERS A WIDE RANGE OF OPPORTUNITIES

Today's campus tour is not completely different from a campus tour round Rutland in the mid-1990s. Some of the buildings have not altered significantly (at least on the outside) since 1994. However, some of the campus landmarks being showcased have undergone major changes both in terms of form and function. The collection of buildings as a whole is typical of university campuses that have expanded over time: some are purpose-built, some are newer than others, some with slightly clumsy extensions and most are split into the familiar disciplinary silos of faculties, departments and/or schools. It is noticeable that there is considerably less open and green space now than there was in 1994. Since that time, the higher education sector has experienced periods of significant investment in major construction projects, many of which have resulted in shiny new buildings springing up to impress prospective students and their parents. Between 2014 and 2019, it is estimated the sector spent more than £8.8 billion on capital projects (Waite 2019). Rutland took advantage of a loan from the European Investment Bank to build a new Interdisciplinary Centre for Sustainable Innovation, complete with sedum-covered roof and thoroughly 'green' credentials (McCann & Ors 2019: 123). The Law School building was extended and a new lecture theatre was added, featuring state-of-the-art flexible seating to facilitate group discussions in 'flipped lectures' (Jamieson 2003). The quality of the built environment is seen as an important selling point by Rutland's senior management team, who are not only keen to attract students, but also have an eye to the conference market (Edwards 2013: 5).

Access to the campus is controlled in a way that was unthinkable in 1994. People can no longer wander freely into the university's physical space. Visitors driving to campus must pre-arrange their parking and on arrival report to a security officer, who can be found in one of the booths located at each entrance to the campus. They will be issued with a parking permit and directed to a visitors' car park. Then, like all other visitors, they will need to meet their host, who will issue them with a temporary badge confirming their status as approved visitors with permission to be on campus. They are instructed to display this clearly for the duration of their visit. The student ambassadors who are conducting tours carry

electronic key cards to swipe as they enter and exit buildings, opening doors or barriers that prevent outsiders from entering. All students carry these cards, giving them access to everything they need: teaching rooms, student union, printing facilities, discounted coffees, the library and, of course, the attendance monitoring system. Without an activated student card it is hard to be a student at all (see Lee & Ors 2003; Mirza & Alghathbar 2009; Murphy & Ors 2013).

[D] 95% OF RUTLAND STUDENTS WERE IN FULL-TIME EMPLOYMENT SIX MONTHS AFTER GRADUATION

On their way to the Law School the student ambassadors ensure that their charges visit The Hub. This is an attractive building with a large glass atrium. Inside, the space is divided into glass-fronted rooms which house a variety of student services. Discussion of facilities like these was absent from Twining's tour of Rutland, but today they have assumed a central role in 'the student experience', a concept which is now widely used among students and staff at universities, as well as in higher education policy, university rankings and institutions' promotional materials (Potschulat & Ors 2021: 4). The spaces in the Hub which are allocated to different types of service can tell us much about the university's priorities. Prominently situated near the entrance is the well-resourced careers office, which advertises employability skills workshops on a large screen facing outwards into the hallway. Other offerings include CV clinics, mock assessment days and interviews, as well as individual appointments with specialist career advisers. Inside the careers office are round tables and flexible furniture which can easily be moved and configured in different ways to meet the needs of different activities, as well as 'pods' where private conversations can take place. Employability is one of the main features of Rutland University's strategic plan, and staff are encouraged to use the AdvanceHE *Essential Framework for Enhancing Student Success: Embedding Employability* (Norton & Tibby 2020) to integrate employability into the curriculum.

The next room in The Hub is the Student Learning Centre. It contains older, less flexible furniture and offers academic and study skills support via posters on the glass door. Today's offering is an essay-writing clinic and next week students can seek help with referencing. The workshop on 'making the most of tutor feedback' is fully booked. Support for student learning has grown exponentially since Twining's tour in 1994, linked both to the diversity of students entering higher education and to concerns

about non-completion/withdrawal rates (Dillon & Ors 2008: 282). As with many other universities, Rutland's website talks enthusiastically about the university's commitment to 'teaching excellence' and the ways in which support is provided to help students achieve their academic potential. However, although learning support is arguably a key driver for improving student attainment, it is not as well-resourced at Rutland as one might have expected, which arguably contributed to the university being awarded a silver rating in the Teaching Excellence Framework (TEF), rather than the gold it had hoped for, having to accept that its teaching 'consistently exceeded rigorous national quality requirements' rather than 'representing the highest quality [university teaching] found in the UK' (Office For Students 2021).

[E] OUR STUDENT SUPPORT SERVICES ARE HERE TO HELP YOU MAKE THE MOST OF YOUR RUTLAND EXPERIENCE

The third room within The Hub (past which our visitors are ushered a little more quickly than the careers office) has opaque rather than clear glass and the sign on the door tells us it is the Student Wellbeing Advice Centre. A timetable of yoga and mindfulness walks is presented on a small screen and a notice on the door informs students that there is a waiting list for wellbeing appointments due to high demand. The screen rolls onto pictures of the puppies and Shetland ponies that will be on campus during exam time to help students de-stress (BBC News 2015).

Although not referred to by Twining, it is likely that the Rutland of the mid-1990s had some form of counselling provision in place for students (perhaps tucked into a room next to the fledgling marketing department). Such a provision would have held little, if any, interest for a majority of Rutland's legal academics who would have viewed it as a purely pastoral affair and squarely outside their remit and expertise. The more conscientious personal tutors within the Law School would have had a small pile of fliers on their desk to hand to distressed students when required and an occasional poster would have been displayed on the noticeboards dotted around the building. The subsequent growth in wellbeing provision has mirrored the increase in concerns around student mental health and wellbeing, with reports indicating higher levels of mental health issues and lower levels of wellbeing than those found within the general population (Ibrahim & Ors 2013; Insight Network 2019). Factors implicated include the growing diversity of the student body as a result of the widening participation agenda, the increased financial

pressures experienced by students in terms of tuition fees and debt, and the academic pressure in terms of results and employment (Thorley 2017; Barkham & Ors 2019). The challenges for young people involved in transitioning into, through and out of the university environment with potential accompanying changes in living arrangements and support networks are increasingly being recognized (Cage & Ors 2021).

The introduction of Rutland's Student Wellbeing Advice Centre has significantly increased the capacity of the university to offer a range of wellbeing and mental health-related services (including signposting to the University's Health Centre for longer term interventions). However, its team still frequently refers to being overstretched and underfunded, leaving its members unable to fully meet student demand. Although there is increasing evidence that problems with wellbeing can contribute to students underperforming academically and issues with retention (Thorley 2017), there is still some ambivalence within the university's senior management team about devoting more resources to wellbeing provision, given the wider financial pressures faced by the higher education sector.

Within Rutland Law School itself, it is the aforementioned personal tutors who remain the key source of support for students. A number of these have now undertaken the university's optional mental health first aid training to assist them in handling increased numbers of distressed students who appear regularly within their office hours. Recent years have seen wider calls within the higher education sector for a 'whole university' approach to mental health and wellbeing, suggesting ways to integrate wellbeing considerations in learning, teaching and the curriculum (Houghton & Anderson 2017; Hughes & Spanner 2019). To the extent that awareness of this has penetrated Rutland Law School, there has been some resistance, on the grounds that it is important not to over-inflate issues with wellbeing and that it is best left to experts in the area (or what is the Wellbeing Centre for?).

The staff wellbeing services at Rutland do not have the shiny visibility of the Student Wellbeing Advice Centre. However, they do have an increasing role as pressures on both academic and professional support staff increase (Collier, this volume). In fact, the student ambassadors are not aware of their existence so it cannot form a part of the campus tour, perhaps somewhat to the relief of the Marketing and Student Recruitment Team who are keen to focus attention upon staff's excellence in teaching and research.

The other facilities in The Hub are open plan. There is a desk for those seeking help with student finance, and there is a student job shop, an

accommodation information desk, an IT services student outpost (because the library, where most of this service is located, is at the other end of the campus) and a general reception. The Hub is not busy, but there is a steady stream of students coming and going through the opaque glass door seeking the services of the Wellbeing Team.

[F] OUR INFORMATION HUB ENABLES YOU TO ACCESS THE LATEST DIGITAL AND HARD COPY RESOURCES

Exiting The Hub, the student ambassadors now move the tour, and its somewhat weary participants, towards the main campus library. Twining identified the library as the centre of the law school, agreeing with Dean Langdell that ‘most learning about law centres on books’ (Twining 1994: 91). The emphasis on the large number of books held in law school libraries is a noticeable feature of the chapter on libraries in *Blackstone’s Tower*. While the library at Rutland does house books, less space is devoted to them than in 1994, due to the need to create ‘informal learning spaces’, individual and group study ‘pods’, a huge room full of computers for student use and a cafe, as the university library has responded to the variety of ways in which academics and students now do their work—in silence and in private, in groups, with their own technology and with technology supplied by the library (Lewis 2017: 161). The law section of the library is small. The shelves are mostly occupied by multiple copies of textbooks; there are considerably less monographs. There is a striking absence of law reports (in fact, the moot courtroom in the Law School contains a bigger selection of law reports than the library). There is one narrow shelf where journals used to be. Some old copies still linger there, but a sign informs visitors that due to space and cost the library’s journal collection now exists solely online. In transferring to digital resources Rutland is following a trend that can be seen in many other university libraries (Armstrong & Ors 2002: 216). The desks in the law section are occupied by students behind laptop screens; none of them are reading books. The group study pods are all full of students apparently engaged in collaborative projects (a form of working not permitted in the library in 1994).

Observing the library and the people within it, it is impossible to tell who is or is not a law student. The behaviour is similar across the disciplines, at least those housed on the social science and humanities floors. Most students are elsewhere, and, when they do use the library, it is to work in groups in the small rooms or to make the best of the reliable and strong wifi connection in the space. The majority of books remain on

their shelves because many textbooks and all required primary sources of law can be accessed electronically. Rutland's students seldom look at monographs except when they are working on their assessments (and not always then). Students may well be 'in the library', but they are in the library from the comfort of their bedrooms, from the social and study spaces provided, on their train journey home or from the classrooms during a lecture or workshop. In *Blackstone's Tower*, Twining anticipated the rise of information technology, commenting that the traditional law library would soon be obsolete. 'The virtual law library will soon be upon us' he predicted (Twining 1994: 117). This was a remarkably prescient observation.

It certainly seems that the library gives us an insight into some of the biggest differences between Rutland then and now. As Brophy commented in his comprehensive introduction to academic libraries nearly 20 years ago: 'There can be no doubt that information and communications technologies have been the biggest influence on academic library development during the last decade' (Brophy 2005: 95). The move to invest in electronic resources brings with it a number of problems, not least cost, as reflected in a recent campaign complaining about the cost of e-textbooks (E-book Campaign 2020). Ironically, while many universities have seen the increasing use of online materials as an opportunity to reduce the number of staff employed in libraries, students (and staff) have greater needs than ever for training, since they do not necessarily possess the skills they need to use these new resources effectively (Hurst 2013: 405). The availability of electronic material might suggest that the need for physical library space is much less important (Shabha 2000). However, recent empirical research into the post-pandemic university by Deshmukh (2021) suggests that students still value the social aspects, sense of shared experience and the routine afforded by their physical presence on campus. Despite the changes in user behaviour which have taken place since 1994, it appears that the library still plays a central role in student life.

[G] OUR LAW SCHOOL RANKS HIGHLY FOR STUDENT SATISFACTION

We arrive at the Law School. Rutland's Denning House no longer houses the Law School. The new Lady Hale Building is purpose-built and looks strikingly modern. The glass-fronted building houses spaces for small group work, for workshops and for lectures. All rooms have computers and multiple screens, some have whiteboards, but there are never any

pens. The three round Harvard-style lecture theatres (intended to facilitate interactive teaching) are mostly used as seminar rooms because with a capacity of 30, 45 and 80 seats, full year cohorts do not fit in them. It was this fact, coupled with the School's ability consistently to meet its recruitment targets, that allowed the head of the law school to persuade the university to build the new Elizabeth Fry Lecture Theatre.

The coffee shop, which is located on the ground floor of the building, next to the main entrance, is busy, as are the social spaces on every floor where students mingle while waiting for their next class or meeting. The building also houses the moot courtroom which features in all prospectuses and is the star of the open day campus tour. In addition to being an extracurricular activity, mooting is used as a form of assessment in a third-year optional module. The student ambassadors are very enthusiastic about mooting and also about the opportunity to participate in the recently established Rutland Law Clinic.

Staff offices are spread over the third and fourth floors. Most house individual academics, although others are shared by people whose role is focused on teaching. The office doors have an official QR code so that students can use their phones to make an appointment with a tutor. There are no noticeboards to guide students to events, since paper notices have been designated a fire hazard. Instead, TV monitors show a rolling slide pack highlighting staff research success and impact, and advertising lecture series and workshops. It is taken for granted that, along with (far too many) emails, which are primarily about university business, social media will provide an additional means of communication with students; it has become part of everyday life (Selwyn & Stirling 2016: 2). The Student Law Society and the Law School both have Twitter and Facebook accounts; the Student Law Society also has an Instagram account, while the school has a Linked-In account (primarily for the benefit of its alumni). These accounts are used to advertise events such as careers workshops and social gatherings, and also to raise the profile of the school by highlighting student and staff achievements—success in mooting competitions and scholarships to study at the Bar, the award of large grants to staff and appointments as advisors to various government bodies have all featured recently. The secretary of the Student Law Society says she does not know how anyone managed to organize anything before Facebook was available (Stirling 2016: 110).

As the ambassadors lead their charges through the corridors of the Law School, the portraits which adorn the walls (all safely confined behind glass to comply with the fire regulations) reflect a stereotypically

masculine image of the legal profession (Godden-Rasul 2019: 418). Most of the pictures are of white male judges that mean little to the students walking by. In this regard, little has changed since Twining noted in 1994 that ‘the icons and emblems of the law school world are almost inevitably inward-looking, homogeneous, male and dull’ (Twining 1994: 72). A portrait of Lady Hale is the only image which deviates from this pattern. Although there have been other female justices in the Supreme Court, none of them have made it onto the walls of Rutland’s Law School, and there appears to be no prospect of Rutland following the example of some other law schools, which have taken conscious steps to ensure there are images of a much more diverse range of legal people on their walls (Godden-Rasul 2019: 424).

As with Twining’s description of Rutland, there is little here which distinguishes the Law School from any of the other schools in the humanities and social sciences. The Business School, which sits next door, looks remarkably similar and once inside is almost indistinguishable, apart from the absence of legal portraits and a moot courtroom. Indeed, the Law School and Business School together make up one Faculty, on the grounds that they are both ‘vocational’ qualifications. This characterization of their discipline is greeted with some ambivalence by many of the Law School academics, who hold a long-standing if somewhat vague commitment to liberal and socio-legal forms of legal education (Cownie 2004; Guth & Ashford 2013). At the same time, the last couple of years have been notable for the significant energy and debate expended upon the extent to which and in what ways the degree programmes could or should be adapted to the demands of the forthcoming Solicitors Qualifying Examination. The student ambassadors extol the range of modules offered by the school, from drug use to gender-based violence to jurisprudence, but are also enthusiastic about the employability initiatives the school offers, particularly those involving visits from local and larger law firms. When asked by some of the parents about their own career intentions, all the ambassadors say that they want to become solicitors in City firms. Their characterization of studying law as a step towards entering the legal profession is typical of many law students, who have a much more vocational orientation than many of their lecturers (Hardee 2014). This difference of perspective as between staff and students was noted by Twining too (Twining 1994: 74).

Heading through the Law School’s moot courtroom for the final part of the tour, the group is ushered into the Rutland Law Clinic. This is housed in a suite of rooms including smaller offices for client interviews and team meetings, plentiful filing cabinets and shelves of lever-arch files (still no

pens) and a small but neat reception area for clients. Despite clinical legal education having a long history generally (Giddings & Ors 2011), Rutland Law School's interest has developed significantly since the early 2000s, drawing on a growing literature emphasizing its pedagogical advantages (see, for example, Brayne & Ors 1998). This follows a similar trajectory to other Law Schools in the UK, with a significant growth taking place in recent years (Carney & Ors 2014; Sandback & Grimes 2020). The student ambassadors are very positive about the opportunities to gain 'real-life' experience of advising clients and show a genuine enthusiasm for being able to assist struggling individuals. This ends the tour on a positive note as its participants slowly drift out of the Lady Hale Building grasping their campus maps and prospectuses and attempting to absorb their whistlestop tour of Rutland in the 21st century.

[H] CONCLUSION

Although there is a tacit assumption within Twining's trip to Rutland Law School that the student body are present, students are largely treated as a homogeneous grouping (the 120 LLB students, for example) rather than being afforded the rich fictional ethnography which characterizes *Blackstone's Tower's* description of its staff and physical setting. This was probably partly due to the space/time constraints of the Hamlyn Lecture format, since several pages of the Law School chapter are devoted to students. However, it is also because Twining's focus was on 'law school culture', so that his discussion of students focuses on the apparent disjuncture between the vocational intentions of law students and the actuality that less than 50 per cent of Rutland law graduates would follow a legal career for more than five years (Twining 1994: 75). It is the increased emphasis on 'the student experience' which means that the student perspective has become a much more important part of reflecting on *Blackstone's Tower* today.

References

- Ali-Choudhury, R, R Bennett & S Savani (2009) 'University Marketing Directors' Views on the Components of a University Brand' 11 *International Review on Public and Nonprofit Marketing* 1-6.
- Armstrong, C, L Edwards & R Lonsdale (2002) 'Virtually There? E-books in University Libraries' 36(4) *Program: Electronic Library and Information Systems* 216-227.

- Baker H & K Sela (2018) 'The Role of the Student Ambassador and its Contribution to Developing Employability Skills: A Creation of Outward Facing Work Roles' in D Morley D (ed) *Enhancing Employability in Higher Education through Work Based Learning* London: Palgrave Macmillan 193-211.
- Barkham, M, E Broglia, G Dufour & Ors on behalf of the SCORE Consortium (2019) 'Towards an Evidence Base for Student Wellbeing and Mental Health: Definitions, Developmental Transitions and Data Sets' 19(4) *Counselling and Psychotherapy Research* 351-357.
- BBC News (2015) '[Bristol University's "Puppy Room" to Combat Exam Stress](#)'.
- Brayne, H, N Duncan & R H Grimes (1998) *Clinical Legal Education: Active Learning in your Law School* Oxford: Blackstone Press.
- Broadbent, Graham & Pamela Sellman (2014) 'Information, Information, Information ... Overload?' 48 *The Law Teacher* 359-366.
- Brophy, P (2005) *The Academic Library* 2nd edn London: Facet Publishing.
- Budd, R (2017) 'Undergraduate Orientations towards Higher Education in Germany and England: Problematizing the Notion of "Student as Customer"' 73 *Higher Education* 23-37.
- Cage E, E Jones, G Ryan, G Hughes & L Spanner (2020) '[Student Mental Health and Transitions into, through and out of University: Student and Staff Perspectives](#)' *Journal of Further and Higher Education*.
- Carney, D, F Dignan, R Grimes, G Kelly & R Parker (2014) *The LawWorks Law School Pro Bono and Clinic Report 2014* London: LawWorks.
- Cownie, F (2004) *Legal Academics Culture and Identities* Oxford and Portland OR: Hart Publishing.
- Dillon, K, M McGowan & H Wang (2008) 'How Effective are Institutional and Departmental Systems of Support? Insights from an Investigation into the Support Available to Students at One English University' 13(3) *Research into Post-Compulsory Education* 281-293.
- Deshmukh, J (2021), 'Speculations on the Post-pandemic University Campus – A Global Inquiry' 15(1) *Archnet-IJAR* 131-147
- [E-book Campaign](#) (2020).
- Edwards, B (2013) *University Architecture* Abingdon: Routledge.

- Foroudi, P, Q Yu, S Gupta & M Foroudi (2019) 'Enhancing University Brand Image and Reputation through Customer Value Co-creation Behaviour' 138 *Technological Forecasting and Social Change* 218-227.
- Gartland, Clare (2015) 'Student Ambassadors: "Role-Models", Learning Practices and Identities' 36(8) *British Journal of Sociology of Education* 1192-1211.
- Giddings, J, R Burridge, S Gavin & C Klein (2011) 'The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada and Australia' in F Bloch (ed) *The Global Clinical Movement: Educating Lawyers for Social Justice* Oxford: Oxford University Press.
- Godden-Rasul, N (2019) 'Portraits of Women of the Law: Re-envisioning Gender, Law and the Legal Profession' 39(3) *Legal Studies* 415-431.
- Guth, J & C Ashford (2014) 'The Legal Education and Training Review: Regulating Socio-legal and Liberal Legal Education?' 48(1) *The Law Teacher* 5-19.
- Hardee, Melissa (2014) *Career Expectations of Students on Qualifying Law Degrees in England and Wales* York: Higher Education Academy.
- HESA (Higher Education Statistics Agency) (2021) [Higher Education Student Statistics: UK, 2019/20 – Notes](#), Figure 19: HE Student Enrolments by CAH Level 1 Subject and Sex – Academic Years 2018/19 to 2019/20.
- Houghton, A M & J Anderson (2017) *Embedding Mental Wellbeing in the Curriculum: Maximising Success in Higher Education*.
- Hughes, G & L Spanner (2019) *The University Mental Health Charter* Leeds: Student Minds.
- Hurst, S (2013) 'Current Trends in UK University Libraries' 114(9/10) *New Library World* 398-407.
- Ibrahim, A K, S J Kelly, C E Adams & C Glazebrook (2013) 'A Systematic Review of Studies of Depression Prevalence in University Students' 47(3) *Journal of Psychiatric Research* 391-400.
- Insight Network (2019) [Student Mental Health Survey 2018](#).
- Jamieson, P (2003) 'Designing more Effective On-campus Teaching and Learning Spaces: A Role for Academic Developers' 8(1-2) *International Journal for Academic Development* 119-133.

- Krezel, J & Z A Krezel (2017) 'Social Influence and Student Choice of Higher Education Institution' 7(2) *Journal of Education, Culture and Society* 116-130.
- Lee, C H L, Y W Cheng & A Depickere (2003) 'Comparing Smart Card Adoption in Singapore and Australian Universities' 58 *International Journal of Human-Computer Studies* 307-325.
- Lewis, D (2017) 'Library as Place' in T Gilman (ed) *Academic Librarianship Today* Lanham, Boulder, New York, London: Rowman & Littlefield 161-170.
- McCann, L, N Hutchison & A Adair (2019) 'External Funding of Major Capital Projects in the UK Higher Education Sector: Issues of Demand, Supply and Market Timing?' 36(1) *Journal of Property Research* 97-130.
- Menis, S (2020) 'The Liberal, the Vocational and Legal Education: A Legal History Review – from Blackstone to a Law Degree (1972)' 54(2) *The Law Teacher* 285-299.
- Mirza, A & K Alghathbar '[Acceptance and Applications of Smart Cards Technology in University Settings](#)' 2009 Eighth IEEE International Conference on Dependable, Autonomic and Secure Computing, Chengdu, China.
- Murphy, J, R Lee & E Swinger (2013) 'Student Perceptions and Adoption of University Smart Card Systems' in A Mesquita (ed) *User Perception and Influencing Factors of Technology in Everyday Life* Hershey PA: IGI Global 142-157.
- Naudé, P & J Ivy (1999) 'The Marketing Strategies of Universities in the United Kingdom' 13(3) *International Journal of Educational Management* 126-136.
- Norton, S & M Tibby (2020) *Frameworks for Enhancing Student Success: Embedding Employability* York: AdvanceHE.
- [Office for Students](#) (2021).
- Potschulat, M, M Moran & P Jones (2021) "'The Student Experience" and the Remaking of Contemporary Studenthood: A Critical Intervention' 69(1) *The Sociological Review* 3-20.
- Rutter, R, S Roper & F Lettice (2016) 'Social Media Interaction, the University Brand and Recruitment Performance' 69 *Journal of Business Research* 3096-3104.

- Sandback, J & R Grimes (2020) *LawWorks Law School Pro Bono and Clinic Survey 2020* London: LawWorks.
- Selwyn, N & E Stirling (2016) 'Social Media and Education ... Now the Dust Has Settled' 41(1) *Learning, Media and Technology* 1-5.
- Shabha, G (2000) 'Virtual Universities in the Third Millennium: An Assessment of the Implications of Teleworking on University Buildings and Space Planning' 18(5-6) *Facilities* 235-244.
- Sommerlad, H, S Harris-Short, S Vaughan & R Young (2015) 'The Futures of Legal Education and the Legal Profession' in H Sommerlad, S Harris-Short, S Vaughan & R Young (eds) *The Futures of Legal Education and the Legal Profession* Oxford: Hart Publishing 1-22.
- Stirling, E (2016) 'Technology, Time and Transition in Higher Education – Two Different Realities of Everyday Facebook Use in the First Year of University in the UK' 41(1) *Learning, Media and Technology* 100-118.
- Strevens, C (2020) 'The Wrong Message: Law Student Well-being in the Contemporary Higher Education Environment' in E Jones & F Cownie (eds) *Key Directions in Legal Education: National and International Perspectives* Abingdon and New York: Routledge.
- Thorley, C (2017) *Not by Degrees: Improving Student Mental Health in the UK's Universities* London: IPPR.
- Waite, Richard (2019) 'Has the University Building Gold Rush Run its Course?' *Architects' Journal* 31 January.
- Ylonen, Annamari (2010) 'The Role of Student Ambassadors in Higher Education: An Uneasy Association between Autonomy and Accountability' 34(1) *Journal of Further and Higher Education* 97-104.

BUILDING ACCESS ROUTES INTO BLACKSTONE'S TOWER: INCLUDING DISABILITY PERSPECTIVES IN THE LIBERAL LAW SCHOOL

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Abstract

Disability, and its relationship to and relative absence within the English university law school permeates *Blackstone's Tower*, from Rutland's rickety lift and law library filled with inaccessible print texts to the recognition that minority perspectives and 'real-life' applications of law are missing from the curriculum. This article explores the importance of mainstreaming disability within curriculum content and design, to ensure that staff and students receive the inclusive experience they are entitled to. It will also explore the need to support staff, both in understanding their roles in providing access and enabling staff and students with disabilities to disclose their disability status and access any support that they might need.

Keywords: disability law; liberal education; proactive critical citizenship; inclusive teaching.

[A] INTRODUCTION

According to the Higher Education Statistics Agency (HESA) data, increasing numbers of students with disabilities are entering universities to study law in the UK, with numbers rising from 10,910 in 2017/2018 to 12,295 in 2018/2019 (HESA nd). Yet, awareness of the legal rights of people with disabilities remains low in the legal services sector, as well as amongst people with disabilities and civil society generally (House of Lords 2010). The changes to the provision of disabled student allowances (DSAs) in 2012 place more responsibility onto institutions and teaching staff to meet the needs of students with disabilities at the point of design and delivery of content. Despite this, there is little support for

¹ Thank you to Professor Fiona Cownie and Dr Emma Jones for their feedback on initial drafts of this article. Any remaining errors are my own. Thank you also to Professor Anthony Bradney and Dr Eliza Varney, who supervised my doctoral thesis which explored many of the issues discussed in this paper.

staff in interpreting, understanding and implementing these new duties in practice (Cameron & Ors 2018).

This context highlights the need and opportunity law schools have to engage with disability. Engaging in this way will encourage legal educators to answer one of the main questions posed in *Blackstone's Tower*, 'What are law schools for?'. This article will argue that disability engages both the liberal and the vocational educational objectives of the law school. By considering each in turn, it will demonstrate that recent and continuing developments within disability law provide a rich seam for research and scholarship within liberal legal education. At the same time, there is an important role for discussions around disability in vocational legal education. Vocational regulatory bodies are increasingly focusing on the practitioner's ability to provide access to legal services for people with disabilities (Bar Standards Board (BSB) 2018; Counsel 2019; Solicitors Regulation Authority (SRA) 2019; BSB 2020).

This article will then move on to focus upon the role of the jurist, arguing that disability offers valuable opportunities for external engagement. It will also consider the role of students, suggesting the ability to mainstream disability perspectives throughout the curriculum provides Twining's real-world engagement with the law while guarding against the lack of direction and external monetarization that Bradney fears (2003: 77-78). It will then broaden out the discussion to consider the ways in which universities generally could offer a template demonstrating how employer and employees could approach disability and increase awareness of particular issues in the employment context. The article will conclude that disability is of relevance within all facets of legal education, both liberal and vocational, for both jurists and students and also within the wider university as an exemplar for the workplaces of the future.

[B] LIBERAL LEGAL EDUCATION

The Nature of Liberal Legal Education

The literature indicates that, in the majority of law schools within the UK, liberal education is merely a signifier for non-vocational education that is not regulated by professional bodies (see, for example, Hepple 1996: 471-477; Bradney 2003: 31-34; Cownie 2003: 159-161; Cownie 2004: 30-35; Stolker 2014: 130-135, 137-141; Quality Assurance Agency (QAA) 2019). Cownie (2011: 129-132) and Burrridge and Webb (2007: 90-96; 2008: 264-265) identify that this superficial engagement with liberal education comes from a lack of understanding of educational

theory in law schools and in the teacher training offered by universities. Such an understanding is necessary to engage with the issues that a liberal education might raise. Guth & Ashford argue that socio-legal and liberal approaches to law degrees and inclusion of broader issues (including disability) are possible under the Legal Education and Training Review 2013. Still, academics must argue for this to prevent increasing colonization by the professions driving for vocationalism (Guth & Ashford 2014: 18-19). For Leavis, the aim of liberal education was to put both students and society in touch with the humane centre that would influence their way of looking at the world by inculcating within students a sense of sensitivity and sensibility, which enables them to produce sensitive and precise responses based on intelligence and integrity in terms of analysis and building their arguments (1943: 33-38). Students must develop their arguments rather than rehearse and repeat those of others (Bradney 1999: 4-5). By restricting students to a pre-ordained notion of the humane centre, Leavis may be undermining the idea of a genuinely liberal education, which values and encourages students to process information and form their own opinions. Bradney is critical of Leavis' conception of culture as something that excludes those who do not 'belong' (Bradney 1999: 4-5). These exclusion issues within the university are becoming more prevalent within the 'decolonizing the curriculum' movement (Charles 2019: 24). Finkelstein highlighted the tendency for there to be a 'Berlin Wall' constructed around disability studies, which has a tendency to create a further barrier between the understanding of disability and divorces it from its social context (Finkelstein 1998: 28-49). Given that the dominant legal approaches to disability are based on either social (Oliver 1990: 22; Barnes & Oliver, 2012: 11-14) or human rights (Degener 2014: 1-8) models of disability, which argue that the barriers faced by people with disabilities are as a result of society's inability to alter social, architectural, attitudinal or policy practices to accommodate their needs and a failure to recognize discrimination as a human rights issue, it would be inconsistent and counterproductive to sideline discussions of disability into separate courses. Instead, it would be more useful to both staff and students in university law schools to mainstream disability discussions throughout the core curriculum and into various modules (Pearson 2018). Disability discussions could be mainstreamed in many different ways. The following examples are intended to illustrate the variety of approaches which could be adopted.

Mainstreaming Disability in the Curriculum

Disability could be introduced into the teaching of tort law via discussion around negligence concerning cases of 'wrongful birth' and the approach to awarding damages in decisions such as *MacFarlane and Another v Tayside Health Board* (1999). In *MacFarlane*, Lord Millett stated: 'First, it is said that the birth of a healthy baby is not harm but a blessing. It is "a priceless joy" and "a cause for celebration"; it is "not a matter for compensation".' This statement appears to promulgate negative images of disability as a personal tragedy or medical issue by suggesting that the birth of an unhealthy child is a misfortune, as characterized by early conceptions of disability (Sullivan 1991): whereas later cases, such as *Parkinson v St James and Seacroft University Hospital NHS Trust* (2001), appear to embrace social model thinking around disability (Sullivan 1991), acknowledge the additional financial costs of disability and recognize that compensation can, when adequately framed, support rather than violate dignity by ensuring the child can receive necessary care and support. *Meadows v Khan* (2017) build on the precedent in *Parkinson*, finding that damages could be awarded for the cost of an unrelated additional disability, autism, provided that, but for the defendant's negligence in failing to test for a genetic disability, in this case haemophilia, the mother would not have continued the pregnancy.

In *McKay v Essex Area Health Authority* (1982), the court decided that to label a disabled child's life as wrongful and recoverable damage would violate the sanctity of human life and therefore the claimant could not be compensated. Discussion of such a decision would enable students and staff to consider the potential difficulties of viewing disability through an entirely economic lens, particularly in terms of quantifying the worthiness of life. It could also be used to highlight the dangers that can happen when this occurs and is supported by both policy and law, as seen in action in the Nazi concept of people with disabilities as 'useless eaters' (Pearson 2018: 273-275).

Lawson offers an insight into how disability-specific issues could be introduced in land law teaching (Lawson 2005). She suggests that this could be done through a consideration of the Scottish cases of *Middletweed v Murray* (1989) and *Drury v McGarvie* (1993) concerning easements. *Middletweed* dealt with the right of way to a riverbank for people with disabilities who owned fishing rights and who could not access the bank on foot but only by vehicle. The difficulty arose because the implied easement meant that there was no express provision for vehicle transport. The question in the case was whether vehicle access was necessary for the

fishing rights' owners to have full beneficial use. The argument advanced by the anglers was that vehicle access was required for their practical use, but this was rejected on the basis that the implied easement related to the needs of a person of average strength and mobility, who would not need vehicular rights, which Lawson argues prevented them from accessing their rights (Lawson 2005: 266-67). In *Drury*, the claimants were an elderly couple with disabilities who accessed their cottage by a track crossing farmland they had the right of way over. However, the owner of the farmland placed gates over the track, which were heavy. The physical impairments of the occupants of the cottage meant that they were unable to open the gates rendering them virtually housebound (Lawson 2005: 267). Consequently, they argued that the gates constituted an obstruction that the landowner should remove to give them access. The claimants in *Drury* were allowed the option to make adjustments to the gates at their own expense (Lawson 2005: 267). There is an English precedent for considering implied rights of easement for particular groups of people, which could incorporate disability into the land law curriculum outside of the specialized landlord and tenant area. Within this area, disability could easily be covered as a protected characteristic under the activities covered by the Equality Act 2010 (EQA). Consequently, this provides an opportunity to explore the issues highlighted by Lawson in the general undergraduate law curriculum through problem questions in both tutorials and exams. Discussing *Middletweed* and *Drury* would go some way to mainstreaming disability in the core elements of the curriculum and offer the opportunity to explore liberal aspects of legal education through the issues raised relating to disability and access to social participation.

'Disability hate crime' or crimes where the victim's disability was a material motivation for the conduct could be discussed in criminal law (Crown Prosecution Service 2020), for example using the high-profile cases of Fiona Pilkington (HSAB 2009) and Gemma Hayter (WSAP 2011), which could be considered in the context of the Offences Against the Person Act 1861 and the Homicide Act 1957, respectively. Disability could be addressed within the context of public law in debating the passage of the Disability Discrimination Act 1996, where the absence of people with disabilities from the drafting process meant that many gaps in coverage and effectiveness remained (Gooding 1996: 3). This could be contrasted with the direct involvement of people with disabilities in the drafting of the United Nations Convention on the Rights of Persons with Disabilities 2006. The barriers to the possibility of engagement with parliamentary processes for people with disabilities could be explored

through discussions of the Crip the Vote movement across the globe (CripTheVote nd). A disability-inclusive liberal legal education could lead to students and staff developing the skills necessary to critique the legal response to disability and to call for change, creating a sense of 'proactive critical citizenship', which offers a new route to external engagement from the law school (Pearson 2018).

[C] VOCATIONAL LEGAL EDUCATION

In response to low-level awareness of the needs of clients with disabilities in the vocational sector, both the SRA and the BSB have launched initiatives examining how to address these issues (Counsel 2019; SRA 2019; BSB 2020). An SRA report found that respondents would welcome increased disability equality training and information about legal practitioners' experience concerning disability to address access barriers to services (SRA 2019: 9, 12, 13, 67, 76). The report also highlighted key issues, such as being able to access materials in appropriate alternative formats. The 'Disability at the Bar' report also highlighted significant problems with access to chambers and legal buildings (BSB 2018). Furthermore, the Legally Disabled project is focused on investigating the barriers to employment in legal services for people with disabilities in England and Wales (Legally Disabled nd). This project has made multiple recommendations, including increased awareness of reasonable adjustments and their application and transparency around the issues involved. Arguably, the inclusion of disability perspectives and consideration of key pieces of legislation and foundational concepts at the academic stage could help inculcate accessible practice in future practitioners (Cardiff Business School 2019: 6-11).

Moreover, the needs of prospective clients with disabilities could be considered in activities such as mooted and client interviewing. For example, participants could be tasked with carrying out an access audit for the proposed appointment and ensuring that information is provided to clients in accessible formats. The National Health Service (2016) Accessible Information Standard and the SRA (2017) plain English requirement could provide a basis for this approach.

[D] THE ROLE OF JURISTS AND STUDENTS

Twining highlights the importance of ensuring that law schools develop an environment whereby both academics and other community members can participate in a variety of activities outside of the law school (1994: 130)—contributing to government consultations and engagement with law reform processes. Twining also emphasizes the importance of students

and society understanding that law is a participatory discipline (1994: 128). However, participation needs to be handled carefully in the context of education to avoid the challenge that students would be vulnerable to indoctrination by their educators. To guard against this it is important that students are made aware of teachers' and others' values so that they can recognize and navigate which they choose to absorb or share and which they choose to jettison and why, based on reasoned assessment (Freire 2000: 87). Freire recognized the importance of this awareness in order to ensure those who were previously oppressed by existing educational and social structures do not merely declare their own newly voiced values to be superior to any others without reasoned engagement and assessment and perpetuate the oppression they suffered, only this time as the perpetrators rather than the recipients (Freire 2000: 87). Some of the criticisms of the Disabled People's Movement for its failure to include young people with disabilities and variant experiences of both disability and activism in their activities illustrate Freire's concerns. Such behaviour has the potential to lead to stasis in terms of the development of the movement (Griffiths 2018: 121-122).

Proactive critical citizenship rather than 'activist' or 'active citizenship' necessitates genuine dialogue and reflection, embodying real respect for humanity to produce meaningful change (Pearson 2018). Ellison argues that citizenship is a critical avenue for the proactive defence of rights in the face of postmodern societal fracture and acknowledges multiple identities (Ellison 2000). Beckett challenges pluralist accounts of citizenship in relation to disability (2006: 162-191), suggesting that many people with disabilities do not conceive themselves as belonging to a distinct or united culture distinguished by disability status (2006: 171-172). She highlights that it is important not to assume that a select number of voices within social groups represent a group of people (2006: 174). Any attempts to discuss disability within a liberal legal education should acknowledge that the cases and issues discussed relate to the experiences of specific people with disabilities, while at the same time highlighting issues about the system surrounding disability rights. Beckett argues that what is necessary is a system to facilitate proactive engagement, which would lessen the need to engage defensively (2006: 182-183).

Jurists play a key role in these processes as sources of learning and inspiration for the students; it is important that students are exposed to sources of critical legal theory and jurisprudence. Critical theory's genesis within the social and political upheaval of the Second World War (Held 1980: 16-19) and the failure of Marxist theory to respond to issues outside its original ideas and consider the potential action and consciousness

of individuals makes it more suitable than pure Marxist theory for the critique and assessment of the impact of established social structures and processes in creating and maintaining relationships even when the utility of those relationships is questionable (1980: 20). Lukács (1970 and Korsch 1980; both cited in Held 1980: 22) argues that social position consciousness and challenging the social order relies on gaps between the actual and possible being exposed. Lukács identifies reification as a means of preventing people from developing this awareness by making social institutions, rules and behaviour appear unchangeable, preventing people from recognizing the unjust allocation of resources between groups within society (Lukács 1967). As future jurists, students could examine the reification of law, legal education, disability and the human rights framework to explore how these have the potential to maintain existing approaches to disability. Honneth considers reification as a psychological element within interaction when people fail to recognize the personal characteristics of other people within society and merely begin to see them as things and a means to an end (2005: 130, 131). This removes context from interactions and prevents people from questioning the potentially negative effects of it. Honneth also identifies external pressures and influences that arrange society to preserve prejudices or stereotypes, to prevent people from recognizing that these are created to fulfil the purpose of maintaining the social order (2005: 131-134). This approach is evident in the historical treatment of disability (Pearson 2018: 15-18). If Honneth's approach is synthesized with Hedrick's (2014: 178-189, 193), that reification exists outside of solely economic contexts, and law plays a role in this by presenting information as neutral and depoliticized. Arguably, the failure of undergraduate legal education to consider discourses around disability is itself an example of reification (Pearson 2018: 72). Hedrick builds upon Lukács' argument by accounting for reification within individual rather than society-wide interactions (ibid 193). Considering the impact of reification enables analysis of the legal approach to disability to encompass both the rhetoric and textual analysis of legislation and policy documents and consideration of the potential effects of intrapersonal translation of these into practice by individuals in continuing, maintaining and, in some cases, exacerbating weaknesses. However, Jütten (2010: 247-248) criticizes Honneth's argument as unworkable, arguing that it is impossible to treat people as things because this would be a moral injury (Jütten 2010: 247-248). Transforming reification from the subject of social interactions and commodity exchange to one of morality falls outside of understanding the concept as proposed by Lukács and Marx (Jütten 2010: 248-249). Arguably, Britain's legislative history concerning people with disabilities

and the acceptability of institutionalization (Shakespeare 2006: 11-14) is an illustration of Honneth's arguments.

In addition to jurisprudence, students should also be introduced to critical disability theory. Pothier and Devlin define critical disability theory as a response to 'the binaristic approach to disability [which] engenders a process of "othering" and categorization, when the more nuanced reality is that Disability might be better understood as a systemic and contextualised range' (Pothier & Devlin 2006: 5-6). They argue that disability has no essential nature but is socially created (2006: 5-6). The current focus on society over the individual's experience is disempowering and removes the role of people with disabilities from actioning change. Meekosha & Shuttleworth highlight critical disability studies' requirement for self-reflexivity and the revaluation of symbolic concepts such as participation and autonomy in response to changing contexts, but with a view to what has gone before (2009: 64-65). Therefore, any attempts to mainstream disability into the law school must recognize these challenges and the need to facilitate engagement between legal academics, activists and civil society organizations to ensure that all shades of experience are recognized. It is important to remember that students with and without disabilities may want to contribute to debates and calls for change concerning disability. It is crucial that, while we respect the disability movement's motto of 'nothing about us without us', we do not fall into the trap of perpetuating the othering of disability by having an unacknowledged 'them' in opposition to the 'us' (Pearson 2018: 62-63).

[E] A MICROCOSM OF SOCIETY

Universities and law schools also provide the potential to test out theories and approaches to disability within a microcosm of society (Twining 1994: 191-195). Consider that most universities are made up of offices, labs, theatres, libraries, sports and leisure facilities, housing, healthcare, employment and learning. This means that the university has the opportunity to examine and address the barriers present within these spaces. Furthermore, as universities in the UK are covered by the public sector equality duty (PSED), this requires public sector institutions to have 'due regard' to the need to eliminate discrimination, harassment and victimization and any other conduct that is prohibited by or under the EQA; advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it; and to foster good relations between people who share a relevant protected characteristic and those who do not share it (EQA, section 149). However,

the impact of the PSED has been criticized by Hepple (2010 19-24), who argues that the wording of the duty has created a tick-list approach focusing on procedure rather than outcome. Authorities are only required to show that institutions have considered elements of equality rather than achieving results. Consequently, Hepple argues that 'due regard' be replaced by an obligation to 'take such steps as are necessary and proportionate for the progressive realization of equality'. The disability-inclusive law school could work towards improving this within the context of the university by demonstrating a commitment to disability equality in terms of teaching, research, outreach and internal policy engagement, as well as by creating future employers and employees with an awareness of the duty and its impact.

Physical Inclusion

Twining highlights that the 'cramped' and traditional layout of the law school can also present barriers (1994: 71), which is a common experience for students with disabilities (Lukianova & Fell 2016: 2-5). O'Connor & Robinson argue that universities need to take a holistic, sustainable approach rather than using one-off initiatives to address issues driven by watchdogs or charities. They highlight that continued focus on cost-effectiveness in terms of access can adversely affect the student experience. Responsive policies result from involving people with disabilities rather than relying on experts (1999: 91). Fuller & Ors highlighted barriers facing students with disabilities at all stages of learning, from processing aural information in lectures, reading and writing at the necessary speed in seminars, examinations (2004: 303-318) and oral presentations (2004: 308-310), and difficulty with information sharing between disability services and lecturers (2004: 313). In terms of physical access to the university environment, there is evidence that universities are encouraging staff to embrace a universal design framework when designing spaces. De Montfort University (2019) has committed to embedding universal design's principles into institutional policy; this is positive as it places accessibility onto the institutional agenda and embeds it into continuing professional development (CPD) for teaching staff. Universal design focuses on an approach to learning which permits multiple means of representation, multiple means of action and expression, and various means of engagement. Teaching materials should be accessible and fair, flexible, straightforward, consistent and explicit.

However, Kroeger (2016) and Lombardi & Ors (2011: 250-261) question how far the universal approach, which focuses primarily on physical interactions with the curriculum, addresses the attitudinal barriers facing

students with disabilities (Griful-Freixenet & Ors 2017: 1627-1649). Reeve refers to these experiences as psycho-emotional disablism, whereby people with disabilities are provided with ineffective adjustments and are left feeling doubly oppressed because they have failed to overcome a barrier, despite adjustments. Therefore, they internalize this, rather than those who made the adjustments taking responsibility for their failure (2014: 92-98). Kroeger expresses the belief that 'society is deliberately perpetuating many of its citizens' disablement'. She debates the use of the word 'deliberately' by exploring its synonyms and antonyms, arguing that the use of the term may seem harsh but what is the critical point is that society as an external model has a role to play in the disablement of individual members. She uses the analogy of students with disabilities moving into the 'rooms of power ... With the understanding, once inside that we want to rearrange the furniture, move some walls, use captions and electronic print, and generally move in as co-owners, rather than short-term tenants' (2016: 138).

The Covid-19 pandemic and the need to move to online teaching (Jisc 2020) has forced institutions to consider access to resources in non-traditional formats. Additionally, they have had to confront issues surrounding copyright that have long presented a barrier for alternative formats, which in turn has long been difficult for students with text disabilities due to copyright restrictions and arrangements (Pearson 2018: 240-245). Recorded online lectures have undermined some of the rationales behind resistance to using lecture capture technologies as an accessibility measure (Pearson 2018: 246-248). However, in so far as online teaching has helped address many issues with physical access, it has also created new ones, such as the difficulties encountered in making online teaching platforms accessible to students with sensory impairments. It is also essential to recognize the potential difficulties in making changes to older university buildings. However, the law school could become a centre for achieving physical improvement by encouraging and fostering innovation in the context of potential alterations and changes to layout, features and teaching styles. Additionally, by equipping students with the knowledge of their legal rights, the law school can actively help students achieve the co-ownership that Kroeger (2016) has identified.

Policy Inclusion

Universities can also offer both students and staff the opportunity to become involved in policymaking about disability via participation on internal committees as encouraged by the QAA (2018: 8-10). Beauchamp-Pryor argues that the effectiveness of such engagement depends on the

attitudes of those in positions of authority to ensure genuine involvement of people with disabilities (2012: 289). Barriers to involvement include disparities of power, inaccessible dominant discourses and the validity of the participation of students in terms of influencing and changing practices at an institutional level, as well as the timing of consultations to ensure that students could take part without jeopardizing their studies alongside their peers, issues of disability identity and stigma, and recognition and encouragement of those with 'invisible' disabilities (2012: 292). The inculcation of the ideas of proactive critical citizenship through the curriculum can redistribute some of the power between institutions and students; this may help them express their ideas through more formalized avenues such as the PSED under the EQA (Equality and Human Rights Commission 2017). The Disabled Student Stakeholder Group's development offers a new avenue for universities to engage students with disabilities in shaping policy and raising issues to be discussed. Moreover, given that policy consultation is one of the extracurricular activities highlighted by Twining in *Blackstone's Tower*, the law school is perfectly placed to offer training and experience on writing such documents for students (Twining 1994: 124-127).

Attitudinal Inclusion

Kendall (2016: 3) also highlights the need for disability equality training for staff. There is evidence that some staff members can view requests for reasonable adjustments with suspicion, seeing them as a way of disabled students seeking to gain an unfair advantage over their peers (Denhart 2008: 483-497; Harriet & Billington 2017: 1358-1372). Tinklin & Ors (2004) acknowledged the effect of a disconnect between the intention and goal of diversity policies and their implementation. Several authors identify difficulties facing students in accepting or appropriating a particular impairment or disability label to enable them to access support for their studies (Tinklin & Ors 2004); Konur 2006: 351-363). Another commonality across the literature is students' feeling that staff misunderstand their disability or impairments, or that they are likely to be accused of claiming reasonable adjustments as a means of gaining an unfair advantage (Olney & Brockelman, 2003: 12; Madriaga 2007: 405).

Though there is evidence to demonstrate that staff do want to assist students in overcoming barriers, it appears that they are sometimes unsure of how to do this and would appreciate more advice (Fuller & Ors 2004: 303-318; Burgstahler & Doe 2006; Cameron & Ors 2018: 224). It is crucial that any advice offered is readily accessible to academics and provided in a format which is easily understood by non-specialists, so

that it does not contribute unduly to their workload (Burgstahler & Doe 2006). Many institutions have developed website sections and manuals to assist staff with making their practice more inclusive (Manchester Metropolitan University 2012). Aguirre & Duncan discuss how staff and student collaboration and discussion about access needs to develop confidence on both sides by removing the fear of offending or doing the wrong thing. Disabled students' involvement means that adjustments can be tailored to their needs and overcome barriers (Aguirre & Duncan 2013: 531-551). Despite the value of collaboration, Dempster & Ors highlighted that this could be difficult to achieve without sufficient support and time from management to collaborate and respond to student feedback when designing courses (Dempster & Ors 2012: 135-147).

The Issue of Disclosure and Lack of Role Models

To facilitate attitudinal inclusion, universities and law schools must work together to address student concerns around the potentially negative impact of disability disclosure, such as the impact of stigma or stereotypical attitudes (Habib & Ors 2012). Rates of disclosure are gradually increasing due to various awareness-raising measures by disability support services (IES 2019: 3-6). Law schools could also support this by providing accessible summaries of equality legislation and its practical application within higher education for both staff and students. Accessible resources would increase confidence and expectations on both sides around how the implementation of adjustments would work in practice. Moreover, both students and staff with disabilities must have access to more role models, which can only be achieved by increasing diversity across various university roles. Measures could include ensuring that staff with both visible and invisible disabilities have the opportunity to perform in leadership, teaching and research roles and confirming that university marketing materials are reflective of the university's diversity (Brown & Leigh 2020: 93, 97, 157).

A Way to Join the Club?

In 2019, I secured Staff and Educational Development Association (SEDA) development funding with colleagues from Keele to develop a new immersive approach to disability awareness training to enable staff to experience some of the more abstract barriers facing students with disabilities in the teaching environment to assist them in addressing these in practice (Pearson & Ors 2020a: 21-23). The 'Lecture from Hell' programme is designed as a three-hour session, divided into three parts. The first hour requires attendees to voice their concerns around

implementing accessibility without fear of judgment from others. The team will address specific issues and or misconceptions as the session progresses. In this session, attendees will reflect on potential barriers in their praxis and discuss how they might be overcome. After a break to enable attendees to reflect on the session, the second hour will consist of a lecture on disability theory. In the lecture, they will experience first-hand the impact of these barriers on student learning. To achieve this, we will design a series of techniques utilizing technology to recreate some of the most commonly reported abstract and concrete barriers identified by students and the literature. A configurable lighting system emphasizes the difficulties faced by those with sensory and psychosocial issues. A restrictive audio setup simulates the experience of those with hearing difficulties. Specially adapted physical objects, such as hard to open books, weighted seating, Braille handouts and inaccessible slides, affect those with various conditions. We will therefore be able to provide specially designed training for the session leader to be able to show how staff can inadvertently create barriers (Pearson 2020). Being able to develop this research and approach in the context of my work within the law school and to work towards delivering these sessions to colleagues outside of the school through CPD avenues highlights how a disability-inclusive law school could become more connected to the university as a whole, by providing experience and training to both students and colleagues.

New Expectations and the Need for Support

DSA is a non-repayable, non-means-tested grant provided to students to meet the additional costs they incur due to the impact of their disability (Clark 2014). This has been available to students since 1990, and expenditure on DSAs has increased year on year along with increased rates of participation (Willettts 2014). As a result, in 2012, changes were introduced to maintain sustainability. Consequently, higher education institutions must ensure (and fund) students' access by making reasonable adjustments as per their EQA obligations rather than relying on DSAs to fund retroactive adjustments to design, such as the provision of support or assistive devices (Hubble & Bolton 2016: 12). These changes appear to have produced an anxious response within the sector: 59 per cent of students indicated that they did not feel confident in passing their course without the funding (Association of NMH Providers 2019: 2). A 2017 report by Gov UK refers to the 'risks' of failing to meet these obligations, including 'litigation' and 'reputational damage' (Gov UK 2017). Conceptualizing the failure to meet the new obligations as risks rather than missed opportunities is inherently negative and links

disability to danger rather than equality and inclusion. This attitude is an example of indirect stigma, which students fear, preventing them from disclosing their disabilities to the institution. This fear is also rooted in the difficulties that staff face in navigating the legal framework around disability equality, as exemplified in the article by Cameron & Ors (2018), which demonstrates the challenges that the fictional Dr James has in responding to a request for reasonable adjustment by a student, such as provision of directed reading lists, adjusted submission dates and modified assessments and the potential implication for standards. The Gov UK report also highlighted staff difficulties in understanding what constitutes a reasonable adjustment or how to accommodate these within the competence standards set for courses by the institutions and, where appropriate, by external regulators (Cameron & Ors 2018: 21-22, 24 and 25-27). Moreover, Cameron & Ors (2018: 224) highlight the difficulties that even law staff can have in interpreting and implementing reasonable adjustments. It is crucial that the law school demystifies and empowers both staff and students to utilize disability legislation and internally and externally achieve its aims and situate the law within its social and legal context to highlight its role and importance.

[F] CONCLUSION

Building access routes into the law school and including disability in the law curriculum present an opportunity to maximize the law school's strengths and address its weaknesses to bring it in from the institution's periphery while maintaining its independence. By nurturing staff and students who can both implement and critique the law, the law school can influence and drive change in the future. To achieve this, the law school must consider the place of disability perspectives within the curriculum and develop a collaborative approach with students and colleagues at the point of design and during the delivery of courses. This must be supported by the management and the wider institution by creating spaces where collaboration and review can flourish and is supported by time and the provision of appropriate CPD training. Moreover, the law school and its staff should be part of the development of these CPD courses to assist both external and non-specialist colleagues in understanding and implementing their duties under the EQA and the reforms to DSAs.

References

Aguirre, R & C Duncan (2013). 'Being an Elbow: A Phenomenological Auto-ethnography of Faculty–Student Collaboration for Accommodations' 33(4-5) *Journal of Teaching in Social Work* 531-551.

Association of Non-Medical Help Providers (Association of NMH Providers) (2019) '[Review and Comments from the Association of Non-Medical Help Providers of the: Evaluation of Disabled Students' Allowances](#)' Department for Education Research Report.

Bar Standards Board (BSB) (2018). '[Vulnerability Good Practices Guide 1: Factsheet 1: Enabling Access to your Service for Clients with Additional Needs](#)' London: BSB.

Bar Standards Board (BSB) (2020) '[Our Approach to Reasonable Adjustments](#)' London: BSB.

Barnes, C & M Oliver (2012) *The New Politics of Disablement* 2nd edn Basingstoke: Palgrave Macmillan.

Beauchamp-Pryor, K (2012). 'From Absent to Active Voices: Securing Disability Equality within Higher Education' 16(3) *International Journal of Inclusive Education* 283-295.

Beckett, A E (2006) *Citizenship and Vulnerability Disability and Issues of Social and Political Engagement* Basingstoke: Palgrave Macmillan.

Bradney, A (1999) 'Liberalising Legal Education' in F Cownie (ed) *The Law School – Global Issues, Local Questions* Aldershot: Ashgate.

Bradney, A (2003) *Conversations, Choices, and Chances: The Liberal Law School in the Twenty-First Century* Oxford: Hart.

Brown, N & J Leigh (eds) (2020) *Ableism in Academia: Theorising Experiences of Disabilities and Chronic Illnesses in Higher Education* London: UCL Press.

Burgstahler, S & T Doe (2006). '[Improving Postsecondary Outcomes for Students with Disabilities: Designing Professional Development for Faculty](#)' Seattle WA: University of Washington.

Burrige, R & J Webb (2007) 'The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School' 10(1) *Legal Ethics* 72-97.

Burrige, R & J Webb (2008) 'The Values of Common Law Legal Education Revisited' 42(3) *The Law Teacher* 263-269.

- Cameron, H & Ors (2018) 'Equality Law Obligations in Higher Education: Reasonable Adjustments under the Equality Act 2010 in Assessment of Students with Unseen Disabilities' 39(2) *Legal Studies* 204-229.
- Cardiff Business School (2019) '[Legally Disabled? The Career Experiences of Disabled People Working in the Legal Profession: Executive Summary of Key Findings and Recommendations](#)' Cardiff: Cardiff University.
- Charles, E (2019) 'Decolonizing the Curriculum' 32(1) *Insights* 24.
- Clark, G (2014) '[Higher Education: Student Support – Changes to Disabled Students' Allowances \(DSA\)](#)' Department for Business, Innovation & Skills & the Rt Hon Greg Clark MP.
- Counsel (2019) '[Disability at the Bar](#)' 22 August.
- Cownie, F (2003) 'Alternative Values in Legal Education' 6(2) *Legal Ethics* 159-174.
- Cownie, F (2004) *Legal Academics: Culture and Identities* Oxford: Hart.
- Cownie, F (2011) 'Twining, Teachers of Law and Law Teaching' 18(1-2). *International Journal of the Legal Profession* 121-138.
- [CripTheVote](#).
- Crown Prosecution Service (2020) '[Disability Hate Crime and Other Crimes against Disabled People – Prosecution Guidance](#)' London: Crown Prosecution Service.
- De Montfort University (2019) '[DMU's Sector-leading Support for Students Wins High Praise](#)'.
- Degener, T (2014) '[A Human Rights Model of Disability](#)'.
- Dempster, J & Ors (2012) 'An Academic Development Model for Fostering Innovation and Sharing in Curriculum Design' 49(2) *Innovations in Education and Teaching International* 135-147.
- Denhart, H (2008) 'Deconstructing Barriers – Perceptions of Students Labelled with Learning Disabilities in Higher Education' 41(6) *Journal of Learning Disabilities* 483-497.
- Ellison, N (2000) '[Proactive and Defensive Engagement: Social Citizenship in a Changing Public Sphere](#)' 5(3) *Sociological Research Online*.
- Equality and Human Rights Commission (2017) '[Public Sector Equality Duty](#)' London: Equality and Human Rights Commission.

- Finkelstein, V (1998) 'Emancipating Disability Studies' in T Shakespeare (ed) *The Disability Reader Social Sciences Perspectives* Oxford: Continuum.
- Freire, P (2000) *Pedagogy of the Oppressed: 30th Anniversary Edition* Oxford: Continuum.
- Fuller, M & Ors (2004) 'Barriers to Learning: A Systematic Study of the Experience of Disabled Students in One University' 29(3) *Studies in Higher Education* 303-318.
- Gooding, C (1996) *Blackstone's Guide to the Disability Discrimination Act 1995* Oxford: Blackstone Press.
- Gov UK (2017) '[Inclusive Teaching and Learning in Higher Education as a Route to Excellence](#)'.
- Griffiths, M (2018) 'These Days Are Ours: Exploring Young Disabled People's Experiences and Views of the Disabled People's Movement' PhD thesis Liverpool John Moores University.
- Griful-Freixenet, J & Ors (2017) 'Higher Education Students with Disabilities Speaking Out: Perceived Barriers and Opportunities of the Universal Design for Learning framework' 32(10) *Disability and Society* 1627-1649.
- Guth, J & C Ashford (2014) 'The Legal Education and Training Review: Regulating Socio-legal and Liberal Legal Education?' 48(1) *The Law Teacher* 5-19 .
- Habib, L & Ors (2012) '[Dyslexic Students in Higher Education and Virtual Learning Environments: An Exploratory Study](#)' 28 *Journal of Computer Assisted Learning* 574-584.
- Hampshire Safeguarding Adults Board (HSAB) (2009) '[Learning from Experience Database – Serious Case Reviews: Fiona Pilkington \(Leicestershire\)](#)'.
- Harriet, C & T Billington (2017). "[Just Deal with It": Neoliberalism in Dyslexic Students' Talk about Dyslexia and Learning at University](#)" 42(8) *Studies in Higher Education* 1358-1372.
- Held, D (1980) *Introduction to Critical Theory: Horkheimer to Habermas* London: Hutchinson & Co.
- Hedrick, T (2014) 'Reification in and through Law: Elements of a Theory in Marx, Lukács, and Honneth' 13(2) *European Journal of Political Theory* 178-198.

- Hepple, B (1996) 'The Renewal of the Liberal Law Degree' 55(3) *Cambridge Law Journal* 471-477.
- Hepple, B (2010) 'The New Single Equality Act in Britain' 5 *Equal Rights Review* 11-24.
- Higher Education Statistics Agency (HESA) (nd) 'What Do HE Students Study?: Personal Characteristics'.
- Honneth, A (2005) '[Reification: A Recognition-Theoretical View](#)' Tanner Lectures on Human Values, University of California, Berkeley March 14–16.
- House of Lords (2010) 'The Equality Act 2010: the Impact on Disabled People' Select Committee on the Equality Act 2010 and Disability.
- Hubble, S & P Bolton (2016) 'Reform of Disabled Students' Allowances in England' House of Commons Library Briefing Paper Number 7444.
- Institute for Employment Studies (IES) (2019) 'Review of Support for Disabled Students in Higher Education in England: Report to the Office for Students by the Institute for Employment Studies and Researching Equity Access and Participation' Brighton: IES.
- Jisc (2020) '[Statement on Access to Content in Response to COVID-19](#)' 20 March.
- Jütten, T (2010) 'What is Reification? A Critique of Axel Honneth' 53(3) *Inquiry* 235-256.
- Kendall, L (2016) '[Higher Education and Disability: Exploring Student Experiences](#)' 3(1) *Cogent Education*.
- Konur, O (2006) 'Teaching Disabled Students in Higher Education' 11(3) *Teaching in Higher Education* 351-363.
- Korsch, K (1970) *Marxism and Philosophy* London: New Left Books.
- Kroeger, S (2016) '[13th Annual Disability Lecture – The Power of Design: Inclusion or Exclusion?](#)' 25 April.
- Lawson, A (2005) 'Mind the Gap! Normality, Difference and the Danger of Disablement through Law' in A Lawson & C Gooding (eds) *Disability Rights in Europe: From Theory to Practice* Oxford: Hart 265-282.
- Leavis, F (1943) *Education and the University* 2nd edn Cambridge: Cambridge University Press.
- [Legal Education and Training Review](#) (2013).

- LegallyDisabled (nd) '[About "Legally Disabled?"](#)'.
- Lombardi, A & Ors (2011) 'College Faculty and Inclusive Instruction: Self-reported Attitudes and Actions Pertaining to Universal Design' 4(4) *Journal of Diversity in Higher Education* 250-261.
- Lukács, G (1967) 'History and Class Consciousness' [Marxists.org](#).
- Lukács, G (1971) *History and Class Consciousness* Cambridge MA: MIT Press.
- Lukianova, N & E Fell (2016) '[Support for Students with Disabilities in the UK Universities](#)' 28 *SHS Web of Conferences* 01066.
- Madriaga, M (2007) 'Enduring Disablism: Students with Dyslexia and their Pathways into UK Higher Education and Beyond' 22(4) *Disability and Society* 399-412.
- Manchester Metropolitan University (2012) 9(1) Autumn *Learning and Teaching in Action*: Themed Issue: [Equality and Diversity in Learning and Teaching](#).
- Meekosha, H & R Shuttleworth (2009) 'What's so "Critical" about Critical Disability Studies?' 15(1) *Australian Journal of Human Rights* 47-75.
- National Health Service (2016) '[Accessible Information Standard: Making Health and Social Care Information Accessible](#)'.
- O'Connor, U & A Robinson (1999) 'Accession or Exclusion? University and the Disabled Student: A Case Study of Policy and Practice' 53 *Higher Education Quarterly* 88-103.
- O'Hear, A & M Sidwell (2009) 'Introduction' in A O'Hear & M Sidwell (eds) *The Social Freedom: A Liberal Education Reader from Plato to the Present Day* Exeter: Imprint Academic.
- Oliver, M (1990) *The Politics of Disablement* Basingstoke: Palgrave Macmillan.
- Olney, M F & K F Brockelman (2003) 'Out of the Disability Closet: Strategic Use of Perception Management by Select University Students with Disabilities' 18(1) *Disability and Society* 35-50.
- Pearson, A V (2018) 'Through Merryman's Window: The Role of English Liberal Legal Education in Advancing Disability Rights' PhD Thesis, Keele University.

- Pearson, A V & Ors (2020a) 'Addressing Inclusive Teaching and Learning Environments Using Immersive Academic Workshops' *SEDA Educational Developments*.
- Pearson, A V & Ors (2020b) ['The Lecture from Hell: Changing Places with Students with Disabilities to Design Spaces that Do more than Tick Boxes'](#).
- Pothier, D & R Devlin (eds) (2006) *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* Vancouver: University of British Columbia Press.
- Quality Assurance Agency for Higher Education (QAA) (2018) 'UK Quality Code for Higher Education: Advice and Guidance: Student Engagement' Gloucester: QAA.
- Quality Assurance Agency for Higher Education (QAA) (2109) 'Subject Benchmark Statement' Gloucester: QAA.
- Reeve, D (2014) 'Psycho-emotional Disablism and Internalised Oppression' in J Swain, S French, C Barnes & C Thomas (eds) *Disabling Barriers – Enabling Environments* London: Sage.
- Rioux, M H & F Valentine (2006) 'Does Theory Matter? Exploring the Nexus between Disability, Human Rights, and Public Policy' in D Pothier & R Devlin (eds) *Critical Disability Theory: Essays in Philosophy, Politics, Policy, and Law* Vancouver: University of British Columbia Press.
- Sang, K (2017) 'Disability on Campus: The Challenges Faced and Change Needed' *Times Higher Education* 18 May.
- Shakespeare, T (2006) *Disability Rights and Wrongs* 1st edn London: Routledge.
- Solicitors Regulation Authority (SRA) (2017) ['Improving Access – Tackling Unmet Legal Needs'](#) London: SRA.
- Solicitors Regulation Authority (SRA) (2019) ['Reasonable Adjustments in the Provision of Legal Services: A Report for the Solicitor's Regulation Authority'](#) London: SRA.
- Stolker, C (2014) *Rethinking the Law School: Education, Research, Outreach, and Governance* Cambridge: Cambridge University Press.
- Sullivan, M (1991) 'From Personal Tragedy to Social Oppression: The Medical Model and Social Theories of Disability' 16 *New Zealand Journal of Industrial Relations* 255-272.

Tinklin, T & Ors (2004) 'Disabled Students in Higher Education' CES Briefing No 32 Edinburgh: Centre for Educational Sociology.

Twining, W (1994) *Blackstone's Tower: The English Law School – The Hamlyn Lectures* London: Stevens & Sons/Sweet & Maxwell.

Warwickshire Safeguarding Adults Partnership (WSAP) (2011) 'Serious Case Review: The Murder of Gemma Hayter 9th August 2010 Public Summary' Warwick: WSAP.

Willetts, D (2014) '[Higher Education: Student Support: Changes to Disabled Students' Allowances \(DSA\)](#)' Department for Business, Innovation & Skills & the Rt Hon David Willetts 7 April.

Legislation Cited

Council of Europe, European Convention on Human Rights 1948 (ECHR) Article 14

Equality Act 2010

United Nations Convention on the Rights of Persons with Disabilities (2006) Preamble, b and d.

Cases Cited

Donovan v Rana [2014] 1Pe CR 23 (CA).

Drury v McGarvie [1993] SLT 987

MacFarlane and Another v Tayside Health Board: HL 21 October 1999

McKay v Essex Area Health Authority [1982] 2 All ER 771

Meadows v Khan [2017] EWHC 2990 (QB)

Middletweed v Murray [1989] SLT 11

Parkinson v St James and Seacroft University Hospital NHS Trust [2001] EWCA Civ 530

SHOULD WE RETHINK THE PURPOSES OF THE LAW SCHOOL? A CASE FOR DECOLONIAL THOUGHT IN LEGAL PEDAGOGY

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Abstract

This article argues that there is a need for more transdisciplinary and decolonial approaches to knowledge production in law. These approaches need to go beyond a focus on diversity which only seeks ways for marginal voices and experiences to be absorbed into a hierarchized structure of knowledge production that in turn [re]produces a hierarchized world. New ways must be sought to ensure that, in reconsidering the purposes of law and law schools, legal education does not reproduce inequalities but unravels them. Thereby legal education may do more than just add to and diversify the profession but may aspire to transform the world.

Keywords: decolonization; legal education; decolonial thought.

[A] INTRODUCTION

When we think of the purpose of law schools, legal academics are often caught somewhere between the seemingly opposing positions of 'legal education as certification', on the one hand, and 'legal education as a means of societal transformation' on the other (Twining 1994: 58). Put differently, in engaging with legal pedagogy, our work is often infused by the need to mix the ends of social justice/order/transformation with the need to produce competent legal professionals, as well as the suggestion that there is a tension between these two ends. This suggested tension is often exacerbated by assumptions of neutrality and universality in operationalizing the aims of legal education especially when such education is focused on doctrinal law. Thus, these assumptions obscure the means of achieving social change. Our supposedly neutral-universal position in legal education predominated by positivism stands in opposition to the ends of social justice. This is because our pedagogy remains perpetually in support of power and the injustices power produces. Consequently, it

could be contended that diversity in legal education would be a good way of bringing in a variety of voices into the field to ensure social justice. This has been the approach of many law schools in the UK, as they attempt to increase gender, class and ethnic diversity in their student and staff bodies. However, in this essay, I argue that to attain any transformative aims of legal education, we need to go beyond diversity and confront our discipline's entanglements with power. If the discipline instinctively aligns itself with power, diversity merely diversifies the face of power, but does nothing to fundamentally dilute its effects.

Knowledge production and transmission of law within legal education often erase law's own ontology and histories, producing an illusion of innocence, universality and neutrality (Peller 2015). Unsurprisingly, the 'core' legal curriculum is silent about the law's involvement in the way the world has, through colonial logics and for colonial purposes, been artificially binarily ordered, as well as the connection between the national and the international spheres of legal epistemologies and histories. The curriculum is therefore unable to draw connections between legal histories and legal presents that account for social injustice, global inequality, extreme poverty and environmental degradation. Consequently, doctrinal law is unable, of itself with only reference to itself, to provide a true self-portrait for educators to transmit to learners. Thus, unable to create a true picture of humanity, traditional legal education suffers functional decay, serving no other purpose than certification into a discipline which disciplines the world to conform to a seemingly perfectly pre-ordained but wholly unequal legal order.

The purpose of this essay is to explore how legal education, especially where the focus is on doctrinal law, exemplifies functional decay and to argue that more transdisciplinary and decolonial approaches to knowledge production in law are needed to counter this. Some transdisciplinary approaches within legal education have already been modelled by critical-legal and socio-legal scholarship within the field. I argue here that those models are exemplary but need to account more closely for coloniality in the field.

[B] THE PURPOSES OF LAW SCHOOLS IN UK HIGHER EDUCATION: A REFLECTION ON 'THE PRESENT SYSTEM'

The 'core' of legal education is a disputed concept, and debates about a core are increasingly affected by and reflected in the different approaches to legal education often found within law schools (Ansley 1991: 1513-1520). These approaches include the more predominant traditional

doctrinal approach to legal education (Thornton 1998: 372), which is often complemented by socio-legal and critical-legal approaches to legal study. The continued dominance of doctrinal law, as Thornton argues, arises from law's propensity to reflect the interests of the powerful (1998: 370-372). Consequently, capital interests and power direct the ontology of law and, therefore, legal education, causing a seeming commitment of doctrinal law to 'rules rationality' and protection of capital (Thornton 1998: 372). Darian-Smith, who describes the ontology of modern law as 'Euro-American', echoes and complements Thornton's argument, by tracing law's current origins to the economic power dictates of the colonial project (2013 and 2015). Thus, Euro-American law, according to Darian-Smith, is law which began in Europe, but also arose out of colonial activities in the Americas, Africa, Asia and Oceania, and whose ontology places Euro-America at the centre of the world (Darian-Smith 2013). This designation intimately ties law to coloniality's interests, origins and uses. Further to this is the fact that the outcome of the colonization of most of what is now designated the Global South was the transplantation of this ontology of law across the world (Darian-Smith 2015: 647). Thus, this globalization of a particular vision of law (and humanity) is implicated in the definition of coloniality—an ontological condition of modernity which outlives colonialism and describes 'long-standing patterns of power that emerged as a result of colonialism ... that define culture, labor, intersubjective relations, and knowledge production' (Maldonado-Torres 2007: 243). It is the long-standing patterns of power, the mechanisms for reproducing them and their outcomes, that are of concern here. Coloniality as a mechanism of material accumulation and dispossession of necessity produces specific inequalities.

In response to power-driven inequalities before and occasioned by law, critical-legal and socio-legal studies have leant heavily on the boundaries that law places between itself and social realities in their troubling of the 'core' and the predominance of legal positivism in legal education. Yet, even in adopting these approaches, law teachers are often also compelled, frequently by market forces, to apply rules-based approaches favoured by doctrinal law (Thornton 1998: 374). Furthermore, these non-traditional approaches, though critical of entanglements of power, being and knowledge in legal education, sometimes take an atomized approach to confronting power, either conceptually, jurisdictionally, spatially, or temporally. Decolonial approaches may bridge this gap.

As Thornton argues, adherence to 'rules-rationality' in legal education arises due to law's close alliance with corporate power and capitalist interests and desires to accumulate (1998: 373-375). Therefore, the

content of the disputed core of legal education (quite similar in the Euro-American legal academy) reflects imperatives that expedite the freedom of the market, private property ownership and the value of corporate power to capital (Thornton 1998: 373). Therefore, recognizing the law as a product of coloniality—that is, the fusing, globalizing and universalizing of the market and racialization as the dominate mode of control (Quijano 2000: 216, 230)—requires an exploration of legal education and the limits of inclusivity in confronting law’s coloniality. Strictly speaking, inclusivity on its own does not adequately address or confront the fusing of capital and racialization within legal epistemologies.

To begin, it is important to appreciate the context in which UK law schools operate at the end of the first 20 years of the 21st century. The world is faced with massive challenges such as global inequality, extreme poverty and environmental disaster. All these continue to occur, in a context of increasing requests for diversity in the content of legal education and in the composition of the professoriate, as well as calls for diversity in the profession—including the judiciary (Matiluko 2020: 558).¹ Furthermore, the debates as to what amounts to ‘decolonization’ in education—which have always been vocal in settler colonies and post-colonial states—have extended to the UK (Kwoba & Ors 2018: especially 3-5). The presence and silence of the nexus of law, power and subjectification in these discourses directs our enquiries as legal academics into the purposes of the law school. In other words, if law schools are to have any transformative effect on society, how have they responded and how can they respond to some of society’s most challenging questions?

In examining the purpose of law schools and the search for a core for legal education, Twining reflects, among other things, on the persistence of the presumed neutrality of law and legal education as he states that, ‘[t]he most common model for “legal science” is the idea of systematic, objective, neutral exposition of the law as it is’ (1994: 155). Nevertheless, this is not necessarily a perspective to be treated with suspicion, as it could be argued that, to teach law as transformative, ‘law as it is’ has to be taught first. Therefore, students must understand doctrinal law first, before they can go on to critique it, even where law schools aspire to transformative purposes of legal education. The positivist aspect of the law has frequently been intellectually critiqued, yet positivism, despite signs of decline, still retains a hold in legal education (Thornton 1998: 372; Tamanaha 2007: 35-38). Also problematic is the fact that presumed neutrality does not hope to teach the *world* as it is, but the world from

¹ On 8 March 2021, six Members of Parliament sponsored an Early Day Motion asking, *inter alia*, for an increase in ethnic diversity in the judiciary: [Representation and the Judiciary](#).

the perspective of power, calling into question our presumptions about the nature of law itself. As Twining explains, this focus on positivism may ‘confine legal studies to exposition’, demonstrating the epistemological universalization and expansion of the standards of the sciences to other fields (1994: 154-155).

Twining identifies two main cardinally opposite proposals for the purposes of law schools and several intermediate hybrid options. These two extremes are: on the one hand, law schools as a conduit to produce more practitioners for the profession; on the other, law schools as spaces for academic learning about law (1994: 52). He complicates these extremes by noting how the increase in different specialisms and multiple perspectives within the law is in tension with the elusive search for a core of legal study (1994: 153-154). However, he notes that to keep the law school economically and socially relevant there should be a diversity of perspectives about legal knowledge (1994: 197). Through their universities, diversity measures in UK law schools have included widening participation schemes, diversification of reading lists, and mentoring programmes, as well as inclusive recruitment policies (Hoare & Johnston 2011: 29; Ragavan 2012; Vaughan 2019; Pilkington 2020). In addition to this, various scholarly outputs have emerged over the last couple of decades that discuss how best to achieve diversity in the profession and in law schools (see, for example, Bhabha 2014; González 2018; Vaughan 2019).

There is, however, an oversight here. Firstly, there is no consensus on the objectives of diversity measures—apart from diversity itself. Thus, this type of diversity discourse seems to presume that all that is required for societal transformation is inclusion of a variety of suitable sources and voices into the pre-existing study of law, rather than engagement with any re-examination of the history and ontology of law and legal education. This consequently ignores the possibility that re-examination and then reconstruction of the discipline will bring about more organic diversity and inclusion. These diversity measures do not address why our discipline persistently reproduces inequalities, not just within the law school, but across the spectrum of the field, in the impact of law and in the profession. Therefore, critical pedagogists, within and outside legal education, have long asked us to query our presumptions of neutrality and objectivity in both the content and structure of educational systems. Hence, on the question of purported neutrality in education, Freire asserts:

There is no such thing as a neutral educational process. Education either functions as an instrument that is used to facilitate the integration of the younger generation into the logic of the present

system and bring about conformity to it, or it becomes 'the practice of freedom,' the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world (2018: 34).

Law is very strategically placed as a discipline and profession to contemplate the transformation of the world. In fact, one could argue that without some engagement with law—the tool of social order—societal transformation proceeds in vain. There is also a societal perception that one of the functions of law and the legal profession is to achieve social justice and societal transformation (Budlender 1992; Elsesser 2012). Yet it has been shown that legal education may actually move students away from social justice as a career expectation and closer to more corporate-focused careers (Sherr & Webb 1989; Chapman 2002; Sheldon & Krieger 2004). One may ask then to what extent legal positivism in legal education hinders it from producing social justice. Thus, Cownie & Ors suggest that if the study of law focuses solely on the black-letter tradition, we ignore the 'social effect and political impact' of legal study; consequently, they also posit, law schools often focus on what the law is, to the detriment of what law can or should be (2013: 126-127). It could be argued therefore that, to the extent that they focus on the black-letter tradition, especially as regards the interests of power, law schools privilege order over justice. Yet Gordon asks us to examine whether our understanding of 'justice' under the shadow of coloniality actually reflects what is 'right' and emancipatory (2020: 33-49). In other words, have we confused 'order-aligned-to-power' with 'justice'? Thus, in our present condition, if legal pedagogy and practice presumes politically neutral, value-free praxis (see hooks 2014: 37), 'order' requires increased deployment of state power in the face of racial, gender, class and other disparities. Nevertheless, the logics of the present system are inevitably unveiled in structurally produced disparities that do not require individual bias—for example, the racialized processes which led the Macpherson report (after the inquiry into the police investigation following the racist killing of Stephen Lawrence) to declare the police institutionally racist. The report defined institutional racism as:

The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantage minority ethnic people (Macpherson 1999: 49).

A more comprehensive definition was given at the inquiry, by the Commission for Racial Equality, as:

established laws, customs, and practices which systematically reflect and produce racial inequalities in society. If racist consequences accrue to institutional laws, customs or practices, the institution is racist whether or not the individuals maintaining those practices have racial intentions (Macpherson 1999: 47).

These structurally produced racial disparities are not confined to the legal system but were and are repeated in the ‘Windrush scandal’ and ethnically disparate vulnerability to Covid-19. Thus, institutional racism is one of the more fundamental logics of ‘the present system’ (Freire 2018: 34) that legal education reproduces, locally and globally. It cannot be denied that this ‘present system’ is becoming more inclusive and diverse, with legal academia in the Global North opening itself up to plural epistemologies (Darian-Smith & McCarthy 2016: 16-18). The increase in social-legal and critical-legal approaches in legal education demonstrates this increased inclusivity. However, inclusivity does not always address the inequalities power produces. Coloniality as an epistemological technology of power requires diversity within its work to normalize and normativize it. In other words, to be effective, coloniality must of necessity include those ‘othered’ (Maldonado-Torres 2017: 123). It is important therefore to not confuse *inclusivity* with *decoloniality*.

I focus here specifically on racial disparities precisely because of the entrenched enfoldment of racialization in the production of the coloniality in the present system. Law and the social construction of race are implicated in creating a nebulous scale of master, subject and object that contributes to creating and maintaining hierarchical binaries (Haney-Lopez 2006: especially 7-14; Gómez 2010). What we often conventionally understand as ‘race’ has already been established as having no biological meaning (Saini 2019). More accurately, the artificial production and historical use of race as a technology creates and reproduces contrived material distinctions between groups of humanity (Patel 2020: 1464). In the here and now, groups are more often racialized by skin colour, but historically also by ‘ethnic, linguistic, religious or cultural identity’ (Grosfoguel 2016: 11). Consequently, it must be understood that the logics of racialization overlap, albeit imperfectly, with creation of class divides—in fact the whole point of racialization (the creation of ‘race’ as a supposedly legitimate categorization of humanity) is to materially dispossess. Thus, the entanglement between race and class is more entrenched than social policy or public discourse often acknowledges. In other words, race was used to mark differences between who can be owned and who can own and who can own what; to mark differences between whose knowledges, practices and jurisprudences were considered ‘modern’ and whose were considered primitive; and to mark differences

between whose land could be appropriated and who could lay claim to territory (Harris 1993; Keenan 2017; Bhandar 2018). These processes and techniques of racialization required the legitimation of law, not just in legislation and judicial precedent,² but also in the development of seemingly race-neutral legal epistemologies that are actually racially contingent (Bhandar 2011; Bhandar 2014: 206-208). Ultimately, ‘race’ is a technology used to underpin the enfolded practices of accumulation and dispossession that characterize and reproduce this present system, creating and maintaining a binary world (Hickel 2017: chapter 3). In the words of Grosfoguel, ‘race constitutes the transversal dividing line that cuts across multiple power relations such as class, sexual and gender at a global scale’ (2016: 11). A predisposition to black-letter tradition, especially curricular absences on the social construction of race and its attendant effects, inescapably preserves ‘the present system’.

The plethora of racialized and gendered deficits and disparities within society is not accompanied by a deficit of data of those disparities. For example, the ‘End of Mission Statement’ of the Special Rapporteur on Contemporary Forms of Racism, at the end of her visit to the UK, reported significant racialized disparities in schooling, welfare, housing, employment, immigration policies, counterterrorism policies etc (Achieme 2017). The Lammy Review, which assessed racial disparities in the criminal justice system, also reported disparities at every stage, from investigation to sentencing (Lammy 2017).³ As racial disparities expose groups to increased structural vulnerability, it is not entirely surprising to note their replication in vulnerability to Covid-19. The 2020 Public Health England report showed that non-white populations in England had a ‘10 and 50% higher risk of death when compared to White British’ (2020: 39). Furthermore, in November 2020, the American Medical Association recognized racism—systemic, cultural and interpersonal—as a ‘public health threat’ (2020). Predictably, despite diversity, racial disparities also exist in higher and legal education, characterized in differences in representational and awarding outcomes, employment and progression to research degrees (Advance HE 2020a: 130-197; Advance HE 2020b: 126-165). It is important to interrogate assumptions that the replication of racial disparities is merely incidental and not produced by the dominant epistemologies and structures of the world. In fact, these

² See, for example, Charter granted to the Company of Royal Adventurers of England Relating to Trade in Africa, 1663; Slave Code for the District of Columbia; The Treaties of Utrecht (1713); *Gregson v Gilbert* (1783) 3 Doug KB 232 summary of first trial; French *Code noir* (1685).

³ The Lammy review has been criticized for not exploring the root causes of disparities and regressing understanding of institutional racism. See Fekete 2018: 76-79.

disparities, that we benignly refer to as institutional racism, are, in the words of Marchais:

neither a by-product nor ‘negative externality’ of otherwise inclusive systems, nor a remnant of old days that is dissipating with time and increased awareness. [Racism] is a resource, or a technology, on which institutions and organisations rely to achieve production (2020).

We must ask ourselves to what extent and why does our discipline exemplify this [re]production?

[C] THE FAILINGS OF DIVERSITY: EPISTEMIC INJUSTICE AND DISCIPLINARY DECADENCE IN LEGAL EDUCATION

To counter disparities within the legal system, systemic racial diversity has been promoted through widening participation, mentoring, targeted bursaries etc. For example, many of the Lammy Review recommendations propose more transparent and detailed collection of data as well as increased representation. Recommendation 16 asks for a more representative judiciary, while recommendation 29 asks for increased diversity in the leadership of the prison service (Lammy 2017). These recommendations find similar threads within the Special Rapporteur’s report on racism, which recommends in-depth assessment of data and inclusion of representatives of racialized communities in decision-making processes. However, it is argued that, despite the good intentions of diversity, there are two inherent limitations in this approach to transforming the present system of law, legal education and our world. Firstly, this approach does little to interrogate the processes by which legal education contributes to the [re]production of the present system. Currently legal education in UK law schools often only engages with scholarship on race and racialization in a limited way. Race, racism and racial inequality are not included in the ‘core’ curriculum. Stanley examines the general curricula of law schools in this regard, citing the tendency of law schools and qualifying law degree criteria to prioritize private law above public law and how this prioritization places emphasis on the needs of privileged sections of society (1988: 83). Thus, private law is focused on regulation of ownership of property, without considering, as has been discussed above, how the emergence of property is itself racially contingent. Therefore, our focus within private property legal education fails to acknowledge, in the words of Bhandar, ‘the constitutive relationship between property law and racial subjectivity’ (2018: 21). Consequently, the teaching of property law

is often directed towards power rather than away from it. For example, land law is part of the 'core' curriculum, while housing law is sometimes to be found as an option. Furthermore, even though the practices of slavery and colonial dispossession are germane to the development of the doctrines within real property, they are hardly to be found in main land law texts (Ansley 1991: 1523-1525; Bhandar 2018: 3-4). The second inherent limitation to representational diversity schemes is that, rather than engaging in any real structural change, this approach averts our gaze outwards, to create what DuBois calls 'problem people' who become the subject of our ineffectual benevolence (1897).

The real tangible question of 'justice' is thus reduced to a metricized or a 'tick-box' diversity scheme which ignores the many intersectional and variable ways in which structural and epistemic injustice is in turn epistemically produced, reproduced and experienced. Thus, Gordon critiques our understanding of 'justice' which is produced by and within colonial knowledge hierarchies when he asks: 'Are the norms for which many of us are fighting in the name of, say, racial justice or liberation from antiblack racism free of normative colonization ...?' (2020: 91). As Fricker maintains, epistemic/hermeneutical injustice is the obscuration of an othered group's social condition from hegemonical understanding (2007: 152-169). Therefore, those with power to influence change are unable (and unwilling) to transform the conditions of those othered. Consequently, epistemic erasures create an inherently unequal world. Furthermore, if legal education does not interrogate how the world is epistemically and structurally ordered, it contributes to reproducing Grosfoguel's dividing line that casts othered populations 'below the line of the human' (2016: 10); or Fanon's zones of nonbeing into which those who have been 'made black of the world' are placed (2008: 2); or de Sousa Santos' abyssal line which invisibilizes the effects of coloniality from those who benefit from coloniality (2015: 70-71). These demarcations manifest, for example, in how we define those who belong to certain spaces and can confidently claim the benefits of belonging. For instance, El-Enany explains how immigration laws have entrenched racialized thinking into their provisions, thus mirroring the Manicheanism inherent in the creation of race as a supposedly legitimate category of humanity (2020: 62).

Therefore, epistemic justice requires more than promoting diversity by focusing our gaze on those whom the structures of the world disadvantage, rather than on the structure of the world which disadvantages. In effect, this approach to racial inequality resorts to 'managing the demands for equality while keeping racial hierarchies intact' (Saha: 2017). Because diversity measures, as described, make no distinction between epistemic

and embodied difference, they operate as an inaccurate, limited-temporal and aesthetic solution to much more structural problems—concealing the *longue durée* effects of coloniality and its related practices (Raghavan 2018). Diversity measures, when proposed as a means for societal change, work on the presumption that objective epistemic knowledge is settled and naturally flows from particular bodies. For example, without interrogating further, an assumption that all women are feminists, all Black people are versed in critical race theory and all people from a working-class background are anti-capitalist would prospectively lead to recruiting women, Black and people with working-class backgrounds who have none of the aforementioned characteristics respectively, as they would be more likely to ‘fit’ into the hegemonical knowledge structure. Properly done, representational data should serve as a means of assessing how transformational and inclusive our structures are. But the data now operates as a *target*, thus drastically reducing the efficacy of such data as a *measure*. Therefore, we may adopt a tokenistic focus on producing good data rather than equitable structures. As hooks noted about such inclusive teaching in the USA, ‘many people supported inclusion only when diverse ways of knowing were taught as subordinate and inferior to the superior ways of knowing’ (2003: 47). Thus, diversity, without more, runs the risk of reifying hierarchical structures. We must not forget that ‘diversity’ is a natural characteristic of humanity; racial and other disparities result from our structural failure to recognize and communicate across pluriversal worlds to create a different global epistemic community than the one we have now (Kothari & Ors 2019: xxviii). The focus here is epistemological: why do the racialized absences within the law school curriculum seated within a typical UK law school seem to impede the curriculum’s ability to transform society effectively and positively? What is it about the related ontology and epistemology of law that reproduces disparities in the design of society?

Gordon calls this phenomenon ‘disciplinary decadence’, which he argues sets in because ‘we treat our discipline as though it was never born and has always existed and will never change or, in some cases, die’ (2015: 4). Building on DuBois’ conceptualization of ‘problem people’, Gordon describes how disciplinary practices elevate disciplinary methodology to a sacrament—complete, pure and perfect (2018: 233); this creates a problem for the discipline of populations not considered part of the core of humanity at the time the discipline’s method and thought was formulated. ‘Problem people’ will not ‘fit’ into the purportedly universal and objective method. So, we try in vain using diversity measures to fit such people into the strict dictates of the discipline, yet the field keeps on spitting

them out. Disparities remain and are reproduced, across time, across space. Consequently, within this intractable adherence to method, ‘non-normative people, become problems, instead of people who face problems’ (Gordon 2014: 84). Our legal epistemologies exist as if internally and immortally legitimized (Gordon 2011: 97), yet the scope of non-normative people increases, as does the scope of problems our discipline is unable to understand, including problems resulting from the ontology of our thought and method. Thus, our analysis of injustice faced by non-normative people descends into a form of victim-blaming. We do not revisit the foundational norms of our discipline such as liberty, freedom and justice. We are unable to adapt to changing sociological realities and realizations. This is what Gordon means by decay—turning from living thought. By trapping our discipline in thought that crystallized during a time when race science was used to abstract property out of humanity through the legalized processes of enslavement and colonial dispossession, we trap our world into reproducing the accompanying injustices of those epistemologies along those racial, gendered and geopolitical lines. Disciplinary decadence operates along colonial lines, creating zones of closure, settlement and negation of human possibility (Gordon 2018: 238). By trapping possibility within disciplinary dictates, transformation is rendered impossible. Rather than justice, anything that exists on the other side of Grosfoguel’s ‘dividing line’, beyond the abyssal line, in the zone of nonbeing, is eliminated or transformed to resemble this side of the line (numbers-diversity) (de Sousa Santos 2015: 120). This is what makes ‘the claim of the universal translatability of the English word “justice” ... an extraordinarily presumptive one’ (Gordon 2013: 70). Epistemic injustice that arises through the obscuring of racialized knowledge cannot be assuaged by obscuration of racialized knowledge. To mean anything at all, our quest for global justice must be preceded and accompanied by an exploration of how the law’s present ontology has been produced through colonial epistemologies of language use and practices.

[D] WHAT DECOLONIAL THOUGHT MEANS FOR LEGAL EDUCATION

If, as argued, legal ontology and epistemology systematically (re)produce coloniality and its attendant injustice, what would it mean to introduce decolonial thought into legal education? First, it is argued that, to avoid the data decay that is inherent in diversity measures, decoloniality cannot be approached as a tick-box exercise. To be effective, legal academics must familiarize themselves with decolonial theory and put that theory in conversation with areas of their pre-existing expertise. Secondly, it is argued that the use of the word ‘decolonization’ has proven misleading,

fungible and almost infinitely malleable. This confusion is evidenced in the use of phrases such as ‘decolonized curriculum’ or ‘decolonized law school’. Despite the variances within the schools of decolonial thought, at its heart it is a way of being and not a destination. At one end of the spectrum, decolonization (mainly articulated by post-colonial and anti-colonial scholars from Asia and Africa) seeks to repair the remnants of the colonial project as they appear and reappear in epistemic, political, legal and economic structures (see, for example, Nehru 1941; Nkrumah 1966; Cabral 1979; Sankara 1988). At the other end of the spectrum, decolonial scholars (mainly from the Americas and indigenous scholars) seek to identify and dismantle the permanence of coloniality and to build in its place flourishing planetary futures—‘worlds otherwise’ (Quijano 2000; Escobar 2007; González 2018). Decolonial thought is thus unified on the origins and manifestations of coloniality, but there is complexity in how the colonial condition is temporalized, contemporarily and historically. The desired outcome of decolonial thought also varies. This complexity further results in overlaps between these two extreme positions: however, both positions can be understood as material and epistemic repudiations of the colonial that seek within their positions an ‘after-colonial’ time and reality. Thus, taking decolonial approaches requires legal academics to continuously commit to communicate democratically across epistemological worlds without valorizing or universalizing Euro-American legal thought. Decolonial thought does not mean replacement but, instead, seeks ways to bring about new worlds of thinking and being that are inclusive of plural systems of (legal) thought and do not reproduce the harms of coloniality, which include racial, class and gender injustice, as well as the resulting global poverty and climate emergencies (Maldonado-Torres 2006: 117). So, we must trouble the ways in which the norms of our discipline and areas of expertise are complicit in that social reproduction of these structural injustices. This is the epistemological task. The structural and representational tasks of interrogating our institutional practices and ensuring epistemic diversity are instrumental to this. However, without the epistemological task, the structural and representational changes operate in vain.

It is further argued that, beyond identification of the norms of social reproduction, we must also theorize on what lies beyond. What other worlds of justice and freedom do we think our discipline can help bring about? On the one hand, there is the task of deconstructing the colonial, but, for the imperial world to not rebuild itself, we must replace it with new systems of thought, new relations between groups of humanity and new relations between humanity and other inhabitants and parts of the

planet. It is accurate practice and *theorization* of decolonial thought that confronts us with the history and effects of imperialism upon our academic practices (i.e. research and teaching) in law. It is both theory and praxis that lead us to new ideas. In a lot of the discourse on decolonization in UK higher education, there has been an overwhelming focus on decolonial practice and decolonizing in teaching, to the detriment of decolonial theory and research. To create radically different futures designed upon just legal ontologies and epistemologies, decolonial theory must take on a future-looking aspect regarding the survival of the earth and its inhabitants (Mignolo 2007:159). So, in rethinking the purposes of the law school, either in the fundamentals of what we teach—this includes the content of the disputed core—or the way in which we teach—with a focus on research or legal practice—we need to consider how legal education can, in being self-critical, disrupt normative universals complicit in the social production of epistemic and epistemically produced injustices.

There are three main themes through which, I argue, this social reproduction is articulated in law. The first is the body. A lot of legal thinking is parsed through what we could consider ‘the normative body’. This is the body of law’s ideal human, which, according to Douzinas, finds its closest representation in a White property-owning man (2000:7). The normative body is ‘rational’, seeks protection of his property and has converging interests and desires that find solace in the state. Thus, the normative body serves as the yardstick against which all negative and positive derogation is measured. The normative body gives us the template of the ‘reasonable man’ (more recently the critiqued ‘reasonable person’ (Moran 2003)) within the law of obligations. Due to the representational deficits in the legislative and judiciary, this normative body is the prism through which law is made, interpreted and enforced. The normative body achieves its positionality through the auspices of capital—this body is the one positioned to achieve the most capitalist value, not hindered by gendered roles, racialization, heteronormative assumptions, class distinctions or inflexible ideas of ability. As argued above, justice articulated from this personification of law’s human is not infinitely translatable.

The second theme of social reproduction is property. As mentioned above, the making of property in law happens contemporaneously with the emergence of law’s ideal human. Critical legal scholars, as well as postcolonial writers, have maintained a long trajectory of writing on the elision of body and property—especially the consequent Euro-modern manifestation of land as property. In her seminal work, Harris argues that ‘whiteness’, originally socially constructed as racial identity, morphed

into a form of property which, in the past and present is acknowledged and protected by law in the USA (1993). Moreton-Robinson makes a similar argument within the Australian indigenous context, contending that the interplay of socially constructed race and property law provides a biosphere of and for possession and dispossession (2015). These arguments are echoed by Bhandar, whose context includes indigenous Canada, apartheid South Africa and contemporary Palestine. She argues that racialization and property-making developed co-terminously (see, particularly, 2014: 211). Ways of using land by populations racialized as ‘not-white’ served to dispossess them of property which could then be appropriated by colonizing forces. These arguments about property are reflected in the concept of racial capitalism, theorized most notably by Robinson (2000) and described above by Marchais (2020) as an explainer of how racialization is itself a source of production. Foregrounding these arguments about the interrelation between the socially constructed body and the emergence of legal property forms is a history of non-European indigenous jurisprudence in which real property is understood differently. For example, indigenous knowledges either personified property, saw it as intimately tied to human relationality or communally held (not owned), and ecological protection was usually the purview of women (Dudgeon & Berkes 2003; NoiseCat 2017). Legal education’s preoccupation with private law and protecting the rights of law’s human in property leave untroubled the ways in which dehumanization enabled the tandem of dispossession and accumulation of land and capital and how this results in further dehumanization.

The last theme which I argue could be explored within decolonial thought is time. Of main concern here is the way in which the creation of modernity dislocates bodies from space and place while simultaneously producing artficed time demarcations to justify these dislocations. As Mignolo states, “Modernity” implied the colonization of time and the invention of the “Middle Ages” (Delgado & Ors 2000: 29). This is because an artificial Euro-modern timeline was colonially abstracted by the colonial enterprise. The result of which was to place colonized spaces/people in an earlier timeline, outside the development process of humanity (Alcoff 2007: 84), where they are eternally and futilely striving to reach Europe (both metaphorically but also physically). This temporal displacement obscures the contingent nature of the temporalities of colonized and colonizer spaces. In other words, left uninterrogated is how the colonized experience of modernity is contingent on the way in which the colonizer experiences modernity and *vice versa*. Or, as Olaniyan says, in explaining why African poverty is predicated on Euro-modern extraction

and accumulation, 'it is absolutely ridiculous to think that Congo is not modern, but Belgium is' (2014). Olaniyan is alluding here to Belgium's brutal colonial activities in what was called the Belgian Congo, which involved racialized use of enslaved, enforced and torture-compelled labour to work rubber and oil palm plantations, resulting in a population loss of roughly 50 per cent of Congolese (Hochschild 1999: 3, 233, 280). These epistemic creations of imagined temporality also manifest themselves in legal education in fragmentation within and across units/modules. For example, the distinctions we draw between, immigration, citizenship, the state and colonial histories. Decolonial thought requires unsettling those fragmentations.

I have used this tripartite thematic framework as an alternative to attempts to 'decolonize' units/modules rather than question the selection of and demarcation *within* the curriculum of legal education. Thinking more thematically prevents the atomization that characterizes contemporary decolonization discourse in UK higher education. These discourses focus on adding more authors from Black or Brown backgrounds to reading lists, as well as introducing, as supplements, topics that raise questions about racialization and empire. Thinking thematically allows us to simultaneously trouble the discipline while continually crafting decolonial thought. Therefore, rather than ask, for example, 'How do we decolonize the law of contract?', we are able to question the possibilities that eventuate the emergence and social production of the law of contract and its underpinning normativities, as well as conceptualize what future possibilities that questioning may lead us to. In this way, we can, thinking about the future of legal education and the world, within the scope of legal education, centre flourishing human futures of freedom and justice, and not the sacrament of the law of contract.

It should be noted that the massification of universities and consumerization of the student class present a significant deterrent to decolonial thought. This deterrence is exemplified by the various standardization measures across higher education. The Research Excellence Framework (REF) as well as the National Student Survey are both examples of this standardization. Sayer describes the process of evaluating research through the REF as impervious to critique of British research standards (2014: 40), indicating that the REF standards may be incompatible with the necessarily unsettling nature of decolonial thought. In other words, the types of rankings which universities increasingly rely on require favouring epistemologies and bodies already privileged, mainstream and highly regarded, and this will not lead us to 'worlds otherwise'. This deterrence also includes rising tuition fees,

casualization, unmanageable workloads, pay gaps, funding models and access to higher education. The university seems to be suffering an identity crisis. Is it a public good or a consumer good? The decolonial approaches recommended in the foregoing paragraphs seek to disrupt the colonial logics of commodification of space, nature, humanity and variably valued labour. But it seems that the neoliberal university can only survive through these very characteristics – namely, the colonial logics of commodification of space, nature, humanity and variably valued labour.

[E] CONCLUSION

This article has argued that law schools in the UK have failed to interrogate how colonial thought is embedded in legal education and that that embedment is complicit in producing this present system and its inequality. Diversity measures, without more, are insufficient to disrupt the reproduction of our unequal world and bring forth ‘otherwise worlds’. However, our engagement with decolonial thought must involve a fundamental rethinking of the purposes of legal education and how reconstructing legal epistemologies may result in flourishing futures for all. Therefore, our commitment to decolonial thought must be intellectually rigorous and sustained. It must also consider seriously the deterrence produced by the systems we are seeking to change. In other words, to be effective in transforming the world, decolonial thought in legal education must reach beneath the surface, continually reinvent itself and look beyond the present with radical imagination for the future at its core.

References

- Achiume, T (2018) ‘[End of Mission Statement of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance at the Conclusion of Her Mission to the United Kingdom of Great Britain and Northern Ireland](#)’ Geneva/Paris: Office of the United Nations High Commissioner for Human Rights.
- Advance HE (2020a) ‘[Equality and Higher Education – Staff Statistical Report 2020](#)’.
- Advance HE (2020b) ‘[Equality and Higher Education – Student Statistical Report 2020](#)’.
- Alcoff, L M (2007) ‘Mignolo’s Epistemology of Coloniality’ 7(3) *CR: The New Centennial Review* 79-101.

- American Medical Association (2020) 'New AMA Policy Recognizes Racism as a Public Health Threat' Press Release 16 November.
- Ansley, F L (1991) 'Race and the Core Curriculum in Legal Education' 79 *California Law Review* 1511.
- Bhabha, F (2014) 'Towards a Pedagogy of Diversity in Legal Education' 52 *Osgoode Hall Law Journal* 59.
- Bhandar, B (2011). 'Plasticity and Post-colonial Recognition: "Owning, Knowing and Being"' 22(3) *Law and Critique* 227.
- Bhandar, B (2014) 'Property, Law, and Race: Modes of Abstraction' 4 *University of California Irvine Law Review* 203.
- Bhandar, B (2018) *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* Durham: Duke University Press.
- Budlender, Geoff (1992) 'The Responsibility of Lawyers to Challenge Injustice' 40 *Cleveland State Law Review* 475.
- Cabral, A (1979) *Unity and Struggle: Speeches and Writings of Amilcar Cabral* vol 3 New York: New York University Press.
- Chapman, J (2002) 'Why Teach Legal Ethics to Undergraduates?' 5(1) *Legal Ethics* 68-89.
- Cownie, F, A Bradney & M Burton (2013) *English Legal System in Context* 6th edn Oxford: Oxford University Press.
- Darian-Smith, E (2013) 'Postcolonial Theories of Law' in R Banakar & M Travers (eds) *Law and Social Theory* Oxford: Hart.
- Darian-Smith, E (2015) 'Postcolonial Law' in James D Wright (editor-in-chief) *International Encyclopedia of the Social and Behavioral Sciences* 2nd edn vol 18 Oxford: Elsevier 647-651.
- Darian-Smith, E and P McCarty (2016) 7(2) 'Beyond Interdisciplinarity: Developing a Global Transdisciplinary Framework' *Transcience: A Journal of Global Studies* 1-26.
- de Sousa Santos, B (2015) *Epistemologies of the South: Justice against Epistemicide* London: Routledge.
- Delgado, L E, R J Romero & W Mignolo (2000) 'Local Histories and Global Designs: An Interview with Walter Mignolo' 22(3) *Discourse* 7-33.
- Douzinas, C (2000) *The End of Human Rights: Critical Thought at the Turn of the Century* London: Bloomsbury.

- DuBois, W E B (1897) 'Strivings of the Negro People' (August) *The Atlantic*.
- Dudgeon, R C & F Berkes (2003). 'Local Understandings of the Land: Traditional Ecological Knowledge and Indigenous Knowledge' in Helaine Selin (ed) *Nature Across Cultures* Dordrecht: Springer 75-96.
- El-Enany, N (2020) *(B)ordering Britain: Law, Race and Empire* Manchester: Manchester University Press.
- Elsesser, C (2012) 'Community Lawyering: The Role of Lawyers in the Social Justice Movement' 14 *Loyola Journal of Public Interest Law* 375.
- Escobar, A (2007) 'Worlds and Knowledges Otherwise: The Latin American Modernity/Coloniality Research Program' 21(2-3) *Cultural Studies* 179-210.
- Fanon, F (2008) *Black Skin, White Masks* New York: Grove Atlantic.
- Fekete, L (2018) 'Lammy Review: Without Racial Justice, Can There Be Trust?' 59(3) *Race and Class* 75-79.
- Freire, P (2018) *Pedagogy of the Oppressed* New York: Bloomsbury USA.
- Fricker, M (2007) *Epistemic Injustice: Power and the Ethics of Knowing* Oxford: Oxford University Press.
- Gómez, L E (2010). 'Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field' 6 *Annual Review of Law and Social Science* 487-505.
- González, A J (2018) 'Decolonizing Legal Studies: A Latin Americanist Perspective' in J Cupples & R Grosfoguel (eds) *Unsettling Eurocentrism in the Westernized University* London: Routledge.
- Gordon, L R (2013) 'Thoughts on Dussel's "Anti-Cartesian Meditations"' 11(1) *Human Architecture: Journal of the Sociology of Self-Knowledge* 67-72.
- Gordon, L R (2014) 'Disciplinary Decadence and the Decolonisation of Knowledge' 39(1) *Africa Development* 81-92.
- Gordon, L R (2015) *Disciplinary Decadence: Living Thought in Trying Times* London: Routledge.
- Gordon, L R (2018) 'Disciplining as a Human Science' in Marina Gržinić & Aneta Stojnić (eds) *Shifting Corporealities in Contemporary Performance* Cham: Springer: 233-250.
- Gordon, L R (2020) *Freedom, Justice, and Decolonization* London: Routledge.

- Grosfoguel, R (2016) 'What is Racism?' 22(1) *Journal of World-Systems Research* 9-15.
- Haney-Lopez, I (2006) *White by Law: The Legal Construction of Race* New York: New York University Press.
- Harris, C I (1993) 'Whiteness as Property' 106(8) *Harvard Law Review* 1707-1791.
- Hickel, J (2017) *The Divide: A Brief Guide to Global Inequality and its Solutions* London: Random House.
- Hoare, A & R Johnston (2011) 'Widening Participation through Admissions Policy – A British Case Study of School and University Performance' 36(1) *Studies in Higher Education* 21-41.
- Hochschild, A (1999) *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* Boston MA: Houghton Mifflin Harcourt.
- hooks, b (2003) *Teaching Community: A Pedagogy of Hope* vol 36 Hove: Psychology Press.
- hooks, b (2014) *Teaching to Transgress* London: Routledge.
- Keenan, S (2017) 'Smoke, Curtains and Mirrors: The Production of Race through Time and Title Registration' 28(1) *Law and Critique* 87-108.
- Kothari, A, A Salleh, A Escobar, F Demaria & A Acosta, (2019) 'Introduction: Finding Pluriversal Paths' in A Kothari, A Salleh, A Escobar, F Demaria & A Acosta *Pluriverse: A Post-Development Dictionary* Chennai: Tulika Books.
- Kwoba, B, R Chantiluke & A Nkopo (eds) (2018) *Rhodes Must Fall: The Struggle to Decolonise the Racist Heart of Empire* London: Zed Books.
- Lammy, D (2017). '[The Lammy Review: An Independent Review into the Treatment of, and Outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System](#)' London: Lammy Review.
- Macpherson, William (1999) *The Stephen Lawrence Inquiry* vol 1 London: The Stationery Office.
- Maldonado-Torres, N (2006) 'Cesaire's Gift and the Decolonial Turn' 9(2) *Radical Philosophy Review* 111-138.
- Maldonado-Torres, N (2007) 'On the Coloniality of Being: Contributions to the Development of a Concept' 21(2-3) *Cultural Studies* 240-270.

- Maldonado-Torres, N (2017) 'On the Coloniality of Human Rights' (114) *Revista Crítica de Ciências Sociais* 117-136.
- Marchais, Gauthier (2020) '[Contemporary Research Must Stop Relying on Racial Inequalities](#)' *Africa at LSE Blog* 30 January.
- Matiluko, O (2020) 'Decolonising the Master's House: How Black Feminist Epistemologies Can Be and Are Used in Decolonial Strategy 54(4) *The Law Teacher* 547-561.
- Mignolo, W D (2007) 'Introduction: Coloniality of Power and De-colonial Thinking' 21(2-3) *Cultural Studies* 155-167.
- Moran, M (2003) *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* Oxford: Oxford University Press Online.
- Moreton-Robinson, A (2015) *The White Possessive: Property, Power, and Indigenous Sovereignty* Minneapolis MI: University of Minnesota Press.
- Nehru, J (1941) *Toward Freedom: The Autobiography of Jawaharlal Nehru* vol 58 Boston MA: Beacon Press.
- Nkrumah, K (1966) *Neo-colonialism: The Last Stage of Imperialism* New York: International Publishers.
- NoiseCat, J B (2017) '[The Western Idea of Private Property Is Flawed. Indigenous Peoples Have It Right](#)' *The Guardian* 27 March
- Olaniyan, Tejumola (2014) '[The Misconception of Modernity, a Conversation with European Attraction Limited](#)' 6 February.
- Patel, K (2020) 'Race and a Decolonial Turn in Development Studies' 41(9) *Third World Quarterly* 1463-1475.
- Peller, G (2015) 'Legal Education and the Legitimation of Racial Power' 65(2) *Journal of Legal Education* 405-413.
- Pilkington, A (2020) 'Promoting Race Equality and Supporting Ethnic Diversity in the Academy: The UK Experience over Two Decades' in *Strategies for Supporting Inclusion and Diversity in the Academy* London: Palgrave Macmillan 29-48.
- Public Health England (2020) '[Disparities in the Risk and Outcomes of COVID-19](#)' London: Public Health England.
- Quijano, A (2000) 'Coloniality of Power and Eurocentrism in Latin America' 15(2) *International Sociology* 215-232.

- Ragavan, S K (2012) Acquiring Skills for a Globalised World through a Peer Mentoring Scheme: A UK Law School Experience' 46(1) *The Law Teacher* 15-37.
- Raghavan, Priya (2018) 'Curriculum Reform in UK Higher Education' *Engenderings*.
- Robinson, C J (2000) *Black Marxism: The Making of the Black Radical Tradition* Chapel Hill NC: University of North Carolina Press.
- Saha, Anamik (2017) 'Diversity Initiatives Don't Work, They Just Make Things Worse: The Ideological Function of Diversity in the Cultural Industries' *Media Diversified* 16 February.
- Saini, A (2019) *Superior: The Return of Race Science* Boston MA: Beacon Press.
- Sankara, T (1988) *Thomas Sankara Speaks: The Burkina Faso Revolution, 1983-87* New York: Pathfinder Press.
- Sayer, D (2014) *Rank Hypocrisies: The Insult of the REF* New York: Sage.
- Sheldon, K M & L S Krieger (2004) 22(2) 'Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-being' *Behavioral Sciences and the Law* 261-286.
- Sherr, A & J Webb (1989). Law Students, the External Market, and Socialization: Do We Make Them Turn to the City' 16 *Journal of Law and Society* 225.
- Stanley, C (1988) 'Training for the Hierarchy? Reflections on the British Experience of Legal Education' 22(2) *The Law Teacher* 78-86.
- Tamanaha, B Z (2007) 'The Contemporary Relevance of Legal Positivism' 32 *Australian Journal of Legal Philosophy* 1.
- Thornton, M (1998) 'Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same' 36 *Osgoode Hall Law Journal* 369
- Twining, W L (1994) *Blackstone's Tower: The English Law School* London: Stevens & Sons/Sweet & Maxwell.
- Vaughan, S (2019) 'Some Reflections on Diversity and Diversifying the Law Curriculum'.

Cases Cited

Gregson v Gilbert (1783) 3 Doug KB 232

GENDER, SEXUALITY AND THE LAW SCHOOL: (RE)THINKING *BLACKSTONE'S TOWER* WITH QUEER AND FEMINIST THEORY

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Abstract

This article will focus on exploring gender and sexuality within the law school. Largely silent from Twining's 'grand tour', these two areas are now key parts of the law school landscape, having become firmly established as key elements of law school discourse and legal scholarship in the years since *Blackstone's Tower* was published. The Blackstone's Tower of Twining's imagination was, Twining suggested, 'holding up a mirror to a familiar world', and it was a world that made only passing reference to gender and no reference to sexuality. Feminism is mentioned twice in 244 pages, whilst queer—still emergent within legal scholarship in 1994—is not referenced at all. A once radical and vital text can perhaps appear antiquated to today's readers. Yet, this should not be regarded as a criticism of the text but rather a reflection of how the law school and legal scholarship has transformed since 1994. Whether in the number of gender and/or sexuality and law courses that now permeate through the UK law school, or the extraordinary growth first of feminist scholarship and more recently queer scholarship, the law school has been profoundly impacted by socio-legal shifts in gender and sexuality research. This is scholarship that does not merely serve as 'another' theory or an addendum to jurisprudence, for these theories have offered the ability to reshape the very architecture of the law school and to re-imagine Blackstone's Tower for what it is and what it can be. This article seeks to explore that journey and offer a glimpse of future possibilities.

Keywords: legal education; gender; sexuality; queer; feminism; gay; pedagogy; LGBTQ; teaching.

[A] INTRODUCTION

Three years after the publication of *Blackstone's Tower*, the election of Tony Blair's Labour Government coincided with a dramatic period of law reform relating to what might loosely be described as 'gay rights' and later (with the implementation of the Gender Recognition Act 2004) 'trans rights', particularly after the equalization of the age of consent and a greater emphasis on identity politics rather than rights linked to specific sexual acts (Ashford 2011a). Progress on women's rights has arguably been less transformative over this period, but there have been some landmark legal reforms, for example the Female Genital Mutilation Act 2003, the Modern Slavery Act 2015, and the key appointment of Brenda Hale as the first woman President of the UK Supreme Court in 2017.

The English law school, the focus of Twining's 1994 Hamlyn Lectures, is now located in a very different environment. There has been a significant shift in social and cultural attitudes that has provided a new visibility to sexuality and created a new landscape for research into law, sex and sexuality (Tierney & Dilley 2009: 52-53). This has in turn led to a growing problematization of the relationship between LGBTQ people and the law (see, for example, Majury 1998). More generally, recent years have seen a transformation in pedagogy within schools, embracing greater diversity, notably through the *No Outsiders* programmes (see more generally DePalma & Atkinson 2009; and, on tensions with faith communities, Nixon & East 2010). This change in the schooling environment also reshapes the educational experiences of many who will go on to study in English law schools.

Whilst research from law schools arguably contributed in part to this legal, social and cultural shift, more recently still it has also been affected by the growing emergence of activist queer legal scholarship (Raj 2020), the greater inclusion of LGBTQ identities as part of existing modules, for example criminal law/criminal justice (Fradella 2007; Fradella & Ors 2009), other optional/elective subjects such as family law, or human rights law (Gerber & O'Hara 2019) and a growth in gender, sexuality and law modules/classes which also give greater prominence to feminist scholarship too (see, more generally, Moran 2000; Ashford 2010a; 2011b). At the same time, there has been growing recognition of childhood—and educational development more generally—as a key site of intervention in our construction of gender and sexuality (Sedgwick 1993; Dyer 2017).

The university-based law school was, Twining suggested in *Blackstone's Tower*, still coming of age (1994: 2), yet he also observed that a characteristic of Blackstone's Tower—namely the English law school—

was that it seemed to exclude outsiders (1994: 193). This perhaps goes some way to explaining the absence of engagement with themes of gender and sexuality in *Blackstone's Tower*, in that the law school had not yet sufficiently 'matured' to engage with these issues. This assumption of 'maturing' of course reflects the heteronormative and patriarchal biases inherent to the law school in that questions of gender and/or sexuality are 'second order' questions rather than of primary concern for the law school. We'll come to gender, and we'll come to sexuality. Eventually. This presupposes that it is 'neutral' not to engage with these ideas, but this fails to critique the very prejudices and assumptions that lie in a 'neutral' consideration of the law school.

This assumption of a neutral silence perhaps also provides a framework for the struggle that continues in many law schools to engage with those who are inside the Tower, but who continue, to varying degrees, to be rendered outsiders by their gender or sexuality. This is a struggle that offers nothing less than an opportunity to tear down the walls of Blackstone's Tower.

[B] GENDER AND SEXUALITY AS A LAW SCHOOL AGENDA

Twining noted that 'a tower is itself an ambiguous symbol, conjuring up images of ancient fortifications, Victorian follies, and modern high rises, such as Centre Point or Canary Wharf' (1994: 3). It is also rather phallic. We could say Blackstone's Penis, or perhaps Willy, Knob, Cock, Dick, Dong, or Whang. For an organ with seemingly limitless synonyms, 'Tower' will probably suffice. For just as Blackstone sought to outline and document the law that was conceived, written, applied and enforced by men, the law school certainly was, and arguably still is, dominated by men and conceptions of the masculine (as well as heterosexual, white and ableist) interpretations of law. As Conaghan has noted, 'for large parts of its history, law served as a bastion of male privilege and female subjection' (2013: 3). A phallic symbol as the conception of the English law school was perhaps still apt for 1994—albeit as a satirical choice—given the continued masculine dominance of the law school. In 2021, it is an anachronistic symbol, although the struggle for gender equity in the law school continues (see, on the English context, Duff & Webley 2021; and, on the North American context, Balachandran & Ors 2019; and Duncan & Ors 2020).

Whilst legal scholars have increasingly engaged with themes of gender and sexuality in research—and feminist and queer theories in particular—

there has been a slower connection with the law school classroom and queer and feminist pedagogies (Brooks & Parks 2004) or indeed the application of masculinities studies (see, for example, Collier 2010). This disconnect perhaps reflects the traditional lower priority and focus given to teaching in some law schools (see Cownie 2011) as they seek to prioritize research instead. This arguably represents an over-correction from the origins of law schools which lay in teaching and training, and a desire to be seen as equal researchers to those in the more established social sciences and humanities (see Twining 1980; 1995). Here is another opportunity for the law school and law teachers who work across disciplinary boundaries to explore issues of gender and sexuality.

Whilst gay student groups began to emerge on university campuses in the USA and Europe in the 1970s (see Liebert 1973), the law school has arguably been slower to catch up in providing a space in which these groups can be visible. In the USA, one 2008 study suggested that the law school climate for GLBT students had improved but also included reports of posters advertising GLBT events on campus being defaced, academics showing disdain for the GLBT community, isolating and ‘freezing out’ GLBT students in classes, and students and faculty using the term ‘gay’ in a pejorative manner. They also highlighted the joking in class around cases such as the key LGBTQ rights cases of *Bowers* (1986), *Romer* (1996) or *Lawrence* (2002) (Strader & Ors 2008). Over a decade on, one can but hope further progress has been made, but there remains a dearth of research on this aspect of the law school. One might, in England and Wales, still point to the discussions around *R v Brown* (1993) as one part of the study of criminal law which is ripe for greater interrogation of attitudes towards sexuality, and especially kink behaviours (see Ashford 2010b; and, more generally, Gledhill & Livings 2018).

We should be cautious in our claims about a shift in gender and sexuality as part of the law school ‘agenda’. Robson (2018: 276) has suggested that, whilst some might argue the legal academy has been queered, this can sometimes amount to some law schools merely ‘touting’ themselves as LGBT friendly. She notes, however—albeit primarily in a US context—that the number of LGBTQ law professors has increased dramatically, the number of self-identifying LGBTQ law students has increased, and LGBTQ courses and course content have also expanded. Yet, she is not convinced of the broader queering claim. In particular, there has not been a commensurate focus on developing what a queer pedagogy might look like for law schools. Moreover, queer students and faculty bring a distinct experience to the law school (see, more generally, Dilley 2002), and this experience is shaped not merely by their experience of the

classroom but also by the broader campus dynamic, including time spent on campus and in student accommodation/halls (see Karioris 2019). This necessitates a queer pedagogy that understands and shapes the broader student and faculty experience, which has not yet been developed, so that the law school classroom remains a key site for resistance and pedagogic intervention which to date is largely unexploited.

[C] GENDER, SEXUALITY, LAW AND TEACHING

In *Blackstone's Tower*, Twining suggested that two main conceptions of the role of the law school have competed for dominance: the first is the law school as a service institution for the profession (the professional school model); the second is the law school as an academic institution devoted to the advancement of learning about law (the academic model) (1994: 52) and whilst this tension arguably remains, feminist and queer theory has provided a tool for the law school to engage with both conceptions (and the fuzzy interplay of the two). If the law school seeks to focus on either of the aspects that Twining identified, it is arguably impossible to think how it does so today without also seeking to engage with the identity politics (to which gender and sexuality are central) that are key both to the legal profession and also the advancement of learning about law. Both feminism and queer theory provide a critical lens for analysis, but also provide a connection with activism and policy. Law school teaching that engages with gender and sexuality serves both the conceptions of the law school that Twining referred to.

Twining's conception was specific to the English law school. Whilst Robson (1998: 219) has suggested that 'even a *liberal* legal education ... is fundamentally different from a liberal arts education' (original emphasis) in considering the role of gender and sexuality, Robson was approaching the law school in a US setting. For the English law school, it continues to provide undergraduate law programmes, alongside postgraduate taught and research provision and—in different ways—direct or indirect vocational training. Law programmes with their hybrid of the 'core' subjects and 'options' sit across these different agendas and provide an important space in which themes of gender and sexuality can be addressed—either as part of compulsory modules (such as criminal law in the earlier *Brown* example), or in optional modules such as family law, or employment law; and increasingly in modules specifically focused upon gender, sexuality and law (Moran 2000; Ashford 2010a; 2011b). Beyond this, extracurricular activities—which Twining noted was one of

the functions of the law school to provide (1994: 124)—such as mooting, provide a space in which knowledge can be approached differently.

Perhaps one of the preoccupations of the contemporary law school that also informs both law programmes and extracurricular activity is the issue of employability (see, for example, Knox & Stone 2019; Nicholson 2020; and, more generally, Tymon 2013). It is an agenda arguably driven by the marketization of higher education and the emergence of the Teaching Excellence Framework which both necessitate ‘good’ employability, that is to say students graduating into ‘graduate-level’ jobs (see Knox & Stone 2019; Weston & McKeown 2020). Here too are opportunities for the law school to rethink what it does. Mizzi (2016: 137) has argued that ‘heteroprofessionalism’ creates marginalization, with notions of ‘professional’ often ill-defined as educational concepts, but nonetheless requiring a mode of behaviour for successful navigation. For law schools, these norms of behaviour are often rooted in the employability discourse, for example the dress that one might associate with a moot (see, more generally, Mulcahy 2017). This also extends to the ‘professionalism’ of classroom-based discourse. ‘Appropriate’ and ‘professional’ are concepts that can act as anchors pulling us back to traditional patriarchal and heteronormative conceptions of ourselves and co-opt law schools into reproducing these restrictive narratives. It is not enough therefore to restrict feminist or queer thinking to the law school curriculum as this can produce merely the illusion of change.

Moreover, the enriching of the research environment of law schools by feminist judgments projects (Hunter 2012) or zine-making, provides further opportunities to enrich the pedagogy of law schools and embed thinking that challenges norms that persist in our attitudes towards gender and sexuality. It is arguably in the teaching of law that we can see moments of praxis—ephemeral incidents of ‘truth’ provided by lived reality—in our understanding of gender and sexuality in the contemporary law school. Both queer and feminist theory (see Halley 1993 and Butler 2007, respectively) have documented the constructed and performed aspects of sexuality and gender. The law school provides an important site in which these moments of praxis can be seen in relation to a range of discourses, for example in relation to dress and performance (Cownie 2006), the use of theory to shape the curriculum, and broader themes of diversity and intersectionality (see Dark 1996; Randall 2011).

Pedagogy can be vital for enabling us as academics to empower our students, and to drive change (see Taylor 1998). A key contemporary tension for the law school, or so popular and social media tell us, is

the introduction of the ‘trigger warning’ into education spaces. The origins of trigger warnings lie in the feminist blogs of the 1990s, in which readers were provided with a warning to try and avoid or minimize any traumatic responses to the material presented (Forstie 2016: 422). It provided agency to the survivors of sexual assault to choose whether to expose themselves to potentially harmful material. Yet, more recently, queer thinkers have been amongst those who have criticized the growing use of trigger warnings as part of a narrative of promoting the neoliberal classroom and the student as consumer which in turn limits the ability to expose students to new and challenging material (see Halberstam 2014), and with broader implications for academic freedom.

Inherent to queer theory is to question; it is central to the ‘radical practice of deconstructing normalcy’ (Luhmann 2009: 151). Whilst the skill of questioning and interrogating ideas and data is arguably inherent to ‘thinking like a lawyer’ (see Gantt 2007; Huxley-Binns 2011), to question or deconstruct normalcy is perhaps more challenging for a discipline that is typically rooted in legal doctrine with its focus on legal rules (see, more generally, Twining & Miers 2014). Queer challenges those rules of normalcy as ephemeral and uncertain and sees that trigger warnings are themselves rooted in these rules of normalcy. For Forstie, these tensions in the use of trigger warnings provide a case study for queer theorists. If the queer classroom is ‘fundamentally affective, political, and imbued with power’ (2016: 491), then what better issue than trigger warnings for the law school to question and explore.

In *Blackstone’s Tower*, Twining described the newspaper exercise he would conduct with first-year students as a way of considering law and society. Students are asked to read all of a non-tabloid newspaper, to mark every passage which, in their view, either deals directly with law or which is ‘law-related’, and to answer some specific questions. They are required to stipulate their own definitions of ‘law’ and ‘law-related’ (Twining 1994: 5). In one Hamlyn lecture that forms part of *Blackstone’s Tower*, Twining undertakes the exercise himself, using *The Independent* newspaper. It is an exercise that provides a useful case study in how an engagement with gender and sexuality research and scholarship can reshape the pedagogic experience. Amongst the stories he notes, two arguably leap out for gender and sexuality scholars in the contemporary law school, and perhaps so too in 1994. He notes that ‘homicide and sex had their normal share of cases reported (including a brief reference to the amputative Lorena Bobbitt)’ and later ‘negligence in respect of the distribution of HIV contaminated blood’. He concludes the section by noting that ‘This looked like a fairly typical day’ (Twining 1994: 6).

Lorena Bobbitt was a story that was treated as a slightly humorous news item at the time—a woman who cut off her husband’s penis with a knife, drove off, and threw it into a field. The penis was eventually found by the police (Lorena told them where she had thrown it) and re-attached to the body of her husband. As a 14-year-old cis-male at the time, I recall the extensive coverage in the media and playground jokes about ‘doing a Bobbitt’ to a guy. How we laughed. Lorena Bobbitt had endured years of rape and abuse at the hands of her husband. The act was the act of desperation and frustration (see Chozick 2019). Would we still laugh today? For a member of the LGBT community—I write today as a gay man—the idea that you could pass over a story relating to HIV when the pandemic was still so seemingly unstoppable, and the funerals of friends and former lovers so fresh in memory of so many LGBT people at the time, is equally remarkable. It is difficult to imagine either story being discussed in a contemporary English law school without considering issues of gender and sexuality. This perhaps speaks to changes that have occurred, and the centrality of law teachers in leading that change.

[D] THE LAW TEACHER

At the heart of our pedagogy is the relationship between a student and teacher. The law teacher can be an important driver for change in the legal profession, society and a broad range of policy agendas (McKee & Ors; 2020; Raj 2020), in addition to being the key architect of law school pedagogy for students. Whilst Twining suggested that the mass university tends to create a gulf between academic staff and students (1994: 49), the law teacher remains a visible and influential presence for the student body. This is a relationship that can arguably reduce to the familial, but such a reduction is typically couched in heteronormative terms. Here, we can see the particular challenge that non-heterosexual identities bring to the classroom and the student/teacher relationship (Robson 1998: 216). In contrast to other identities, sexuality has arguably received less attention as a lived identity for UK academics more generally, let alone for law teachers (Cownie 2004: 184), and despite the growth in general law and sexuality scholarship, this has not—at least to the same extent—‘spilled over’ into the study of sexuality and the legal academy.

The student/teacher relationship is forged in a shared understanding of power and, with it, desire. In being ‘out’ with our sexuality in the law school, we arguably position ourselves through a prism of desire—and sex (see Robson 1998: 93). We outwardly and consciously define ourselves by our desire in contrast to the silent—but ever present—desire of our heterosexual colleagues. It is a desire that—even if we have children—

is not born of reproductive desire, but unambiguously of sexual desire. Rofes (2000) previously noted that, as a gay male educator, he was someone who immersed himself in and organized his social life around communities that value and prioritize sex, and engaged in behaviour that might be regarded as promiscuous. He was gay, but was a gay liberationist, and what today might be framed as a queer activist or queer teacher. Here lies a further challenge for the operation of the queer law teacher. Is it someone who is 'out' as gay, or is it someone that student might see on hook-up apps like Grindr or Recon? Is it someone who their students might see in leather, rubber, or other fetish gear? The idea that faculty and student might 'accidentally' have sex with one another might be a particularly challenging concept for some. Yet in a public sex venue such as a sauna in a dark room or through a glory hole it is a possibility. These spaces and experiences arguably remain absent for the way norms and codes of behaviours are constructed within and for law schools. Queer interventions provoke questions about the boundaries that we observe or impose upon ourselves and our students. It also potentially raises tensions between queer and feminist thinkers as power becomes (re)problematized.

As we 'move from the back to the front' of the law school classroom, we also draw on those experiences of being taught as we shape our own pedagogy, with Brooks & Parkes noting the importance of 'out' law lecturers in shaping their law school experience and their subsequent thinking about a queer pedagogy (Brooks & Parkes 2003). In my own case, experiencing law school pedagogy as a gay student in the late 1990s and early 2000s, 'out' LGBTQ law teachers seemed relatively rare, but those that were served as important beacons of hope, albeit still within a heteronormative law curriculum and law school dynamic. The diversity of legal academics is perhaps not of concern to some law students, but it remains a vital agenda for law schools (Lai 2015; Vaughan 2016). Legal academics can also be seen as providing role models for law students, with McGlynn noting the particular importance for women law teachers in shifting perceptions of law students towards female lawyers and judges (1999), and similarly Robson invokes the—still imaginary—idea of the lesbian US Supreme Court justice (Robson 1998: 1-4). Moreover, 'out' senior members of the law school can be important role models for junior faculty (Tierney 1997: 102).

Cownie has argued that the study of women legal academics may not only contribute to our understanding of the university as an institution, but also to our knowledge of the discipline of law (1998). Twining was a member of the Faculty of Queen's University Belfast when in 1970 Claire

Palley became the first woman to be appointed as a professor of law in the UK. A landmark event—although not appreciated as such by those making the appointment—about which, as Cownie has noted, relatively little has been written (Cownie’s own work is a notable exception) (Cownie 2015). Celia Wells, reflecting on her life as a UK female law professor, notes that she found ‘talking about the world in a way which includes women as well as men provoked the label “rabid” or “radical” feminist’, adding that, as well as encountering biased law students, she also encountered the same attitudes from her male colleagues (Wells 2019: 91). These biographies and autobiographies are an important dimension in bringing to life the stories of women and can also be seen in the bringing together of a range of disciplines and approaches including feminist and queer scholarship to the study of law (Sugarman 2015; also see Miller 2009). Collectively, these stories document the lives of women law teachers but also raise questions about how these identities can be supported by and in turn reshape the law school.

Twining invokes his attitude towards gender (alongside his approach to racism, inequality, war and poverty) as a sign that he is progressive, saying he is probably more of a social democrat than a legal democrat (Twining & Sugarman 2020). However, the identity of law teachers should not be reduced merely to a political proxy. Feminist and queer theories provide radical interventions in thinking about the identity of law teachers and, if meaningfully engaged with, provoke some challenging conversations for law schools that highlight how male-centric and heteronormative our law schools remain.

[E] FEMINIST AND QUEER THEORY IN THE LAW SCHOOL

Guth (2016: 248-249) has noted that ‘not all law teachers are researchers’ and that ‘even those who are do not necessarily research in areas where they teach or teach in areas they research’. Nonetheless, it is to research that we often look as the foundation for knowledge that is then disseminated in law schools. Queer interventions here have provided new ways for problematizing research, even down to the acknowledgments that commence monographs and some articles. These acknowledgments offer thanks to families or the scholarly families that have produced academic work. Buehler & Samer (2018) have noted the power of this element of research for denoting academic family ties and a genealogy of queer thinking. It also arguably points to the ways that power plays out in the academy and the ways that gender and sexuality shape the evolution

and presentation of ideas within the law school community. The power of scholars, teachers and their ideas can be glimpsed through these acknowledgments before one even commences reading the substantive work. Whom we thank at the start of a book is arguably as important as what we write on the pages that follow.

Twining observed that: ‘The distinction between law in books and law in action is dissolving as more of the action gets into the books. There is thus much greater variety in legal literature than there was twenty years ago’ (1994: 13). Yet there remains no textbook in the area of gender, sexuality and law. What may be the first textbook is currently under contract with Edward Elgar with this author and Alexander Maine at Leicester University, and it will take the form of an edited textbook, an attempt to queer the textbook. Perhaps that will be the start of many. For a field that seeks to disrupt boundaries, there is an uncomfortable tension in seeking to draw a boundary in order to define the parameters of a textbook. Nonetheless, the textbook is also rooted in theoretical enquiry, and these theories are themselves rooted in an activist tradition. This might seem at odds with traditional approaches to pedagogy in the law school.

Twining notes in his 2019 memoir that the law in context movement has an underlying ideology of ‘a liberal interpretation of the academic ethic’, suggesting that ‘those who think that the overall purpose of scholarship and education is *not* to understand the world, but *instead* to change it, clearly differ from this view, but even they can be accommodated in this broad movement’ (Twining 2019: 164 original emphasis). This suggests a choice that may seem antithetical to feminist or queer theorists within law schools for whom the need to change the world is a goal of survival and presents arguably a clash with the mindset of Twining—one rooted in that of a white male heterosexual—albeit one who has led a rich and diverse life. For Conaghan (2013: 247), ‘law is not just something that *is* but also something one *does*’ (original emphasis). Conaghan resists the reduction of law into politics but argues that they both often occupy the same space. Yet, as Bradney (2016: 226-227) has noted, whilst legal scholarship has increasingly engaged with law and politics, teaching—in so far as we can tell (and textbooks can be instructive for this understanding)—has not reflected this shift to the same degree.

Feminism allows us to question the truths of law (Smart 1990) and queer fundamentally challenges our conceptions of truth, both providing scope for a significant reappraisal of the law school. Recent decades have seen a growing presence of feminism in the law school curricula since the 1990s (Twining 2019: 250), with Conaghan noting at the turn of this century that

'few areas of law, no matter how musty or arcane, have remained immune from the feminist legal challenge' (Conaghan 2000: 352). The journal *Feminist Legal Studies* emerged in 1993, the first UK peer-reviewed scholarly journal to focus specifically on feminist legal scholarship, providing an important space to nurture feminist legal scholarship (Hunter 2018). In the noughties, the Feminist Judgments Project—based on a similar venture in Canada called the Women's Court of Canada—sought to 'inaugurate a new form of critical legal scholarship, one which seeks to demonstrate in a sustained and disciplined way how judgments could have been written and cases could have been decided differently' (Hunter & Ors 2010: 3). Feminist judgments challenge our assumptions about the 'neutrality' of judges (Grear 2012)—as if to apply feminist theories undermines the very basis of judicial reasoning—yet these interventions allow us to see that that neutrality is often rooted in gendered assumptions. Feminist judgments can be applied to a range of modules; for example Auchmuty (2012) has described the application of them to the property law classroom, enabling a contribution across law school programme provision. More recently, the Women's Legal Landmarks Project sought to highlight the key landmarks in legal history for women in the UK and Ireland (see Rackley & Auchmuty 2018), creating a further resource and arguably an important moment of solidarity for participants.

Recent years have also arguably seen the emergence of assumptions that we operate in a 'post-gay' environment in the classroom, in which understanding and acceptance is provided for all (see Lapointe 2016), yet this is also a space in which LGBT citizens 'conform' to a new normative framework (see, more generally, Ashford 2011a). The scope for queer to reframe the law school should not be underestimated. Bernini—in an eviscerating critique of fellow queer theorists, particularly Bersani—suggests a 'historic difficulty' with queer theory, arguing that 'even the most radical queer critique of liberalism cannot free itself, as it says it would like to, of that normative ideal of a community of love', suggesting a 'waning of revolutionary ideologies and their justification for violence as an accelerator of progress' (Bernini 2017: 47). Yet, at the very least, to question concepts such as love offers the opportunity for a fundamental reappraisal of concepts both rooted in, and seemingly devoid of, the concept from family law to contract law.

Twining (2018: 256) more recently noted his dissatisfaction with the ways that legal education has been theorized since the 1960s, suggesting that legal academics need to 'persistently, confidently, and loudly articulate what is the general mission of our academic discipline'. One might suggest that feminist and queer legal theory offer such an opportunity.

Perhaps for Twining these theories reflect a ‘minority’ interest; sectional rather than universal. Yet, for those legal scholars who identify with these theories—and I identify as a queer theorist—then these frameworks are fundamental world-views and the universality Twining points to is merely one rooted in traditional notions of patriarchal power or homonormative assumptions. These theories—and the struggles that gave birth to them and continue to shape and inform them—also demand a persistence, confidence and volume in the messages that they generate.

[F] QUEERING RUTLAND: A CASE STUDY

In seeking to understand the culture of the law school, Twining invented the University of Rutland, to provide an imagined case study (1994: 66-85). The university was, Twining tells us, founded in 1930, and Twining writes of the institution in 1994. In the tradition of *Blackstone’s Tower*, perhaps we can offer a vision for the law school in 2021 through an alternative prism, and—given the utopian traditions of the theory—I am here applying a queer lens. A queering of Rutland might offer us an alternative, utopian, vision of the law school.

In 2013, the university appointed a new Head of Department and professor. They set about taking advantage of a number of retirements from the Law School to begin the process of co-designing an alternative vision for Rutland. The faculty numbers have further expanded since 1994, from 33 to 66. This doubling has not matched student numbers which have trebled from 600 to 1800. The Law School has grown but remains a relatively modest size compared to many other law schools. The LLB has grown as part of the undergraduate mix whilst the four-year LLB with French and English law continues, albeit with modest numbers. This has over a sustained period allowed for an exchange of faculty and has embedded aspects of French philosophy—particularly poststructuralist ideas from Foucault—deeply into the faculty culture. The family law LLM that Twining described has grown and now engages with complex issues of gender and sexuality in relationship recognition, custody, and has a pioneering partnership with a number of gender-based violence organizations in the UK and internationally, particularly in France. A name change—at the suggestion of the marketing department—added the prefix ‘international’ to the title. The Law School’s faculty, thinking that this was in line with their global ethos, agreed, and the marketing department sighed in relief that it wasn’t another battle that they’d need to have with the law school. The European LLM also continues, and the faculty have recently publicly committed to its continuation, irrespective of Brexit. The Law School projected a light installation onto its building

in the run-up to the 2016 referendum advocating people to vote no, and choose instead to remain within the European Union as part of an outward-looking vision for the UK.

Twining began his tour with the Rutland Law School building, comprised of three converted terrace houses with an ‘ugly’ 1985 modern annex tagged on. Following the expansion of the Law School in the early noughties, the Law School was moved to a modern brick and glass building co-designed with the faculty and students. There is no longer a Latin inscription, simply a sign saying ‘School of Law’. The Denning name was abandoned and the old rather expensive plaque sold off with the proceeds donated to a charity supporting homeless LGBTQ young people. The decision was made following a vote of students and faculty. In contrast to the old building, it is light and open. The creaking lift has been replaced with multiple lifts and accessible entrances to the building.

Digital displays have replaced the notice boards and present an image of a diverse faculty and student body. They also highlight events and activities. One PowerPoint flashes on screen as we enter promoting a forthcoming event with Lorena Bobbitt talking via Zoom ‘Giving Voice to Gender-based Violence’. Although the noticeboards have gone, students have reclaimed a number of walls that are now covered in bright and overlapping posters for community protests and events. The university did attempt to remove the posters, but faculty joined students in protesting that they should stay. Also on the ground floor we see a Law Clinic space. The Clinic is new since 1994 and specializes in LGBTQ services—a ‘Rainbow Clinic’—and one dedicated to services for women. They also have a Street Law Programme with a local charity working with women of colour who have experienced domestic violence. Also on the ground floor are spaces for student groups—the Law School Queer Lawyers for Tomorrow Society and the Student Feminist Judgments Society are among them. There are also small office spaces that are made freely available to small community groups—the majority of which address issues relating to gender and/or sexuality and support the clinic and research impact activity of the Law School, including a number of groups focused on the Global South.

There is no longer a dedicated law library, but there is a range of flexible study spaces that provide digital access to resources. The Law School has in recent years also worked with partners—including many of the groups based on the ground floor—to launch several ‘diamond’ open access academic journals. They include rigorous academic research articles but also more digestible content. As diamond journals, they are free to publish and open access to all readers. Many of the student

and community spaces have student zines placed on them—the latest product of a number of student publishing groups. The third floor houses Rutland’s moot court. On the walls of the moot court, the old framed pictures of male judges have survived, but they are surrounded by pictures of graduates (the law school abandoned the term ‘alumni’ some years ago) and inspirational women and queer lawyers, selected by faculty and students. One QC dressed as a pup appears alongside a breast-feeding judge. Inside, students are engaging in a moot problem co-designed with their tutor exploring a problem relating to HIV transmission and the Offences Against the Person Act 1861. Some of the students recently took part in a policy clinic response to the Law Commission advocating reform of this area of criminal law.

In contrast to Twining’s time, in which offices were hierarchically allocated, the building allows for spaces to be reconfigured. There are shared spaces and individual spaces, with faculty working in the ways in which they feel most comfortable. The current Dean shares a space with a post-doc researcher and a lecturer who all work on similar themes. Research has grown since 1994. The glass cabinet that once contained a sample of research outputs has long gone, and all faculty can be found producing media outputs alongside research outputs. They performed very well in the last Research Excellence Framework (REF) although the faculty were divided on whether they should even be in REF. Some felt it was representative of the neoliberal agenda that has distorted UK higher education. Others agreed with that but felt it was the best of a series of bad options to more equitably redistribute resource. Debates continue to rage.

Graduates from Rutland continue to go into a range of careers, including the legal profession. There are hopes that the first openly gay member of the Supreme Court will be a high-profile judge who is a Rutland graduate; they regularly visit the Law School with their partners (with whom they are in polyamorous relationships) to talk with students about the profession and to hear from the charity and non-governmental organizations based in the Law School about how they are experiencing the justice system. Rutland remains a work in progress, but it is somewhere they feel they belong.

[G] CONCLUSION

The brief reimagining of Twining’s Rutland Law School provides us with an opportunity to imagine what could be. Perhaps the imagined portraits still amuse, but why, if they reflect a lived reality? Our ongoing discomfort and imposition of boundaries to our own thought speaks to the vital power that remains in constructions of gender and sexuality.

Robson has noted that LGBTQ law professors have power, and that power can be used to empower law students. Although Robson writes from an American law school perspective, the observation is, I suggest, equally applicable in the English law school context. The ways that we choose to operate our classroom, including who and how we call upon students, how we solicit and utilize preferred names (and one might add gender pronouns), and in the scenarios we present to students, and role plays, are all vital in understanding the gender and sexuality dynamic. This relationship can be more acute in the context of research student supervision and the individual bonds that can be found in those spaces. One might add personal tutoring to this aspect of law school life. Finally, Robson notes the broader law school environment, for example through societies, events and conferences as spaces for empowerment.

Mayo & Rodriguez (2019: 4) have asserted that ‘queerness isn’t done and finished’ and temptations to think of queer as a fixed concept—rather than embrace the fluidity and uncertainty inherent to the theory—are misplaced. Rather, the potential of queer should be nurtured, and, in doing so, pedagogy can be constantly questioned and reframed. Pervasive heteronormative assumptions within higher education (see, more generally, Seal 2019) persist, and so the application of queer (and feminist) theories enables us to transform the law school. This transformation is often rooted in our own scholarship, underlining the importance of nurturing feminist and queer legal thought. Herman (2006: 657) has suggested that ‘Our scholarship is more than just an intellectual pursuit or a means of improving our effectiveness in the classroom.’ For queer theorists, sexual identities are not descriptive but performative. In applying this to the teaching space of the law school (see, more generally, Halley 1993; Nelson 2002), we can move beyond the boundaries that limit our pedagogies and ultimately our understanding of law.

Perhaps as we see the transformative effects of programmes such as *No Outsiders* on our educational system, there will be those who feel that the law school need not change because ‘schools will already have done that’ and shifted the conversation and moved past the silence relating to gender and particularly sexuality that can still operate in some schools (see DePalma & Atkinson 2006). Yet if we, like Twining, draw upon the mission of William Blackstone, we see not a figure—like Blackstone’s great critic Jeremy Bentham—preserved in a glass box loitering in a university building lobby, its head stored away under lock and key elsewhere—but someone who sought to recognize the contemporary world and change law schools to not merely reflect that but to drive change (see, more generally on the Blackstone/Bentham relationship, Posner 1976). Though not a

radical or a reformer—and indeed that has been the basis of criticism of Blackstone—the effect of what he advocated and produced was to enable reform. His, albeit at the time unsuccessful, attempt to create a law school at Oxford was the vision of not someone looking back, but a jurist looking forward. Twining too, at his best, reflected the reality of the contemporary law school and looked forward.

In *Blackstone's Tower*, Twining (1994: 2) suggests that the dominant model of the English scholar-teacher is a competition between 'the expositor, the censor, the scientist and the craftsman' (represented by the four founding figures of Blackstone, Bentham, Austin and Amos respectively). The prisms of gender and sexuality perhaps highlight the fluidity and complexity of these categories. Law schools need to remember this and embrace the radicalism of their history and not only to reflect—with greater diversity—the world we inhabit now, but also to create a new world.

References

- Ashford, Chris (2010a) 'Socio-legal Perspectives on Gender, Sexuality and Law' 31(1) *Liverpool Law Review* 1-12.
- Ashford, Chris (2010b) 'Barebacking and the Cult of "Violence": Queering the Criminal Law' 74(4) *Journal of Criminal Law* 339-357.
- Ashford, Chris (2011a) '(Homo)normative Legal Discourses and the Queer Challenge' 1(1) *Durham Law Review* 77-98.
- Ashford, Chris (2011b) 'Sexualities and the Law' 14(2) *Sexualities* 265-272.
- Auchmuty, Rosemary (2012) 'Using Feminist Judgments in the Property Law Classroom' 46(3) *The Law Teacher* 227-238.
- Balachandran, Malika, Roisin Duffy-Gideon & Hannah Gelbort (2019) 'Speak Now: Results of a One-year Study of Women's Experiences at the University of Chicago Law School' *University of Chicago Legal Forum* 647-684.
- Bernini, Lorenzo (2017) *Queer Apocalypses: Elements of Antisocial Theory* Cham: Palgrave Macmillan.
- Bradney, Anthony (2016) 'But It Still Goes on: The Teaching of Law and Politics in 2015' in C Ashford, N Duncan & J Guth (eds) *Perspectives on Legal Education: Contemporary Responses to the Lord Upjohn Lectures* Abingdon: Routledge.

- Brooks, Kim & Debra Parks (2003) 'Moving from the Back to the Front of the Classroom' 1(3) *Seattle Journal for Social Justice* 637-652.
- Brooks, Kim & Debra Parks (2004) 'Queering Legal Education: A Project of Theoretical Discovery' 27 *Harvard Women's Law Journal* 89-136.
- Buehler, Brandon & Roxanne Samer (2018) 'Queer Acknowledgments' in E McNeil, J E Wermers & J O Lunn (eds) *Mapping Queer Space(s) of Praxis and Pedagogy* Cham: Palgrave Macmillan.
- Butler, Judith (2007) *Gender Trouble: Feminism and the Subversion of Identity* 2nd edn New York: Routledge.
- Chozick, Amy (2019) '[You Know the Lorena Bobbitt Story. But Not All of It](#)' *New York Times* 30 January.
- Collier, Richard (2010) 'Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender' 33(2) *Harvard Journal of Law and Gender* 431-476.
- Conaghan Joanne (2000) 'Reassessing the Feminist Theoretical Project in Law' 27(3) *Journal of Law and Society* 351-385.
- Conaghan, Joanne (2013) *Law and Gender* Oxford: Oxford University Press.
- Cownie, Fiona (1998) 'Women Legal Academics – A New Research Agenda?' 25(1) *Journal of Law and Society* 102-115.
- Cownie, Fiona (2004) *Legal Academics: Culture and Identities* Oxford: Hart Publishing.
- Cownie, Fiona (2006) 'Dressing the Part: Gender, Performance and the Culture of Law Schools' 57(3) *Northern Ireland Legal Quarterly* 557-576.
- Cownie, Fiona (2011) 'Twining, Teachers of Law and Law Teaching' 18(1-2) *International Journal of the Legal Profession* 121-138.
- Cownie, Fiona (2015) 'The United Kingdom's First Woman Law Professor: An Archerian Analysis' 42(1) *Journal of Law and Society* 127-149.
- Dark, Okainer Christian. (1996) 'Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching' 32(3) *Williamette Law Review* 541-575.
- DePalma, Renée & Elizabeth Atkinson (2006) 'The Sound of Silence: Talking about Sexual Orientation and Schooling' 6(4) *Sex Education* 333-349.

- DePalma, Renée & Elizabeth Atkinson (2009) “No Outsiders”: Moving beyond a Discourse to Challenge Heteronormativity in Primary Schools’ 35(6) *British Educational Research Journal* 837-855.
- Dilley, Patrick (2002) *Queer Man on Campus: A History of Non-heterosexual College Men, 1945-2000* New York: RoutledgeFalmer.
- Duff, Liz & Lisa Webley (2021) ‘Gender and the Legal Academy in the UK: A Product of Proxies and Hiring and Promotion Practices’ in U Schultz, G Shaw, M Thornton & R Auchmuty (eds) *Gender and Careers in the Legal Academy* Oxford: Hart Publishing.
- Duncan, Susan Hanley, Karen Lott & Catherine Pettis (2020) ‘Law School Dean Wanted: Woman for All Reasons’ 65(5) *Villanova Law Review* 1083-1104.
- Dyer, Hannah (2017) ‘Queer Futurity and Childhood Innocence: Beyond the Injury of Development’ 7(3) *Global Studies of Childhood* 290-302.
- Forstie, Clare (2016) ‘Trigger Warnings’ in N M Rodriguez, W J Martino, J C Ingray & E Brockenborough (eds) *Critical Concepts in Queer Studies and Education: An International Guide for the Twenty-First Century* New York: Palgrave Macmillan.
- Fradella, Henry F (2007) ‘Integrating the Study of Sexuality into the Core Law School Curriculum: Suggestions for Substantive Criminal Law Courses’ 57(1) *Journal of Legal Education* 60-76.
- Fradella, Henry F, Stephen S Owen & Tod W Burke (2009) ‘Integrating Gay, Lesbian, Bisexual, and Transgender Issues into the Undergraduate Criminal Justice Curriculum’ 20(2) *Journal of Criminal Justice Education* 127-156.
- Gantt, Larry O Natt II (2007) ‘Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind’ 29(3) *Campbell Law Review* 413-481.
- Gerber, Paul, & Claerwen O’Hara (2019) ‘Teaching Law Students about Sexual Orientation, Gender Identity and Intersex Status within Human Rights Law: Seven Principles of Curriculum Design and Pedagogy’ 68(2) *Journal of Legal Education* 416-456.
- Gledhill, Kris & B Livings (2018) *The Teaching of Criminal Law: The Pedagogic Imperatives* Abingdon: Routledge.

- Grear, Anna (2012) 'Learning Legal Reasoning while Rejecting the Oxymoronic Status of Feminist Judicial Rationalities: A View from the Law Classroom' 46(3) *The Law Teacher* 239-254.
- Guth, Jessica (2016) 'Fostering Curiosity: The Importance of Research and Teaching in Law Schools' in C Ashford, N Duncan & J Guth (eds) *Perspectives on Legal Education: Contemporary Responses to the Lord Upjohn Lectures* Abingdon: Routledge.
- Halberstam, Jack (2014) '[You Are Triggering Me! The Neo-liberal Rhetoric of Harm, Danger and Trauma](#)' *Bully Bloggers* 5 July.
- Halley, Janet E (1993) 'The Construction of Heterosexuality' in M Warner (ed) *Fear of a Queer Planet: Queer Politics and Social Theory* Minneapolis MI: University of Minnesota Press.
- Herman, Susan N (2006) 'Balancing the Five Hundred Hats: On Being a Legal Educator/Scholar/Activist' 41(4) *Tulsa Law Review* 637-660.
- Hunter, Rosemary (2012) 'Introduction: Feminist Judgments as Teaching Resources' 46(3) *The Law Teacher* 214-226.
- Hunter, Rosemary (2018) 'Feminist Legal Studies Journal, 1993' in Erika Rackley & Rosemary Auchmuty (eds) (2018) *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* Oxford: Bloomsbury.
- Hunter, Rosemary, Clare McGlynn & Erika Rackley (eds) (2010) 'Feminist Judgments: An Introduction' in R Hunter, C McGlynn & E Rackley, *Feminist Judgments: From Theory to Practice* Oxford: Hart Publishing.
- Huxley-Binns, Rebecca (2011) 'What is the "Q" For?' 45(3) *The Law Teacher* 294-309.
- Karioris, Frank G (2019) *An Education in Sexuality and Sociality: Heteronormativity on Campus* Lanham: Lexington Books.
- Knox, Jenny & Stone, Melanie (2019) 'Embedding Employability Skills for the Legal Professionals of the Future' 53(1) *The Law Teacher* 90-101.
- Lai, Amy (2015) 'From Affirmative Action Hiring to the Globalisation of Legal Academia' 49(1) *The Law Teacher* 3-21.
- Lapointe, Alicia (2016) 'Postgay' in N M Rodriguez, W J Martino, J C Ingray & E Brockenborough (eds) *Critical Concepts in Queer Studies and Education: An International Guide for the Twenty-First Century* New York: Palgrave Macmillan.

- Liebert, Robert (1973) 'The Gay Student: A Psychopolitical View' in H M Ruitenbeek (ed) *Homosexuality: A Changing Picture* London: Souvenir Press.
- Luhmann, Susanne (2009) 'Queering/Querying Pedagogy? Or, Pedagogy is a Pretty Queer Thing' in W F Pinar (ed) *Queer Theory in Education* New York: Routledge.
- Majury, Diana (1998) 'Representing Lesbians and Gays in Law' in J L Ristock and C G Taylor (eds) *Inside the Academy and Out: Lesbian/Gay/Queer Studies and Social Action* Toronto: University of Toronto Press.
- Mayo, Cris & Newlson M Rodriguez (2019) 'Wanting More: Queer Theory and Education' in C Mayo & N M Rodriguez (eds) *Queer Pedagogies: Theory, Praxis, Politics* Cham: Springer.
- McGlynn, Clare (1999) 'Women, Representation and the Legal Academy' 19 *Legal Studies* 68-92.
- McKee, Tina, Rachel Anne Nir, Jill Alexander, Elisabeth Griffiths, Paul Dargue & Tamara Hervey (2020) 'The Fairness Project: The Role of Legal Educations as Catalysts for Change. Engaging in Difficult Dialogues on the Impact of Diversity Barriers to Entry and Progression in the Legal Profession' *The Law Teacher* Online First.
- Miller, Janet L (2009) 'Autobiography as a Queer Curriculum Practice' in W F Pinar (ed) *Queer Theory in Education* New York: Routledge.
- Mizzi, Robert C (2016) 'Heteroprofessionalism' in N M Rodriguez, W J Martino, J C Ingray & E Brockenborough (eds) *Critical Concepts in Queer Studies and Education: An International Guide for the Twenty-First Century* New York: Palgrave Macmillan.
- Moran, Leslie (2000) 'Homo Legalis: Lesbian and Gay in Legal Studies' in T Sandfort (ed) *Lesbian and Gay Studies: An Introductory, Interdisciplinary Approach* London: Sage.
- Mulcahy, Sean (2017) 'Acting Law | Law Acting: A Conversation with Dr Felix Nobis and Professor Gary Watt' 4(2) *Exchanges: Warwick Research Journal*.
- Nelson, C D (2002) 'Why Queer Theory Is Useful in Teaching: A Perspective from English as a Second Language Teaching' 14(2) *Journal of Gay and Lesbian Social Services* 43-53.
- Nicholson, Alex (2020) 'The Value of a Law Degree' 54(2) *The Law Teacher* 194-208.

- Nixon, David & Sue East (2010) 'Stirring It Up or Stirring It In? Perspectives on the Development of Sexualities Equality in a Faith-based Primary School' 18(2) *Educational Action Research* 151-166.
- Posner, Richard A (1976) 'Blackstone and Bentham' 19(3) *Journal of Law and Economics* 569-606.
- Rackley, Erika & Rosemary Auchmuty (eds) (2018) *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland* Oxford: Bloomsbury.
- Raj, Senthoran (2020) 'Once More with Feeling: Queer Activist Legal Scholarship and Jurisprudence' 24(1) *International Journal of Human Rights* 62-79.
- Randall, Vernelia R (2010) 'Teaching Diversity Skills in Law' 54(3) *Saint Louis University Law Journal* 795-808.
- Robson, Ruthann (1998) *Sappho Goes to Law School* New York: Columbia University Press.
- Robson, Ruthann (2018). 'Educating the Next Generation of LGBTQ Social Justice Attorneys' in C Ashford & P McKeown (eds) *Social Justice and Legal Education* Newcastle-upon-Tyne: Cambridge Scholars Publishing.
- Rofes, Eric (2000) 'Bound and Gagged: Sexual Silences, Gender Conformity and the Gay Male Teacher' 3(4) *Sexualities* 439-462.
- Seal, Michael (2019) *The Interruption of Heteronormativity in Higher Education* Cham: Palgrave Macmillan.
- Sedgwick, Eve (1993) 'How to Bring Your Kids up Gay' in M Warner (ed) *Fear of a Queer Planet: Queer Politics and Social Theory* Minneapolis MI: University of Minnesota Press.
- Smart, Carol (1990) 'Law's Power, the Sexed Body, and Feminist Discourse' 17(2) *Journal of Law and Society* 194-210.
- Strader, Kelly, Brietta R Clark, Robin Ingli, Elizabeth Kransberger, Lawrence Levine & William Perez (2008) 'An Assessment of the Law School Climate for GLBT Students' 58(2) *Journal of Legal Education* 214-244.
- Sugarman, David (2015) 'From Legal Biography to Legal Life Writing: Broadening Conceptions of Legal History and Socio-legal Scholarship' 42(1) *Journal of Law and Society* 7-33.

- Taylor, Catherine G (1998). 'Teaching for a Freer Future in Troubled Times' in J L Ristock & C G Taylor (eds) *Inside the Academy and Out: Lesbian/Gay/Queer Studies and Social Action* Toronto: University of Toronto Press.
- Tierney, William G (1997) *Academic Outlaws: Queer Theory and Cultural Studies in the Academy* Thousand Oaks CA: Sage.
- Tierney, William G & Patrick Dilley (2009) 'Constructing Knowledge: Educational Research and Gay and Lesbian Studies' in W F Pinar (ed) *Queer Theory in Education* New York: Routledge.
- Twining, William (1980) 'Goodbye to Lewis Elliot: The Academic Lawyer as Scholar' 15 *Journal of the Society of Public Teachers of Law* 2-19.
- Twining, William (1994) *Blackstone's Tower: The English Law School* London: Stevens & Sons/Sweet & Maxwell.
- Twining, William (1995) 'What Are Law Schools For?' 46(3-4) *Northern Ireland Legal Quarterly* 291-303.
- Twining, William (2018) 'Rethinking Legal Education' 52(3) *The Law Teacher* 241-260.
- Twining, William (2019) *Jurist in Context: A Memoir* Cambridge: Cambridge University Press.
- Twining, William & David Miers (2014) *How to Do Things with Rules* 5th edn Cambridge: Cambridge University Press.
- Twining, William & David Sugarman (2020) 'Jurist in Context: William Twining in Conversation with David Sugarman' 47(2) *Journal of Law and Society* 195-220.
- Tymon, Alex (2013) 'The Student Perspective on Employability' 38(6) *Studies in Higher Education* 841-856.
- Vaughan, Steven (2016) 'The State of the Nation: Diversity and the British Legal Academy' 50(2) *The Law Teacher* 255-263.
- Wells, Celia (2019) *A Woman in Law: Reflections on Gender, Class and Politics* Hook: Waterside Press.
- Weston, Sally & Sarah McKeown (2020) 'After the TEF and Consumer Law-Based Interventions – Are Prospective HE Students Now Able to Make Informed Choices?' 54(3) *The Law Teacher* 414-425.

Cases Cited

Bowers v Hardwick, 478 US 186 (1986)

Lawrence v Texas, 539 US 558 (2003)

R v Brown [1993] UKHL 19, [1994] 1 AC 212

Romer v Evans, 517 US 620 (1996)

Legislation Cited

Female Genital Mutilation Act 2003

Gender Recognition Act 2004

Modern Slavery Act 2015

Offences Against the Person Act 1861

**BLACKSTONE'S TOWER REVISITED:
LEGAL ACADEMIC WELLBEING, MARKETIZATION
AND THE POST-PANDEMIC LAW SCHOOL**

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Abstract

The years since the publication of *Blackstone's Tower* have witnessed an explosion of international scholarship on university law schools and legal academics. More recently, the UK, as elsewhere, has seen the emergence of a distinct interdisciplinary body of work termed 'critical university studies' seeking to explore multifarious dimensions of what has been widely termed the marketization of universities and their law schools; a process well under way by the time *Blackstone's Tower* first appeared but which has since gathered pace. This article will explore the nature of these changes and, more specifically, assess their impact on a subject that has itself become the focus of increasing political and policy debate across the higher education sector over the past decade; the *wellbeing and mental health* of those who inhabit the contemporary university.

Focusing specifically on legal academics, the subject of a growing body of recent research, the article will chart both changes and continuities that have occurred within understandings of legal academic wellbeing since *Blackstone's Tower* was published; and, interweaving a discussion of the impact of the global pandemic of 2020 on wellbeing in university law schools, taking place at the time of writing, consider how Covid-19 is reshaping our understandings both of the 'private life' of the law school, as discussed by Fiona Cownie, and of legal academic wellbeing as a focus of socio-legal study.

Keywords: legal academics; wellbeing; mental health; UK universities; legal profession; marketization; critical university studies.

[A] INTRODUCTION

The publication of *Blackstone's Tower: The English Law School*, Cownie & Jones note in their introduction to this volume, proved significant and radical in 1994, a period when research into legal education was less developed and respected within the legal academy than it is now. The response to Twining's work, celebratory and critical (e.g. Goodrich 1996), reflected the political and theoretical terrain of legal studies of the moment; a field marked by the growing impact, for example, of socio-legal research, feminist legal theory, critical legal studies, sexualities/gender scholarship (Ashford, this volume) and, if to a lesser degree in the UK than elsewhere, critical race theory. Each, in different ways, shares with Twining's work a concern to interrogate the nature of legal scholarship, its history and the political, economic and cultural contexts in which legal research is undertaken (also Twining 1996; 1997); to advance, more generally, a 'law in context' perspective that might challenge the borderlands of the legal discipline and ask what, ultimately, university law schools are *for*.

The years since 1994 have witnessed an explosion of work within higher education studies and, in law schools, the sub-discipline of legal education (e.g. Bradney 2003; Jones & Cownie 2020). A sustained and distinctive strand of qualitative, quantitative and theoretical research, meanwhile, has examined diverse aspects of the lives of legal academics (Cownie 1998; 2004; Wells 2001; Thornton 2012; Collier 2013; 2004). Over the past decade, however, this work on the legal academy has been increasingly informed by a body of scholarship recently termed 'critical university studies' (henceforth CUS: for a flavour see Barcan 2016; Hall 2018; Pesta & Ors 2017; Taylor & Lahad 2018). This refers to a methodologically diverse engagement with—and challenge to (see below)—multifarious dimensions of structural changes that have occurred in the political economy in which universities operate. More specifically, CUS scholarship constitutes an attempt to better understand the impact of changes associated with the marketization of higher education (henceforth HE), a network of processes that have served to introduce entrepreneurial competition into public institutions (Levidow 2002). It explores their consequences for the cultures, practices and values of universities and the lives of those who inhabit them, staff and students. This includes, in the case of law, law students (Guth & Ors, this volume) and, my focus here, legal academics.

The narrative of the marketization was well-established and under way by the time *Blackstone's Tower* appeared. Twenty-five years earlier not dissimilar concerns were being expressed in Thompson's *Warwick*

University Ltd (Thompson 1970). In ‘Thinking about Law Schools: Rutland Reviewed’, four years on from *Blackstone’s Tower*, Twining sought to extend his discussion of the institutional functions and goals of law schools, recognizing the growing significance of metrics, league tables, modularization and drives to ‘massification’ (Twining 1998). In the years since, however, these processes have gathered pace exponentially in a period that has seen, importantly, major reform to the structure of funding of universities in England and Wales. These changes, taken together, have been perceived by some legal scholars as reinforcing an institutional view that law is a broadly applied subject and relatively in-demand commodity within an emerging new educational marketplace; a market model of education in which the *value* of a university degree is pitched, increasingly, in terms of future earnings potential and employability (Thornton 2012; Collier 2013; Thornton 2007). The resulting tension between models of ‘legal education as certification’ and ‘legal education as a means of societal transformation’ is addressed elsewhere in this collection (Adebisi, this volume: see further below).

This article reflects on *Blackstone’s Tower* in the context of new approaches to understanding how ‘the institutional is political’ in universities (Gillies & Lucey 2007). It seeks, more specifically, to examine the subjective consequences of these changes for the ‘private lives’ of legal academics (Cownie 2004). It does so via interrogation of a topic that barely registered on the agenda of legal studies at the time *Blackstone’s Tower* appeared but one which is, I shall argue, now at the *forefront* of contemporary political and policy debate across the UK HE sector, including within the discipline of law; the wellbeing and mental health of those who inhabit the contemporary university, the staff and students who, to use a Twitter hashtag widely in use during the 2018 dispute over pension reforms, *are* the university. This includes, in the case of law, legal academics.

The scale of change that has occurred since *Blackstone’s Tower* could not have been envisaged by Twining in his ‘tour’ of the university law school. At the time of writing, in the context of rapidly evolving governmental and institutional responses to the Covid-19 pandemic, the consequences of the marketization of HE is an issue central to discussion about the financial sustainability of the current model of funding of universities and the management of public health, safety and community transmission of the virus (Marginson 2020). The wider consequences of new platforms of knowledge production and education wrought by Covid-19, and longer-term impact of the pandemic on the wellbeing and mental health in universities, cannot be known (see further Parry & Ors

2021). What is clear, however, is that questions of student *and* staff wellbeing have become central to debates about the nature of any post-pandemic university.

The article will argue there has been both change and continuity in understandings of legal academic wellbeing since the time *Blackstone's Tower* was published. Interweaving reflections on the impact of the pandemic, I wish to consider what a wider 'wellbeing turn' across the international legal community over recent years can tell us about changes in the political economy in which law schools operate. This is a geopolitical conjuncture very different to that which shaped Twining's account from 'the standpoint of a not entirely respectful local guide'. If the current moment is marked by continuities with the law school depicted in *Blackstone's Tower*, then understandings of what it means to 'feel academic' (Taylor & Lahad 2018) have been reshaped in significant ways by the processes of marketization over the past 25 years.

[B] CRITICAL UNIVERSITY STUDIES AND ACADEMIC WELLBEING—A BRIEF TOUR OF THE TOWER

Over two decades into the 21st century it would not be possible to adopt Twining's approach of 'tour guide' to the law school without at least reference to the multitude of books and articles, special issues of journals, reports and data sets interrogating diverse aspects of what has become known in the literature as the 'neoliberal' university (for an overview in law, see Thornton 2012). The sheer scale of work on this topic is indicative of how the politics of HE has evolved since the mid-1990s. Twining's tour of the ideal-typical, middle-tier, fictitious law school, of its activities, composition and ethos, its libraries and architecture, was framed by an attempt to bring law into the intellectual mainstream; to locate law within a wider academy as part of our intellectual heritage (Twining 1994). The university in which this tower is located is broadly recognizable as a product of the model of funding that had shaped the post-war period of expansion of HE. At a political and policy level much CUS work is informed by an attempt to defend a model of this 'public university' (Bailey 2011); one that, for all the shifts underway at the time of *Blackstone's Tower*, is positioned as the product of social and political forces and a model of funding different from the present (see, e.g. Campaign for the Public University).

What of the legal academics who inhabit the law school? Over the past five years, in particular, a sub-strand of CUS scholarship has

emerged concerned with the subjective impact of changes associated with marketization on those who work in universities. The interconnections between the neoliberal university and poor academic wellbeing and mental health has received increasing attention across disciplines, the focus of a plethora of articles, online blogs, conferences, workshops and networks. If an engagement more developed in some fields than others, it has also, intriguingly, become a marked feature of recent legal scholarship (Baron 2014; Collier 2014; 2016; Field & Ors 2016; Wilson & Strevens 2018).

If a legal academic or law student were to take Twining's tour in the early 2020s what might they find discussed about wellbeing? Looking beyond the law school they would see growing concern about wellbeing across the silos of the legal community (Collier 2020a), encompassing law practitioners (Jones & Ors 2020) and students (Field & Strevens 2019). They would find a cultural landscape and policy debate around mental health issues transformed since the time Twining was writing in the 1990s; a concern that the Covid-19 pandemic has accelerated in far-reaching ways (see below). With regard to university law schools, they would see increasing attention paid to the wellbeing of law students against the backdrop of heightened political and policy concern over the past decade about student mental health. Even before the profound challenges raised to the mental health of university students by Covid-19 (National Union of Students (NUS) 2020) discussion was taking place about the place, purpose and responsibilities of universities with regard to student wellbeing; questions different to those framing the everyday life of Twining's law school (e.g. Higher Education Policy Institute (HEPI) 2016; Guthrie & Ors 2017; Thorley & IPPR 2017; Universities UK 2018a; 2018b).

Our tour of the contemporary law school would find a conversation about legal education increasingly shaped by consideration of the ethical obligation of law schools to better engage with the wellbeing of their students and 'educate for wellbeing' (Field & Strevens 2019); to address how law student wellbeing might be embedded within the law curriculum via 'intentional design' (Field & Ors 2016); to reconsider the place of the emotion and affect in legal education and legal practice (Jones 2019; also Woods 2010), to reassess the role therapeutic jurisprudence, positive psychology, self-determination theory and integrative law might each have in improving law student wellness, resilience and 'humanizing' law schools. It is notable, looking at responses to *Blackstone's Tower*, how the law schools of earlier periods had provided, for some, a profoundly *de*-humanizing experience; a legal education that fostered a 'progressive disappointment' which 'robbed me of any surviving sense of the relevance of my inner world, of poetry, desire, or dream' (Goodrich, 1996: 59).

If a nascent international legal wellness literature was, by 1994, tentatively identifying interconnections between poor lawyer wellbeing, lawyer attributes and what happens in law schools (see further Jones & Ors 2020), the contemporary UK law school is grappling with a 'wellbeing question' transformed from the time of *Blackstone's Tower* in terms of cultural visibility and political urgency; a growing recognition that not only have traditional law school teaching practices and cultures impacted in deleterious ways on law students, the processes of marketization discussed above are themselves closely interlinked with the kinds of problems being described within this recent literature (Thornton 2016).

We need at this stage to be more specific about these links between marketization and *academic* wellbeing. What would the recipient of Twining's tour of the contemporary law school find said about this topic? Recognizing the diversity of UK law schools and heterogeneity of the legal academic community, and how the wellbeing of law students and of those who teach them interlink in a myriad of ways, a number of themes emerge.

[C] A TROUBLED TOWER? LEGAL ACADEMICS AND THE RISE OF THE 'ANXIOUS UNIVERSITY'

Drawing on the CUS scholarship, the central problem can be simply stated. Albeit inflected by concerns that resonate in different ways across disciplines, a substantial research base addressing the emotional and affective consequences of the marketization of the UK higher education sector suggests that the organized practices, structures and cultures of universities are enmeshed with concerns now being expressed about academic wellbeing and mental health (e.g. Kinman 2001; 2014; Kinman & Wray 2015; Peake & Mullings 2016; Morrish 2019; HEPI 2019; Grove 2018). A range of national surveys using Health and Safety Executive Management Standards and other measures have examined levels of psychosocial hazards in academia (for example job demands, control, manager support, peer support, relationships, change) and the mental health of academics against national benchmarks. They point to a picture of poor mental health among academic staff against benchmarks (Kinman & Wray 2021). The specificities of law schools, their location in a market for legal education and, at an individual level, contingencies of age, stage of career and social background, I argue elsewhere, mediate how the impacts of marketization are experienced 'on the ground' (Collier 2014; 2020a). Nonetheless, looking to our tour of the ideal typical law school of today, research from diverse sources, adopting different methodologies,

would suggest there is no reason to think UK legal academics are inoculated from the pressures and concerns described within the CUS scholarship and research on academic wellbeing.

What, therefore, has been said? The years since *Blackstone's Tower* have witnessed an intensification of interconnected processes around the metricization of academic labour (Burrows 2012; 2016; Knowles & Burrows 2014) and growth of national and global ranking industries; a rankings-driven 'High-Ed-Biz' (Corver 2019). There has occurred a proliferation of metric assemblages encapsulated in the idea of the 'Data University' (Knowles & Burrows 2014). Organizational restructurings across the sector and institution of new models of metric-driven performance management (Lynch 2015; Watts 2017), meanwhile, have resulted in 'quantified control' of academics (Lupton 2013; Knowles & Burrows 2014) and commodification of the outputs of academic labour (Davies & Bansel 2010; Burrows 2012; Hall 2018; Pack 2018) These developments have, in turn, reshaped the 'structures of feeling' (Burrows 2012) of contemporary universities and understandings of the nature of academic work (Chubb 2017; Taberner 2018).

Academic workplaces have become increasingly marked across whole swathes of academic activity by the logic of the market and embedding of corporatization, commercialization and competition (whether for students, esteem, funding, time to undertake research and so on: Robertson 2010). University academics, it is argued, have increasingly taken on the status of an 'entrepreneurial self', positioned as self-promoting subjects within a model of the 'university as business' (Bröckling 2015); individuals who are, to varying degrees, complicit and resistant in processes that have reshaped, if not eradicated (see below), the kinds of academic cultures and values (including a value of knowledge for its own sake: Chubb 2017) that interweave through Twining's anthropological 'impressionistic tour' (Twining, 1994: 66) of a mid-1990s law school.

An array of theoretical and autobiographical accounts within the recent CUS literature, meanwhile, have sought to flesh out the findings of empirical research on poor academic wellbeing and explore *why*, at a subjective level, emotional distress is seemingly commonplace amongst many university academics (Smith & Ulus 2019). The literature identifies a number of relevant themes; for example, the emergence of a pervasive culture of 'hyper-performance' and normalization of long working hours interlinked to the metric tide, rankings and performance management (Bothwell 2018); forms of working, and academic identity, qualitatively different to the ideas of autonomy and commitment associated with

earlier ideas of academic vocation (Bradney 2003). The work describes an academic subject forged at a nexus of metric assemblages marked by a subjective sense of being constantly monitored and assessed (Pereira 2017); widespread feelings of imposter syndrome, rejection (Day 2011; Horn 2016) and insecurity (Breeze 2018) linked in the literature to organizational imperatives to be consistently 'excellent', always seek out new quantifiable opportunities and constantly give *more* to institutions in perpetual cycles of competition with others (Grove 2020).

Both universities and individuals, meanwhile, are engaged in a multidimensional management of risk across a plethora of metrics; constantly guarding, for example, against declining institutional/school ranking, poor student enrolment and levels of external funding, poor research rankings, the (dis)satisfaction of the student as consumer (Nixon & Ors 2018) and associated measures of national/global status, judged against the ultimately nebulous notions of 'prestige', 'reputation' and 'excellence' fostered by rankings. The discussion that has taken place following the suicides of UK academics (Cassidy 2014; Pells 2018) encapsulates how these themes coalesce in the idea that 'hidden injuries' have attached to the neoliberal university (Gill 2009; Gorczyński 2018). Within work on academic wellbeing we find accounts of emotional and affective reactions to overwork including isolation, exhaustion (Sibai & Ors 2019), stress, shame, unhappiness, insomnia, guilt, feelings of worthlessness, anxiety, burnout, depression and, in some instances, suicidal ideation.

Covid-19 has heightened these concerns around academic wellbeing. If prior to the pandemic work-related stress and worsening mental health had become an issue of concern across HE, as above, major shifts in the management and delivery of teaching and student support resulting from the pandemic suggest additional pressures, and actions taken by universities to control the virus are having implications for the wellbeing of academic and professional services staff (Wray & Kinman 2021). The pandemic has revealed how marketization has fostered divisions, not only between universities and their law schools but also sub-sets of the academy; for example, those in more secure employment and the significant numbers of academics employed on precarious contracts, the 'new precariat' who, it is important to remember, in many institutions constitute the majority of university teaching staff on fixed-term, hourly paid or temporary contracts (Inge 2018); divides between teaching and non-teaching, academic and professional services (Carvalho & Videria 2019), senior management and 'jobbing' academics. Encapsulating each of the above themes, what has emerged at an organizational level is no

less than an ‘anxious university’ (Berg & Ors 2016; Hall & Bowles 2016; Beer 2019; Morrish 2019), an ‘accelerated academy’ (Carrigan 2015) interlinked to wider processes of social acceleration (Rosa 2013).

In the next section I wish to explore these changes in more depth and the extent to which our tour of the contemporary law school would, in fact, see the change *and* continuity referred to by Cownie & Jones in their introduction. The argument is not that marketization is a fixed and finished process; nor, importantly, is it to see the law school of 1994 through ‘rose-coloured’ glasses (cf. Dixon 2020). It is to recognize that the engagement with wellbeing in legal education is of a different order to that of *Blackstone’s Tower*.

[D] ACADEMIC WELLBEING, CHANGE AND CONTINUITY: THE LAW SCHOOL AND THE POST-PANDEMIC UNIVERSITY

The transformation that has occurred in universities and their law schools over the past three decades, I argue elsewhere, has been double-edged and complex with regard to the subject of academic wellbeing (Collier 2020c). The changes discussed above do not lend themselves to one single over-arching narrative in the case of law. To turn to *Blackstone’s Tower*, our tour of the contemporary law school, for example, would reveal much to be warmly welcomed from the perspective of legal academics who, like this author, would seek to defend a model of liberal legal education (see further Bradney 2003; Cownie 2004). If Twining’s ‘radical’ engagement in 1994 was inflected by a sense of optimism about the future of socio-legal research, it is an idea of progress borne by the way the law curriculum has, over the past two decades, across many if not all UK university law schools, evolved so as to embrace philosophical and moral perspectives and engage with cultural and political questions.

A visit to today’s law school would find, for example, areas of scholarship some of which were in their infancy at the time of *Blackstone’s Tower*; alongside feminist legal studies, already well-established across many law schools, work in areas such as law and literature, film and popular culture, on intersectionality, race, ethnicity and class, post-colonial scholarship, sex/gender and queer theory, trans-jurisprudence, disability studies, elder law, law and wellbeing, vulnerability, legal masculinities, sports law and much more. This work attests to an intellectual terrain and recognition of the importance of theory to law teaching (Cownie 2000) that has undergone significant shifts since the early 1990s (Jones & Cownie 2020).

How does this connect to wellness? Noting the links between subjective wellbeing, self-determination and workplace autonomy, this reading may suggest that many legal academics are researching, perhaps even teaching, in areas of intrinsic interest in topics that sit uneasily with the narrative of the marketized, increasingly commercialized law curriculum. This suggests, rather, a pluralistic approach to research where legal academics can still, notwithstanding marketization, follow their own interests, beliefs and enthusiasms (Bradney 2003). At the same time, staff of university law schools, if not without qualification (see below), have become more diverse than they were, if not in 1994, then in the not-too-distant past; a period when universities were marked by a white, middle class, male dominance, a governance *by* men and largely *of* men (Collier 2021); a habitus in which the social, cultural and economic capital of certain groups of men, in particular, made academia, in a term once said to me by a leading critical legal scholar during the 1990s, a particularly attractive career for the enquiring 'gentleman' of inherited means.

Reflecting on the legal academic career of a 'Wandering Jurist' (Twining 2019) which began in the 1950s, therefore, it is necessary to locate changes in law school cultures in the context of shifting intersections of class, gender and race in universities. The significant growth since 1994 of research on women legal academics, for example, is indicative of how these demographic changes have fed into work on legal education. Recent histories of women in law schools (e.g. Schultz & Ors 2021), of feminist law professors, of sexualities (Ashford, this volume) and interrogations of men and masculinities in the legal academy (Collier 2021) cast new light on the gendering of the jurisprudential tradition addressed in *Blackstone's Tower*. Increasingly encompassing voices from the Global South these developments are indicative of a 'Tower' reflective about its demographic profile (Vaughan 2016) and professional history. We have seen significant changes in how universities, and their law schools, prioritize and engage with equality, diversity and inclusion, embrace identity-based student and staff networks and seek to challenge abusive behaviour. Our tour of the law school would see initiatives aimed at supporting students and staff to report incidents of sexual violence, hate crime, disability, sex, race and age discrimination, transphobia, homophobia; a recognition of new kinds of behaviour injurious to health such as student initiation ceremonies/rituals. This is an engagement with practices directly relevant to the subjective wellbeing of individuals that is, I suggest, of a different order to the early 1990s.

Our visitor would also see questions of wellbeing central to attempts to *resist* these processes of marketization (Anderson 2008; Aubrecht 2012),

encompassing organizational challenges to the institution of targets-based performance management (Heath & Burdon 2013; Analogue University 2019) and initiatives to mobilize collective action (Morrish & Analogue University 2017); to rethink academic labour conceptually (Hall 2018) and the boundaries of what constitutes ‘proper’ knowledge in the neoliberal university (Pereira 2012; Mountz & Ors 2015). Research is exploring what it might mean to foster different, healthier, ways of working in this ‘accelerated academy’ (Hartman & Darab 2012; Berg & Seeber 2016); to bring to academic journal space long-neglected questions about emotion and the politics of care (Askins & Blazek 2017), recognition of the:

emotional suffering of individuals’ experiences ... the taboos of speaking openly about mental health and emotional well-being in academic institutions ... [the] new wounds created by cruelly competitive, winner-takes-all structures ... *we lead from the rawness and pain of disclosures to emphasize that structural factors are experienced within the individual, psychological and sociocultural aspects of mental health and wellbeing.* It is the embodied individual who is living these experiences (Smith & Ulus 2019: 840-841, my emphasis).

Recent work in the field of autoethnography is seeking to ‘talk back’ to audit culture by making visible subjective anxieties that have become part of the structures of feeling of contemporary academia (Ruth & Ors 2018). Work is seeking to defend and reimagine not only the idea of HE as a public good (Lewis & Shore 2019), as above, but to rethink what a ‘good university’ might be (Connell 2019). The latter is a question the Covid-19 pandemic has, once again, made all the more pressing.

If the above reading points to a broadly positive interpretation of change that has occurred since *Blackstone’s Tower* with regard to wellbeing, however, another account of the ‘hidden injuries’ of the marketized university is possible. Two examples will be used to illustrate this point.

Interrogating Legal Academic Wellbeing: The Example of the Life Course, Age and Stage of Career

In ways that mirror the relative neglect of the life course in legal studies generally (Herring 2021), the contingencies of age and its intersections with social class, gender, race, sexuality, health and disability remain a dimension of social experience that rarely features in accounts of legal academic wellbeing. Recent studies of age at work, however, are drawing attention to the ways our subjective experiences of changes in organizations over time—such as, let us say, universities—intersect with life-course transitions and ageing as an embodied process and

movements through stages of career (Hearn & Parkin 2021). At the same time differential access to social, cultural and economic capital, research suggests, can shape distinctive *kinds* of professional identity formation and, with it, understandings of 'belonging' (or not belonging) in legal communities (Davies 2018: see further Wakeling & Savage 2015).

Why is this relevant to wellbeing and the changes around marketization since *Blackstone's Tower*? The experiences of those, such as this author, who have lived through these processes of marketization, and who were initially inculcated into the values and cultures of a legal academy far less aligned to the 'university-as-business model' of today, are not necessarily the same as those of a younger generation of legal scholars. Constructions of professional identity on the part of young/er academics can be quite distinct to those of previous generations (Archer 2008). Set against the growing structural divisions within universities noted above, it is significant, therefore, that it is early career academics and casualized staff who, studies suggest, can face particular problems relating to these hyper-performative cultures and the need to 'prove oneself' (Bristow & Ors 2017; McKie 2020); negotiating institutional pressures relating to the demands of beginning a career in 'the neoliberal university' (Robinson & Ors 2017) and securing research outputs. In the context of Covid-19, meanwhile, age and career are similarly mediating our situated experiences of the pandemic (Parry & Ors 2021). The early career legal academic of today may well be entering a legal academy in which, compared to the time of *Blackstone's Tower*, 'law in context' and socio-legal approaches are embedded across law schools. At the same time, however, these are scholars likely to be facing demands of an intensity and a precarity of employment different to those of the mid-1990s (Prasad 2013).

Covid-19, the 'Student as Consumer' and Academic Wellbeing

Marketization, we have seen, has fostered an idea of legal education as a private good, something to be measured against indices of employability and future earnings potential (Thornton 2012). Interlinked to proliferation of rankings, our tour of the contemporary university would find a law school, compared to *Blackstone's Tower*, increasingly engaged in a branding of legal education as a discrete (if broadly homogeneous) product within a global marketplace for students. What is being sold is not just an education but a commodified 'uni-experience' and lifestyle; a cultural shift reflected across campus architecture, investment in new buildings and infrastructures of student support services that, whilst

broadly familiar, is also in many respects qualitatively different from that of Twining's ideal-typical law school.

Today's visit to 'Denning House—Faculty of Laws' would see, for example, platforms of delivery, use of information technology and virtual forms of communication very different to the noticeboards with information about student timetables, sale of student textbooks, recruiting visits by law firms and the like depicted in *Blackstone's Tower*. In 1994 the internet, as we know it today, did not exist. The law student experience of legal education has been transformed in a multiplicity of ways by online and blended platforms, the use of smartphones, search providers, the possibilities of 24/7 digital communication with staff, online storage, streaming services, social media groups and so on. Law libraries are, in many ways, familiar yet also unrecognizable from those of 25 years ago. At the same time, interlinked to the proliferation of metrics and rankings, technology has transformed models of knowledge production and the management of academic performance, as above (Gonzales & Nunez 2014). With regard to wellbeing, our tour would soon come across not only discussion of the detrimental effects of rankings on the mental health of academic staff (Fazackerley 2018) but also new concerns about digital wellbeing, the rolling-out of online mental health support and enhanced provision of information from employers to academics about the importance of 'looking after yourself' (see below).

The landscape of HE is being reshaped, meanwhile, Czerniewicz & Ors (2021) suggest, by a convergence of the disaggregation of educational provision into its component parts (partnership with private providers for example: Macfarlane 2011), marketization and digitization processes. These developments were, prior to Covid-19, raising new questions about staff workloads, digital inequalities and the ownership and control of academic labour as new forms and models of teaching and learning come into existence (Czerniewicz & Walji 2019). Even the physical structure of legal education would appear different. The law school that Twining's contemporary visitor will find is far more likely to be located, not in the 'homely' converted Victorian terrace house of past decades, or the 1960s annex to buildings of university administration, but a purpose built, 'state of the art' glass structure, a simulacra of corporate law firm offices; a law school more likely to have lost separate faculty status and to be closely aligned at an organizational level, in particular although not exclusively in post-1992 universities, with the disciplines of business and commerce.

This is the backdrop against which the Covid-19 pandemic has brought to the fore how the logic and consequences of marketization

have, in the years since *Blackstone's Tower*, not only transformed the experiences of law students but also legal academics. The twin drivers of the technological development, emergence of new digital platforms associated with the internet and reforms to the funding structure of HE, have turbo-charged cultural shifts around the 'student as consumer'. These developments, I suggest, do not stand apart from but are integral to the debate now taking place about wellbeing and mental health in law schools. Underscoring the narrative of the 'mis-sold' university education—encapsulated in the circulation across national and social media of the images of '9K for what' that became emblematic, during the course of 2020, of the impoverished student experience resulting from the pandemic—is the model of the student as consumer produced by marketization (Nixon & Ors 2018; also Page 2019); a process that has reshaped relational boundaries between academic staff and students (Chory & Offstein 2016) and impacted on academic performance in a myriad of ways (Bunce & Ors 2017), bringing an acute ambivalence to the role of academics as 'educators and performers' (Wong & Chiu 2017). The anxieties circulating at the time of writing this paper around the financial sustainability of some UK universities (and, with it, their law schools) as a result of Covid-19 are themselves inseparable from questions about how (and, importantly, *why*) a market model of education is being expected to operate more or less as normal in the midst of a global pandemic (Marginson 2020; also Collier 2020b).

Looking to the future, meanwhile, if *Blackstone's Tower* sought to make the case for law to move towards a balance of educational, scholarly and social objectives, there is reason to think that a combination of economic and political forces may heighten the pressure still further on many law schools, if not all, to make their degrees more vocational and to align and work with private providers of legal education. The consequences of the Solicitor's Qualifying Examination (beyond the scope of this article) may well be felt in different ways across institutions. If the law degree is no longer to be 'the normal route of entry' to becoming a solicitor or barrister, however (Vaughan, this volume), and noting how the purchase the profession has on law schools still remains strong, then, set in the context of debate about whether we are now experiencing the 'end of the university as we know it' (McCowan 2017), the implications for the changes outlined above may be far-reaching for our understandings of what constitutes a liberal legal education.

[E] CONCLUDING REMARKS: FROM RUTLAND TO BANTSHIRE? ...

The University of Rutland is a civic university of the middling sort, founded in 1930 ... During the 1960s it rapidly outgrew its original suburban campus, captured further territory, some neighbouring and some far-flung, where it demolished, converted and erected a motley collection of unmemorable buildings (Twining 1994: 66).

Bantshire was founded in 1969 by [name redacted due to ongoing court proceedings]. It was the 25th member of the Russell Group, until it was expelled in 1970 for being a bit shit. However, it has turned itself right-the-fuck around and now ranks No.1 for Canteen Facilities in the CEF 2020, and brings joy to thousands of punters via its Twitter website (University of Bantshire).

Twining's imaginary ethnography in *Blackstone's Tower* had a serious point. In a similar vein, resistance to marketization within UK universities has produced an array of cultural artefacts amongst which the fictitious (but essentially serious) 'Bantshire University' is one example. Twining's tour guide captured a moment when the study of the 'private life' of legal academics (Cownie 2004) was in its infancy and the relationship between law and wellbeing rarely examined. What is distinctive about the present moment, I have argued, is how an array of issues and concerns encompassing diverse questions about the value and purpose of legal education and shifting conditions of academic work are now being framed via a 'wellness lens'. Growing concern about academic wellbeing is evident not just in the heightening of demand being placed on occupational health services, employment assistance programmes, online digital therapies, wellbeing support and the like (Morrish 2019); a trend the tide of mental health issues raised by Covid-19 has exacerbated as more academics report problems around stress and mental health (Wray & Kinman 2021). Rather, questions of student *and* staff wellbeing are now routinely embedded in the policies, procedures, mission statements and related charters of universities in ways qualitatively different to the time of *Blackstone's Tower*. In law schools, questions of wellbeing resonate through the discussions taking place about the ethical obligations of law schools to promote the mental health of their students as part of their university experience and, increasingly, how already hard-pressed legal academics can ensure that wellbeing is at the core of their legal education.

This is an engagement the visitor to Twining's 'Tower' would find difficult to recognize. A cursory look at the political terrain of contemporary HE, meanwhile, reveals a sector beset by concerns interlinked to marketization around casualization and employment precarity (Inge 2018); about

cultural sexism in academia (Savigny 2014), campus sexual violence, discrimination, harassment, institutional racism and how intersections of gender, race, ethnicity, health and socio-economic background continue to mediate the contours of academic careers. This brings us to the bigger picture of the political-economic context in which our Tower stands and the geopolitical 'global tides' of an increasingly 'market world' (Connell 2014). Our tour of Rutland (or, indeed, Bantshire) may well reveal a more diverse staff demographic and evidence of a liberal legal education. The progressive strands of legal scholarship discussed above, however, exist in a political and cultural context in which the arts, social sciences and humanities in universities have come under sustained attack over the past decade and where a new configuration of 'culture war' is, at the time of writing, positioning such work as 'woke'. The visitor would discover a law school where Covid-19 has exposed the fragility of the model of 'student as consumer' and commodification of the 'uni-experience'. The pandemic is raising broader questions relevant to wellbeing, however; about the future of work-life integration and changing forms of identity management resulting from new teaching platforms and modes of delivery; the increasingly interconnected networks of 'private life', intimacy, work, leisure and health and what are, for so many, precarious '24/7' employment cultures (Parry & Ors 2021).

A nexus of forces, I have argued, underscores the pervasive exhaustion and poor mental health in universities charted across research studies of academic wellbeing (Wray & Kinman 2021). These developments must themselves be set in the context of a modelling of responsibility for wellbeing that reflects neoliberal modes of self-governance and new technologies of management (Ivanova & von Scheve 2020); one in which, crucially, the 'empowered employee' is accorded an increasingly central role shaped by a commodification of the very idea of wellbeing (Esposito & Perez 2014; Davies 2015; Franco-Santos & Ors 2017) and new technologies of wellness (the rise of smartphone apps, digital surveillance and the like: Gill & Donaghue 2016; Zuboff 2018); a landscape

which academics have had to navigate even as it shifts beneath their feet ... [a] reformulated narrative of HE and even its purpose, inevitably involving digital technology, increasingly including private companies, and deepening inequalities among students ... these changes are producing emergent forms of teaching and learning and also question academic roles with regard to who has ownership and control over the teaching and learning process. These changes are affecting and are affected by academics ... (Czerniewicz & Ors 2021).

If it is the case the majority of students say their mental health has declined since the Covid-19 pandemic began, with pre-existing mental health conditions exacerbated by a combination of online learning, self-isolation, loneliness and anxiety (NUS 2020), what is at issue in discussing wellbeing in the law school is far more than the ability of universities to offer ‘more support’ to students. If we are to follow Twining and recognize how our own ‘personal odyssey’ is situated in the locales that are the settings of our work and careers as legal academics, then there is reason to think that institutions of HE, like other employers, may be dealing with the consequences of the disruptions caused by Covid-19—experiences of isolation, loneliness, anxiety and, for many, grief and mourning—for some time to come; that ‘a combination of increased demands and reduced resources will have serious implications for a profession already at risk’ (Wray & Kinman 2021: online). As discussion of university performance in the age of Covid-19 increasingly focuses on how best to ensure staff and students can thrive in new learning environments, the consequences for universities and their law schools may be far-reaching. If it is the case that scholarly attitudes can shape a discipline, and that such attitudes are worthy of study (Cownie 2004), then research on legal education will be impoverished if it does not engage with the social forces that have produced this ‘wellbeing turn’.

References

- Analogue University (2019) ‘Correlation in the Data University: Understanding and Challenging Targets-based Performance-management in Higher Education’ 18(6) *ACME: An International Journal for Critical Geographies* 1184.
- Anderson, Gina (2008) ‘Mapping Academic Resistance in the Managerial University’ 15(2) *Organization* 251–270.
- Archer, Louise (2008) ‘The New Neoliberal Subjects? Young/er Academics’ Constructions of Professional Identity’ 23(3) *Journal of Education Policy* 265.
- Askins, Kye & Matej Blazek (2017) ‘Feeling Our Way: Academia, Emotions and a Politics of Care’ 18(8) *Social and Cultural Geography* 1086–105.
- Aubrecht, Katie (2012) ‘The New Vocabulary of Resilience and the Governance of University Student Life’ 6(1) *Studies in Social Justice* 67–83.
- Bailey, Michael (2011) *The Assault on Universities: A Manifesto for Resistance* London: Pluto Press.

- Barcan, Ruth (2016) *Academic Life and Labour in the New University: Hope and Other Choices* London: Routledge.
- Baron, Paula (2014) "Sleight of Hand": Lawyer Distress and the Attribution of Responsibility' 23(2) *Griffith Law Review* 26
- Beer, David (2019) '[Is Neoliberalism Making You Anxious? Metrics and the Production of Uncertainty](#)' *LSE British Politics and Society Blog*.
- Berg, Lawrence, Edward Huijbens & Henrik Gutzon Larsen (2016) 'Producing Anxiety in the Neoliberal University' 60(2) *The Canadian Geographer* 168.
- Berg, Maggie & Barbara Seeber (2016) *The Slow Professor: Challenging the Culture of Speed in the Academy* Toronto: University of Toronto Press.
- Bothwell, Ellie (2018) 'Get a Life? No Time for That' *Times Higher Education* 8–14 February 34–47.
- Bradney, Anthony (2003) *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* Oxford: Hart.
- Breeze, Madeline (2018) 'Impostor Syndrome as a Public Feeling' in Y Taylor & K Lahad (eds) *Feeling Academic in the Neoliberal University: Feminist Flights, Fights and Failures* London: Palgrave Macmillan.
- Bristow, A, S Robinson and O Ratle (2017) 'Being an Early-Career CMS in the Context of Insecurity and "Excellence": The Dialectics of Resistance and Compliance' 38(9) *Organization Studies* 1185–207.
- Bröckling, Ulrich (2015) *The Entrepreneurial Self* London: Sage.
- Bunce, Louise, Amy Baird & Siân E Jones (2017) '[The Student-as-Consumer Approach in Higher Education and its Effects on Academic Performance](#)' 42(11) *Studies in Higher Education* 1958–1978.
- Burrows, Roger (2012) 'Living with the H-index: Metric Assemblages in the Contemporary Academy' 60(2) *Sociological Review* 355.
- Burrows, Roger (2016) '[Ancient Cultures of Conceit Reloaded? A Comparative Look at the Rise of Metrics in Higher Education](#)' *LSE Impact Blog*.
- [Campaign for the Public University](#).
- Carrigan, Mark (2015) '[Life in the Accelerated Academy: Anxiety, Thrives Demands Intensify and Metrics hold the Tangled Web Together](#)' *LSE Impact Blog*.

- Carvalho, Teresa & PedroVideira (2019) '[Losing Autonomy? Restructuring Higher Education Institutions Governance and Relations between Teaching and Non-Teaching Staff](#)' 44(4) *Studies in Higher Education* 762–773.
- Cassidy, Sarah (2014) 'University Enquiry into Professor Stefan Grimm's Death' *The Independent* 28 November.
- Chory, Rebecca & Evan Offstein (2016) "Your Professor Will Know You as a Person": Evaluating and Rethinking the Relational Boundaries between Faculty and Students' 41(1) *Journal of Management Education* 9–38.
- Chubb, Jennifer (2017) '[Academics Fear the Value of Knowledge for its Own Sake Is Diminishing](#)' *The Conversation* 19 June.
- Collier, Richard (2002) 'The Changing University and the (Legal) Academic Career – Rethinking the Relationship between Women, Men and the "Private Life" of the Law School' 22 *Legal Studies* 1.
- Collier, Richard (2004) "We're All Socio-Legal Now?": Legal Education, Scholarship and the Global Knowledge Economy – Reflections on the UK Experience' 26 (4) *Sydney Law Review* 503.
- Collier, Richard (2013) 'Privatizing the University and the New Political Economy of Socio-legal Studies: Remaking the (Legal) Academic Subject' 49(3) *Journal of Law and Society* 450.
- Collier, Richard (2014) "Love Law, Love Life": Neo-liberalism, Wellbeing and Gender in the Legal Profession – The Case of Law School' 17(2) *Legal Ethics* 202.
- Collier, Richard (2016) 'Wellbeing in the Legal Profession: Reflections on Recent Developments (or, What Do We Talk about When We Talk about Wellbeing?)' (2016) 23(1) *International Journal of the Legal Profession* 41.
- Collier, Richard (2020a) 'Moving across Silos: Legal Academic Wellbeing and the Legal Professions – Some Reflections on the UK Experience' in J Chan, P Vines & M Legg (eds) *Wellbeing in a Changing World: The Impact of Technology and innovation on the Legal Profession* London: Palgrave.
- Collier, Richard (2020b) '[Towards a New Normal? Rethinking Wellbeing in the Legal Profession after Covid-19](#)' *SLSA Blog*.

- Collier, Richard (2020c) [“Left Pessimists” in “Rose Coloured Glasses”?](#) [Reflections on the Political Economy of Socio-Legal Studies and \(Legal\) Academic Well-Being](#) 47 (S22) *Journal of Law and Society*
- Collier, Richard (2021) ‘Rethinking Men, Masculinities and the Legal Academy: Or, Whatever Happened to the “Nutty Professor?”’ in Ulrike Schultz, Gisele Shaw, Margaret Thornton & Rosemary Auchmuty (eds) *Gender and Careers in the Legal Academy* Oxford: Hart.
- Collyer, Fran M (2015) [‘Practices of Conformity and Resistance in the Marketisation of the Academy: Bourdieu, Professionalism and Academic Capitalism’](#) 56(3) *Critical Studies in Education* 315–331.
- Connell, Raewyn (2014) ‘Global Tides: The Market World and Gender Dynamics on a World Scale’ 1(1) *Social Currents* 5.
- Connell, Raewyn (2019) *The Good University: What Universities Actually Do and Why It’s Time for Radical Change* London: Zed Books.
- Corver, Mark (2019) [‘Higher Education is Big Business’](#).
- Cownie, Fiona (1998) ‘Women Legal Academics – A New Research Agenda?’ 25 *Journal of Law and Society* 102.
- Cownie Fiona (2000) ‘The Importance of Theory in Law Teaching’ 7(3) *International Journal of the Legal Profession* 225-328.
- Cownie, Fiona (2004) *Legal Academics: Culture and Identities* Oxford: Hart.
- Czerniewicz, Laura, Rada Mogliacci, Sukaina Walji, Alan Cliff, Bronwen Swinnerton & Neil Morris (2021) [‘Academics Teaching and Learning at the Nexus: Unbundling, Marketisation and Digitisation in Higher Education’](#) *Teaching in Higher Education* 1-15.
- Czerniewicz, Laura & S Walji (2019) [‘Issues for Universities Using Private Companies for Online Education’](#) Policy Brief.
- Davies, Bronwen & Peter Bansel (2010) ‘Governmentality and Academic Work: Shaping the Hearts and Minds of Academic Workers’ 26(3) *Journal of Curriculum Theorizing* 5.
- Davies, Mark (2018) ‘Educational Background and Access to Legal Academia’ 38 *Legal Studies* 120-146.
- Davies, William (2015) *The Happiness Industry: How the Government and Big Business Sold Us Wellbeing* London: Verso.

- Davies, William (2020) *This is Not Normal: The Collapse of Liberal Britain* London: Verso.
- Day, Nancy (2011) 'The Silent Majority: Manuscript Rejection and its Impact on Scholars' 10(4) *Academy of Management Learning and Education* 704–18.
- Dixon, David (2020) 'The Poverty of Pessimism' in B Golder, M Nehme, A Steel & P Vines (eds) *Imperatives for Legal Education Research: Then, Now and Tomorrow* London: Routledge.
- Esposito, Luigi & Fernando Perez (2014) 'Neoliberalism and the Commodification of Mental Health' 38(4) *Humanity and Society* 414–442.
- Fazackerley, Anna (2018) 'Universities' League Table Obsession Triggers Mental Health Crisis Fears' *The Guardian* 12 June.
- Field, Rachael, J Duffy & C James (eds) (2016) *Promoting Law Student and Lawyer Wellbeing in Australia and Beyond* London: Routledge.
- Franco-Santos, Monica, Michael Nalick, Pilar Rivera-Torres & Ors (2017) 'Governance and Well-being in Academia: Negative Consequences of Applying an Agency Theory Logic in Higher Education' 28(4) *British Journal of Management* 711–730.
- Gill, Ros (2009) 'Breaking the Silence: The Hidden Injuries of the Neoliberal University' in R Flood & R Gill (eds) *Secrecy and Silence in the Research Process: Feminist Reflections* London: Routledge.
- Gill, Ros & Ngaire Donaghue (2016) 'Resilience, Apps and Reluctant Individualism: Technologies of Self in the Neoliberal Academy' 54(1) *Women's Studies International Forum* 91–99.
- Gillies, Val & Helen Lucey (eds) (2007) *Power, Knowledge and the Academy: The Institutional is Political* London: Palgrave.
- Gonzales, Leslie & Anne Marie Nunez (2014) 'The Ranking Regime and the Production of Knowledge: Implications for Academia' 22(31) *Education Policy Analysis Archives* 1-24.
- Goodrich, Peter (1996) 'Of Blackstone's Tower: Metaphors of Distance and Histories of the English Law School' Book Chapters 68.
- Gorczynski, Paul (2018) 'More Academics and Students Have Mental Health Problems than Ever Before' *The Conversation* 22 February.

- Grove, Jack (2018) 'Half of UK Academics "Suffer Stress-linked Mental Health Problems"'. [Link](#)
- Grove, Jack (2020) 'Competition Drives Researchers to Counselling – and Exit Door' *Times Higher Education*.
- Guthrie, Susan, Catherine Lichten & Janna Van Belle (2017) *Understanding Mental Health in the Research Environment: A Rapid Evidence Assessment* Cambridge: RAND.
- Hall, Richard (2018) *The Alienated Academic: The Struggle for Autonomy Inside the University* London: Palgrave.
- Hall, Richard & Kate Bowles (2016) 'Re-engineering Higher Education: The Subsumption of Academic Labour and the Exploitation of Anxiety' 28 *Workplace: A Journal for Academic Labour* 30.
- Hartman, Yvonne & Sandy Darab (2012) 'A Call for Slow Scholarship: A Case Study on the Intensification of Academic Life and its Implications for Policy' 34(1)–(2) *Review of Education, Pedagogy, and Cultural Studies* 49.
- Heath, Mary & Peter Burdon (2013) 'Academic Resistance to the Neoliberal University' (2013) 23(2) *Legal Education Review* 379.
- Herring, Jonathan (2021) *Law through the Life Course* Bristol: Bristol University Press
- Higher Education Policy Institute (HEPI) (2016) *The Invisible Problem? Improving Students' Mental Health* Oxford: HEPI.
- Higher Education Policy Institute (HEPI) (2019) *Measuring Wellbeing in Higher Education* Oxford: HEPI.
- Horn, Sierk (2016) 'The Social and Psychological Costs of Peer Review: Stress and Coping with Manuscript Rejection' 25(1) *Journal of Management Inquiry* 11–26.
- Inge, S (2018) 'UK Universities Rely on Casual Staff 'for up to Half of Teaching'' *Times Higher Education* 6 March. [Link](#)
- Ivanova, Mirela & Christian von Scheve (2020) 'Power through Empowerment? The Managerial Discourse on Employee Empowerment' 27(6) *Organization* 777-796.
- Jones, Emma (2019) *Emotions in the Law School: Transforming Legal Education through the Passions* London: Routledge.

- Jones, Emma & Fiona Cownie (2020) (eds) *Key Directions in Legal Education National and International Perspectives* London: Routledge.
- Jones, Emma, N Graffin, R Samra & M Lucassen (2020) *Mental Health and Wellbeing in the Legal Profession* Bristol: Bristol University Press.
- Kinman, Gail (2001) 'Pressure Points: A Review of Stresses and Strains on UK Academics' (2001) 21(4) *Educational Psychology* 473.
- Kinman, Gail (2014) 'Doing More with Less? Work and Wellbeing in Academics' (2014) 4(2) *Somatechnics* 219.
- Kinman, Gail & Siobhan Wray (2015) *Work-related Wellbeing in UK Higher Education – 2014* London: University and College Union.
- Knowles, Caroline & Roger Burrows (2014) 'The Impact of Impact' 18(2) *Etnográfica* 237.
- Levidow, Les (2002) 'Marketizing Higher Education: Neoliberal Strategies and Counter-Strategies' in Kevin Robins & Frank Webster (eds) *The Virtual University? Knowledge, Markets and Management* Oxford: Oxford University Press.
- Lewis, Nick & Cris Shore (2019) 'From Unbundling to Market Making: Reimagining, Reassembling and Reinventing the Public University' 17(1) *Globalisation, Societies and Education* 11–27.
- Lupton, Deborah (2013) '[The Academic Quantified Self](#)' *This Sociological Life Blog*.
- Lynch, Kathleen (2015) 'Control by Numbers: A New Managerialism and Ranking in Higher Education' 56(2) *Critical Studies in Education* 190–207.
- Macfarlane, Bruce (2011) 'The Morphing of Academic Practice: Unbundling and the Rise of the Para-academic' 65(1) *Higher Education Quarterly* 59–73.
- McCowan, Tristan (2017) 'Higher Education, Unbundling, and the End of the University as We Know It' 43(6) *Oxford Review of Education* 733–748.
- McKie, Anna (2020) '[Casualised Staff “Dehumanised” in UK Universities](#)' *Times Higher Education*.
- Marginson, Simon (2020) '[Covid 19 and the Market Model of Higher Education: Something Has to Give and It Won't Be the Pandemic](#)' London: Council for the Defence of British Universities 17 July.

- Morrish, Liz (2019) *Pressure Vessels: The Epidemic of Poor Mental Health among Higher Education Staff* London: HEPI.
- Morrish, Liz & Analogue University (2017) 'Academic Identities in the Managed University: Neoliberalism and Resistance at Newcastle University UK' 59(2) *Australian Universities Review* 23.
- Mountz, Alison & Ors (2015) 'For Slow Scholarship: A Feminist Politics of Resistance through Collective Action in the Neoliberal University' 14(4) *ACME: An International E-Journal for Critical Geographies* 1235.
- Nixon, Elizabeth, Richard Scullion & Robert Hearn (2018) 'Her Majesty the Student: Marketised Higher Education and the Narcissistic (Dis)satisfactions of the Student-Consumer' 43(6) *Studies in Higher Education* 927–943.
- National Union of Students (NUS) (2020) '[Coronavirus and Students Phase 3 Study Mental Health with Demographics](#)' NUS Connect 7 December.
- Pack, Justin (2018) *How the Neoliberalization of Academia Leads to Thoughtlessness: Arendt and the Modern University* Lanham MA: Rowman & Littlefield.
- Page, Damien (2019) '[Academic as Consumed and Consumer](#)' *Journal of Education Policy*.
- Parry, Jane & Ors (2021) '[Working from Home under COVID-19 Lockdown: Transitions and Tensions](#)' *Work after Lockdown*.
- Peake, Linda & Beverley Mullings (2016) 'Critical Reflections on Mental and Emotional Distress in the Academy' 15(2) *ACME: An International Journal for Critical Geographies* 253.
- Pells, Rachael (2018) '[Cardiff Plans Review after Suicide of "Overworked" Lecturer](#)' *Times Higher Education* 8 June.
- Pereira, Maria do Mar (2012) "'Feminist Theory is Proper Knowledge but ...': The Status of Feminist Scholarship in the Academy' 13(3) *Feminist Theory* 283.
- Pereira, Maria do Mar (2017) *Power, Knowledge and Feminist Scholarship: An Ethnography of Academia* London: Routledge.
- Pesta, Tai, Simon Barrie & Jan McLean (2017) 'Academic Life in the Measured University: Pleasures, Paradoxes and Politics' 36(3) *Higher Education Research and Development* 453.

- Prasad, Ajnesh (2013) 'Playing the Game and Trying not to Lose Myself: A Doctoral Student's Perspective on the Institutional Pressures for Research Output' 20(6) *Organization* 936–48.
- Robertson, Susan L (2010) 'Corporatisation, Competitiveness, Commercialisation: New Logics in the Globalising of UK Higher Education' 8(2) *Globalisation, Societies and Education* 191–203.
- Robinson, Sarah, Oliver Ratle & Alexandra Bristow (2017) 'Labour Pains: Starting a Career within the Neo-liberal University' 17(3) *Ephemera* 481–508.
- Rosa, Hartmut (2013) *Social Acceleration: A New Theory of Modernity* New York: Columbia University Press.
- Ruth, Damien & Ors (2018) 'Anxious Academics: Talking Back to the Audit Culture through Collegial, Critical and Creative Autoethnography' 24(2) *Culture and Organization* 154–70.
- Savigny, Heather (2014) 'Women, Know Your Limits: Cultural Sexism in Academia' 26(7) *Gender and Education* 794–809.
- Schultz, U & Ors (eds) (2021) *Gender and Careers in the Legal Academy* (in press) Oxford: Hart.
- Sibai, Oliver, Bernardo Figueiredo & Marcia Chrinsina Ferreira (2019) 'Overworked and Isolated: The Rising Epidemic of Loneliness in Academia' *The Conversation* 29 January.
- Smith, Charlie & Eda Ulus (2019) 'Who Cares for Academics? We Need to Talk about Emotional Well-being Including What We Avoid and Intellectualise through Macro-discourses'.
- Strevens, Caroline & Rachael Field (2019) *Educating for Wellbeing in Law: Positive Professional Identities and Practice* (London, Routledge)
- Strevens, Caroline & Rachael Field (eds) (2020) *Educating for Well-being in Law: Positive Professional Identities and Practice* London: Routledge.
- Taberner, Andrea M (2018) 'The Marketisation of the English Higher Education Sector and its Impact on Academic Staff and the Nature of their Work' 26(1) *International Journal of Organizational Analysis* 129–152.
- Taylor, Yvette & Kinneret Lahad (2018) 'Introduction: Feeling Academic in the Neoliberal University: Feminist Flights, Fights and Failures' in Yvette Taylor & Kinneret Lahad (eds) *Feeling Academic in the Neoliberal*

- University: Feminist Flights, Fights and Failures* London: Palgrave Macmillan.
- Thompson, E P (1970) *Warwick University Ltd: Industry, Management and the Universities* Harmondsworth: Penguin.
- Thorley, Craig & Institute for Public Policy Research (IPPR) (2017) *Not by Degrees: Improving Student Mental Health in the UK's Universities* London: IPPR.
- Thornton, Margaret (2007) 'The Law School, the Market and the New Knowledge Economy' 17 *Legal Education Review* 1.
- Thornton, Margaret (2012) *Privatising the Public University: The Case of Law* London: Routledge.
- Thornton, Margaret (2016) 'The Case of Law Student Wellbeing: A Neoliberal Conundrum' 58(2) *Australian Universities Review* 42.
- Twining, William (1994) *Blackstone's Tower: The English Law School* London: Stevens & Sons/Sweet & Maxwell.
- Twining, William (1996) 'Rethinking Law Schools' 21 *Law and Social Inquiry* 1007.
- Twining, William (1997) *Law in Context: Enlarging a Discipline* Oxford: Oxford University Press.
- Twining, William (1998) 'Thinking about Law Schools: Rutland Reviewed' 25(1) *Journal of Law and Society* 1-13.
- Twining, William (2019) *Jurist in Context: A Memoir* Cambridge: Cambridge University Press.
- Universities UK (2018a) *Minding our Future: Starting a Conversation about the Support of Student Mental Health* London: Universities UK.
- Universities UK (2018b) *Stepchange: Mental Health in Higher Education* London: Universities UK.
- [University of Bantshire](#).
- Vaughan, Steven (2016) 'The State of the Nation: Diversity and the British Legal Academy' 50(2) *The Law Teacher* 255-263.
- Wakeling, Paul & Mike Savage (2015) 'Entry to Elite Positions and the Stratification of Higher Education in Britain' 63 *Sociological Review* 290.

- Watts, Rob (2017) *Public Universities, Managerialism and the Value of Higher Education* London: Palgrave Macmillan.
- Wells, Celia (2001) 'Working out Women in Law Schools' 21(1) *Legal Studies* 116.
- Wilson, J Clare & Caroline Strevens (2018) 'Perceptions of Psychological Well-being in UK Law Academics' (2018) *The Law Teacher* 335.
- Wong, Billy & Y L Chiu (2017) 'Let Me Entertain You: The Ambivalent Role of University Lecturers or Educators and Performers' 71(2) *Educational Review* 218–33.
- Woods, C (2010) 'Employee Wellbeing in the Higher Education Workplace: A Role for Emotion Scholarship' 60(2) *Higher Education* 171–85.
- Wray, Siobhan & Gail Kinman (2021) '[The Challenges of COVID-19 for the Well-being of Academic Staff](#)' *Occupational Medicine*.
- Zuboff, Shoshana (2018) *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* 1st edn New York: Public Affairs.

THE INDEPENDENT PANEL'S REPORT ON JUDICIAL REVIEW (CP 407) AND THE GOVERNMENT'S CONSULTATION DOCUMENT ON JUDICIAL REVIEW REFORM (CP 408)

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[A] INTRODUCTION

Judicial review (JR) is the process through which individuals or groups may challenge in the courts the lawfulness of action and decisions, including inaction and non-decisions, by public bodies exercising public powers. JR is the fail-safe legal device when there are no other rights of appeal or legal challenge available. In England and Wales it is a process created and developed incrementally through the common law: that is, judicially determined law, with some statutory accretions. In the UK, JR is a basic realization of the rule of law: government and governors must act within their legal limits. Limits are set by Parliament in legislation and the common law. While legislation as an embodiment of the Crown in Parliament is superior to the common law, legislation is interpreted in accordance with the traditions and principles of the common law. A key ingredient of the rule of law is an independent and effective judiciary and access to justice. In a democracy there will be tensions between the executive, the legislature and the courts in pursuit of their constitutional duties. The executive may not have the powers in law it believes it has. Parliament may believe that the courts have not interpreted legislation in a manner it predicted. It will have to try again in new legislation. The tensions are normal and constructive where there is mutual respect between the branches of the state. As it has been famously expressed by Nolan LJ:

The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is (*M v Home Office* (1992) at 314).¹

¹ This was based on formulations made by counsel in the case.

JR has become a significant and ubiquitous feature of our public life (Ministry of Justice 2021a: paragraph 19 on figures on growth of JR).² Barely a news bulletin is aired without reference to a topical JR challenge. Two cases brought by Gina Miller concerning the Government's decision to leave the European Union (EU) (under Article 50 Treaty on European Union: *R (Miller) v Secretary of State for Exiting the EU* (2017) (*Miller No 1*)) and Boris Johnson's prorogation of Parliament at a crucial stage of the Brexit process in 2019 (*R (Miller) v The Prime Minister* (2019) (*Miller No 2*)) brought sensational media coverage and prominence to JR. The cases also attracted vitriolic newspaper assaults on the senior judiciary from the Brexit-supporting media. In both cases the Government was defeated.

Shortly after the Supreme Court decision in *Miller No 2* on prorogation, Parliament was dissolved, and a general election was called for December 2019. The Conservative manifesto highlighted, in a section entitled 'Protect our Democracy' the need to look at 'the broader aspects of our constitution: the relationship between the Government, Parliament and the courts'. Among the sundry topics included was JR.

We will ensure that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays. In our first year we will set up a Constitution, Democracy & Rights Commission that will examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates (Conservative Party 2019: 48).

'Restore' suggests something was lost.

[B] THE INDEPENDENT PANEL'S REPORT

Reviews of administrative law and JR go back in one way or another to the Donoughmore Report of 1932 (Committee on Ministers' Powers 1932) and have been regularly conducted since the 1950s, in recent years leading to significant reforms. Clashes between the senior judiciary and ministers of both major parties have been common.

A Commission has not been established. An 'independent' panel (IP) was appointed under former Conservative minister and lawyer Lord Faulks to examine JR and to make recommendations. The review has now reported (Ministry of Justice 2021a: the 'Panel Report') and this has been published together with the submissions to the panel although several government departments refused to release their submissions under the

² On numbers of applications, see: paragraphs 4.33ff. The facts reveal the paucity of success against departments in such claims (paragraph 4.55).

Freedom of Information Act 2000 (Constitution Unit 2021).³ A further review is being conducted on the Human Rights Act 1998 (HRA) under former Lord Justice Sir Peter Gross, a commercial lawyer.⁴ From the start greater transparency was promised for the latter which is to report in ‘summer 2021’. Both panels have a UK context in which to operate and not simply an English and Welsh context.⁵

The Prime Minister sees a problem with JR (describing the results of the *Miller* cases as ‘perverse’: Cowburn 2020). JR has its role in protecting the individual against an arrogant Government acting unlawfully. But for too many years, opponents claim, JR has drifted increasingly into merits review of political decisions, expanded over-generously the common law bases of JR and generally allowed the judicial arena to be used to upset political decisions by those who have lost in the political arena—law is resorted to when the case in politics is lost, they argue. JR has become ‘politics by another means’, a phenomenon of which the courts have been aware and have frequently warned against encouraging (see Lord Reed’s evidence to the panel: Reed 2020).⁶ By ‘merits’ one means the intrinsic and substantive nature of a decision and its policy content together with its essential objective. JR is concerned with legal errors in the way a decision was formulated and made, legal errors in its substance and in its impact and effects.

JR has reflected changes brought about by the UK’s membership of the Council of Europe and European Convention on Human Rights (ECHR) and the latter’s incorporation into UK law by the HRA, and by the UK’s membership of the EU. The review of the HRA by Sir Peter Gross does not include departure from the ECHR or repeal of the HRA. The UK’s commitment to the ECHR is a key feature of the UK’s Withdrawal Agreement (2019) with the EU and EU–UK Trade and Cooperation Agreement 2020. The UK completed its departure from the EU on 31 December 2020, but the influence of principles of review shaped by the European Court of Justice is likely to be present in our common law and statute book for the foreseeable future. The growth of subtlety in domestic JR occurred in the period of membership of the EU (Birkinshaw 2020a: chapters 4 and 14).

³ A synopsis of departments’ views is contained on the Gov.UK Judicial Review [Reform Consultation](#) page.

⁴ See: [Independent Human Rights Act Review](#).

⁵ See [Terms of Reference](#). These include to ‘consider public law control of all UK wide and England & Wales powers (but not Wales only powers) that are currently subject to it whether they be statutory, non-statutory, or prerogative powers’. The panel ruled out delegated or transferred powers: chapter 5.

⁶ The phrasing of ‘politics by another means’ is taken from case law: *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* (2019) [326]; *R (Wilson) v The Prime Minister* (2019) [56].

The subjects in the terms of reference for the review ranged from the appropriate constitutional sphere of JR, the limits of justiciability, what subjects are appropriate for courts to review, the bases of jurisdiction (the competence to make a decision in question tied in with the amenability of public law decisions to JR by the courts (Gov.UK 2020: paragraph 1.1)), grounds of review and remedies, and possible codification of grounds for JR principles by legislation ‘and a democratic process’. In-depth analyses were not possible even in the largest area of JR applications, immigration.

The task set for the Faulks panel was hopelessly ambitious in terms of subject matter and timescale.⁷ The panel was established on 31 July 2020 and had six months to investigate, examine, reflect, draft and report. There were 238 submissions, the overwhelming majority from lawyers. Government departments in particular were targeted for evidence, a factor which drew some criticism although their experience is clearly important (Panel Report: paragraph 16). The panel had some sympathy with the views of the UK Administrative Justice Institute that the period of time allotted was ‘inadequate given the complexity, scope, and importance of the issues’ (paragraph 1).

In the event, the suggestions for reforms from the panel were measured and modest given the dimension of the terms of reference. The major issues referred to above on justiciability, jurisdiction and codification were not subject to recommendations for reform. Indeed, the panel recommended restraint on the part of the Government. While the panel expressed some sympathies for the concerns raised by the Government, it is fair to state that it saw an effective JR as a precursor to effective executive accountability and, I add, effective executive action and governance (paragraph 40). What public good, one may ask, will emerge from any Government if its actions were to be based on lies, bullying, bluff or abuse and a compliant judiciary? Codification might make JR more explicable to the general public but ‘On balance, little significant advantage would be obtained by statutory codification, as the grounds for review are well established and accessibly stated in the leading textbooks’ (Panel Report: paragraph 1.43).

In relation to justiciability, the panel recognized the question-raising subjects, usually common law prerogative powers, that were not subject, as the panel put it, to judicial challenge *per se*—e.g. conferral of honours, approval of appointment of ministers—and those subjects that are not determinable by judicial decision. In the latter case, questions may

⁷ Faulks was a controversial choice as chair because he had expressed outspoken views on the role of judges abusing their position, including in *Miller No 2*. Membership comprised senior academic and practising lawyers.

involve choices between one policy and another which judges are ill-equipped to consider on, for example, national security, economic policy. One might pause to ask whether the decision in *Council of Civil Service Unions v Minister for the Civil Service* (1984) (*GCHQ*) did in fact open the door to JR of the prerogative, as the panel suggests (paragraph 2.5).⁸ The courts had highlighted in litigation from the mid-1980s limits in the nature of a challenge to a prerogative so that irrationality was unlikely to be a suitable ground of challenge (*GCHQ*, per Lord Diplock). While the zone of judicial immunity in relation to the prerogative has receded, the prerogative had not, the panel believed, become a part of open season. ‘[W]e think this view of the law overstates the position – at least so far as the common law of judicial review is concerned – in that there are still some powers that are non-reviewable on any ground’ (paragraph 2.17). Pausing to reflect on this statement, is it correct to state that there are today non-reviewable prerogative powers? The Government through its Bill repealing the Fixed-term Parliaments Act 2011 specifically sought to make dissolution inviolable in the courts, but this is clearly one area where the courts would not intervene because dissolution leads to an election and a new Parliament. But can one safely say that conferral of honours through corruption, waging an oppressive war of persecution or engaging in treaties contrary to international law would never be justiciable? One can foresee the judicial reluctance to intervene in such matters of high policy and the reasons for such caution, but surely never say never is advisable?

The panel acknowledged the concerns that have been expressed about the expansion of JR since the 1960s. Evidence from some quarters suggested corrections are called for. The subject of JR reform by legislation is a legitimate subject for Parliament to consider. Ultimately, it is for Parliament to reflect the public weal. As a statement of principle, that is unexceptional. But, as a practical reality, one might accept that statement more graciously if Parliament were a grand inquest of the nation and not a party-political assembly, the lower chamber of which is under the control of an executive determined to steamroller its way to its ideological success. One wonders whether the apologists for Parliament would be so sanguine if Mr Corbyn had been successful in 2019 and had embarked on an agenda to reform the fiscal advantages of public schools, the system for awarding honours (peerages in particular), taxation, the press and so much else. No doubt JR would then have been added to the list of reforms

⁸ The case law on prerogative goes back to the 17th century, but a question involving prerogative disbursement of public funding and a successful challenge occurred in *R v Criminal Injuries Compensation Board ex parte Lain* (1967).

when these policies were challenged through JR by political opponents. That turn of events may well come under future electoral lotteries. The judge you dislike today may be your friend in the future.

Parliament can legislate on any matter it chooses, and there is no reason for JR to be immune from its scrutiny. But a root and branch reform of JR by the political chamber and the temporary ascendancy of one particular political creed resembles too closely setting chickens to guard against foxes.

To the panel's credit, they were not prepared to remove the advances made by JR in almost 60 years by reverting to an individual rights basis for JR. Such a move would wipe away the public's interest in good government and good governance. Do we not all have an interest in lawful government, protecting Parliament's proper role as in *Miller Nos 1 & 2* (paragraph 2.27)? Advances in the 1980s⁹ meant the absence of an issue affecting an individual's rights in many prerogative powers no longer defeated a valid claim for JR. Although it is worth noting that, even in *Miller No 1* there were interested individuals' rights which the court was asked to protect. Prior to the advances in the range of interests protected by JR:

many exercises of the prerogative powers might have remained non-reviewable even after GCHQ because the exercise of those powers could not be said to have altered someone's 'rights or obligations' or have deprived someone of a 'benefit or advantage' that they had a legitimate expectation of enjoying (paragraph 2.27).

Authorization of unlawful expenditure, for instance on foreign aid, would not have been regarded as reviewable (this was statutory: *R v Secretary of State for Foreign and Commonwealth Affairs* (1995) at 402). Few, the panel believes, would regret the 'general reorientation' of the law from individual entitlement towards ensuring the legality of government action (paragraph 2.43).

The HRA has also modified the constitutional distribution of powers. Arguable allegations that an individual's ECHR rights have been infringed will make the claim justiciable even if traditionally it would be treated as a preserve of the executive.¹⁰ ECHR breach allegations may involve assessment of the merits of government policy to assess whether they are ECHR compliant (*Huang v Secretary of State for the Home Department*

⁹ The panel pays special regard to the decision in *Gillick v West Norfolk and Wisbech AHA* (1986) which concerned a departmental memorandum of guidance allegedly containing advice 'erroneous in law'.

¹⁰ *R (Lord Carlile) v Secretary of State for the Home Department* (2015) [28]-[29]. This was particularly striking in *R (Gentle) v The Prime Minister* (2008), concerning Article 2 ECHR on the right to life and the alleged waging of an illegal war in Iraq. Applications in both cases were unsuccessful.

(2007) [11]-[13]). The HRA was passed by Parliament into law. The courts are simply effecting the will of Parliament. Any reform of justiciability would necessitate a substantial reform of the HRA.

The panel clearly has misgivings about the *Miller* cases. But even these ‘novel’ cases which fomented the present investigation are unlikely ‘to have wider ramifications given the unique political circumstances which provided the backdrop for those cases being brought’ (paragraph 2.37). This commentator is not so convinced that *Miller No 2* was ‘novel’ (Birkinshaw 2020b).

Although there were cases where justiciability should have been more keenly argued by Government (paragraph 2.45) – the panel includes *R (Evans) v Attorney General* (2015) which concerned a successful review of the Attorney General’s decision to prevent disclosure of information that the Upper Tribunal had found was disclosable under the Freedom of Information Act, a decision which was certainly eyebrow raising—the panel sided with the ‘overwhelming majority of submissions from those outside the government [who] did not favour legislative intervention on the issue of non-justiciability in any form’ (paragraph 2.58). They favoured allowing the courts to take the lead in this area and ‘trust in the courts to properly observe the boundary between what sorts of exercises of public power (and issues in relation to the exercise of that power) should be regarded as justiciable and what sorts should be regarded as non-justiciable’ (paragraph 2.68).

Relying on Sir Stephen Sedley’s observations in his submission:

The Panel may find itself urged to treat one or more recent cases as evidence of a need for systemic reform. I would respectfully counsel caution about leaping from the particular to the general. For example, I am among those who doubt the conclusions of the *Evans* case; but to treat the outcome of the case by itself as evidence of dysfunction in the system of public law is to invite a cure worse than the disease (paragraph 2.70).

No general or far-reaching legislation on justiciability should be passed (paragraph 2.96). Parliament’s role should be confined to specific cases: the panel refers to the Fixed-term Parliaments Act 2011 (Repeal) Bill which excludes JR of a prerogative dissolution restored by that Bill. Issues emerging from specific case law should not promote ‘*general*’ (my emphasis) legislative reform (2.97). Parliament’s approach should reflect ‘a strong presumption in favour of leaving questions of justiciability to the judges’ (2.100).

Where a subject is justiciable, the panel was asked to consider whether there should be tailoring of the grounds of review that can be invoked to set aside the exercise of a particular public power and altering the remedies that are available where the exercise of a particular public power has been the subject of a successful application for JR. This is related to the ‘growth’ of grounds for review from the 1984 *locus classicus* of Lord Diplock in the GCHQ litigation as illegality, irrationality and procedural impropriety, adding the possibility of future adoption of proportionality. Clearly, the Government would wish to see the grounds curtailed. The grounds over time have become more substantive, for example review of fact and not simply a point of law, systematic unfairness and not simply a breach of natural justice in a judicial or ‘quasi-judicial forum’, legitimate expectation, proportionality in certain circumstances, breaching constitutional rights, failure to publish adequate policy-related materials, consultation rights, lack of transparency and so on.¹¹ The consequence, it is claimed, is uncertainty for officials and ministers and interference with effective public administration.

The panel advised against such tailoring, although the courts themselves had particularized grounds and remedies on specific occasions (paragraph 3.14). Another obstacle lies in the fact that such an attempt to tailor the grounds of JR is unlikely to be effective. Constraining the judges in this manner could be counter-productive, as the history of attempts to prevent the courts examining questions of law by what are known generically as ouster clauses has shown.

JR, it is argued, has moved beyond supervision of legality to merits calculation and reassessment. Judges have begun to make the decisions that Parliament has bestowed upon the executive, it is argued, and not simply correct technical errors of law. The panel saw the solution lying in judicial restraint by the judges themselves. Judicial restraint is as important in the UK constitution as judicial vigilance. This, I add, depends upon that mutual respect which the branches of government must show each other, as Nolan LJ outlined in the quote above (page 501). The panel indicate a tendency to exaggerate judicial overreach, and recent examples of caution in the face of national security include the *Begum* case (*Begum v Secretary of State for the Home Department* (2021)), while, in the area of liability of public bodies in negligence, the Supreme Court thwarted any temptation to move away from long-established principles of private law (*Poole BC v GN* (2019)).

¹¹ See *R (Litvinenko) v Secretary of State for the Home Department* (2014) and the irrationality of the Home Secretary’s reasons not to hold an inquiry into the sensational death in London of former KGB (Federal Security Service) operative Alexander Litvinenko.

On uncertainty, the panel pointed out that legitimate expectation is accused of being overly confused in some submissions, proportionality’s existence is limited to human rights law (which is a little over-simplified), and ‘constitutional rights’, although frequently invoked in litigation, are hopelessly vague in UK law (paragraph 3.32). These concepts may ‘work themselves pure’ in case law (as suggested by Lord Reed cited in paragraph 3.33), but perhaps the time and resources of the Law Commission or House of Lords Constitutional Committee could assist here in a more synoptic analysis of what constitutional rights are, the panel suggested (paragraph 3.34)? A good starting point would surely be the ECHR and common law case law?

The panel made some specific recommendations. One such was reversal of the Supreme Court’s judgment in *Cart* (a child maintenance case) concerning the Upper Tribunal’s power to refuse to grant an applicant permission to appeal against a decision of a First-tier Tribunal (*R (Cart) v Upper Tribunal* (2011)). Such a refusal, even though containing an error of law, cannot be appealed. The only possible challenge was a JR. The court ruled that such decisions are reviewable on more limited grounds than would usually be the case. Otherwise, an error would not be corrected. *Cart* reviews are the largest ground of application to the High Court for JR (on average 779 cases each year from 2015–2019). The choice was between a restricted form of review, a very wide (post *Anisminic* below) form, or an in-between. Too restricted a test of review ‘might still leave serious errors of law affecting large numbers of people uncorrected’. Post *Anisminic* would be too broad (*Cart* [44]). The court opted for an in-between form of review. The largest category of *Cart* JRs concerns detention of foreign nationals. Examining the available statistics, the panel reasoned that the paucity of findings of an error of law and its correction in *Cart* reviews (0.22 per cent of all applications for a *Cart* JR since 2012) ‘we have concluded that the continued expenditure of judicial resources on considering applications for a *Cart* JR cannot be defended, and that the practice of making and considering such applications should be discontinued’ (paragraph 3.48). Money is important, but there are still individuals who have suffered an error and who are without remedy. Is this not appropriate for a right of appeal to the Court of Appeal?

The panel also recommended amending section 31 of the Senior Courts Act 1981 to give courts power to issue a suspended quashing order—a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met. This would be in *addition* to existing quashing orders. The order would operate prospectively and not retrospectively. Such a recommendation, if accepted, would remedy

the shortcoming recognized by the Supreme Court early in its career in *Ahmed v HM Treasury No 2* (2010) (which concerned financial freezing orders against suspected terrorists).

The panel advised against reform of the law of nullity. This involves a finding that an error of law renders a decision null and void *ab initio*. Prior to the decision in *Anisminic Ltd v Foreign Compensation Commission* (1968), there was a distinction between errors within and errors outside jurisdiction. In the latter case, an error rendered a decision null and void *ab initio*. Post *Anisminic*, all errors of law rendered a decision null and void. This had significant consequences where government through Parliament wished to exclude JR in a statute. Basically, an error of law outside jurisdiction meant that such an attempt was not possible.¹² The panel believed the better route would be to give the courts the freedom to decide whether or not to treat an unlawful exercise of public power as having been null and void *ab initio* (paragraph 3.64). The courts would have a discretion to issue suspended quashing orders in response to the unlawful exercise of public power. This would have particular advantage in:

high-profile constitutional cases where it would be desirable for the courts explicitly to acknowledge the supremacy of Parliament in resolving disagreements between the courts and the executive over the proper use of public power, and cases such as *Hurley and Moore* [2020] where it is possible for a public body, if given the time to do so, to cure a defect that has rendered its initial exercise of public power unlawful (paragraph 3.64).

This would be without prejudice to collateral challenges which are dependent on a finding of null and void *ab initio*. Collateral challenges are raised in proceedings where an individual is a defendant in a criminal charge or involved in a civil action.

In a lengthy chapter on procedure, the panel felt ill-equipped to make suggestions in relation to costs for JR applications. On the law of standing or *locus standi*, the temptation to legislate should again be resisted (paragraph 4.98). Standing refers to the interest an applicant has to show in an application to bring a JR. JR is often applied for by public interest groups or individuals who do not have a private law right involved. This is a public interest application to test the legality of action. The rule of law may be violated by such illegality as well as by a breach of an individual's rights. The panel make the following important point:

¹² Confirmed in *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491. See Jowell & Rose 2018–2019: 1. For a more flexible approach by the courts to ouster clauses, which the courts will control and determine under the rule of law, see Lord Carnwath in *Privacy International* at [144].

We do, however, hope that the courts will be astute to distinguish between ‘public spirited’ groups that enable challenges to the legality of an act or decision to take place and those applications which seek to involve the courts in a general policy review of decisions that an elected government is entitled to make (paragraph 4.100).

Intervention rights for those who had not brought the JR application had been allowed to drift since 2000. The panel therefore recommends that criteria for permitting intervention should be developed and published, perhaps in the Guidance for the Administrative Court’ (paragraph 4.108).

Some clarification was required on the duty of candour which exists on both sides to disclose relevant information including information that undermines its own case, although the panel’s views were divided (paragraph 4.113). The duty of candour exists because public authorities are not engaged in private law ‘ordinary’ litigation defending private interests. Authorities are ‘engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law’ (paragraph 4.113) (see *Hoareau* at [20]). A ‘more proportionate approach to the duty without undermining the fundamental importance of candour in judicial review proceedings’ was recommended (paragraph 4.132).

In relation to time limits, the panel believed that the practice in Northern Ireland which had dropped the qualifying requirement of acting ‘promptly’ within the three-month limitation could well be followed (paragraph 4.148). Clear improvement in this area was difficult to suggest and the panel would not favour any ‘tightening of the current time limits for bringing claims for judicial review’ (paragraph 4.149). The standard period is three months, but there are variations in, for example, procurement, planning, post inquiries and *Cart* reviews. More needs to be done to make the procedures for bringing JR accessible to ordinary individuals (paragraph 4.173).

The panel’s terms of reference included UK-wide matters, and it has been explained above how it interpreted this instruction. The panel agreed with submissions received which advised that it would be ‘highly undesirable’ were statutory intervention to result in a ‘dual’ or ‘two-tier’ system within the UK’ (paragraph 5.48) (or more?). The submissions on devolved matters were all against a reduction in JR.

The panel’s emphasis on the importance of Parliament as a means of redress and accountability is rightly spelt out in the report. I have no doubt that our constitution works best when the three branches work constructively together. But you cannot have more than one interpreter of the law. Before looking at the Lord Chancellor’s response to the report

(Ministry of Justice 2021b: the Response) it must be recalled that both *Miller Nos 1 & 2* had as a central concern the protection of the constitutional role of Parliament both in relation to fundamental constitutional change in the UK and Parliament's role as an engine of accountability and as supreme legislator.

[C] THE CONSULTATION PAPER

The Response from the Lord Chancellor commenced with tendentious interpretations of what the panel had reported. A drift into a more substantive form of review for well over 50 years (common law process) was summed up as an interference with the merits of political decision-making and the Government should 'strive to create and uphold a system which avoids drawing the courts into deciding on merit or moral values issues which lie more appropriately with the executive or Parliament' (paragraph 2). This is a crude statement both of the panel's comments and what has in fact occurred. The concept of legality has expanded, as we have seen, but outside human rights the courts have been careful not to infringe on the merits of decisions. Even in one of the high-water marks of intervention, *Evans v Attorney General* (2015), the court was concerned about the brusque setting-aside of the Upper Tribunal's judgment by a member of the executive, and its reasons for intervention were spelt out. It did not say 'We don't like this decision' and therefore set it aside.

The Lord Chancellor was interested in reforms beyond those recommended by the panel. The independent panel had not given him what he wanted, so let's try again seems to be the message. This appears to be what he meant by 'iterative'. If lawyers cannot give him the answer he wants, what about the butcher, the baker the candle-stick maker? Specifically, he wanted to look more roundly at ouster clauses, to 'clarify' the law on nullity and to investigate prospective remedies beyond suspended quashing orders. It is quite clear he has 'broader reforms' in mind (paragraph 6). 'This does not mean we think there needs to be a radical restructuring of JR *at this point*' (paragraph 32, emphasis added). But note the warning that if JR continued on its present road 'The Government would then need to consider whether proposing legislation on these and other broader constitutional questions was needed' (paragraph 46). This approach is mindful of the role of the courts in developing the application of the rule of law through JR, he claimed, but seeks Parliament's involvement in areas where the Government disagrees with the direction of the evolution of JR. Thoughts are prompted of the duty on the Lord Chancellor under the Constitutional Reform Act 2005 and the Chancellor's existing constitutional role in relation to the rule of

law (section 1) and the duty of the Chancellor to uphold and defend the ‘continued independence of the judiciary’ (section 3). It’s all very simple: the judges have been overstepping their mark, they have been interfering in executive discretion, Parliament can make whatever laws it wants, and the judges will have to follow these.

His aim was ‘to restore the place of justice at the heart of our society by ensuring that all the institutions of the state act together in their appropriate capacity to uphold the Rule of Law’. ‘That means affirming the role of the courts as “servants of Parliament”, affirming the role of Parliament in creating law and holding the executive to account, and affirming that the executive should be confident in being able to use the discretion given to it by Parliament’ (paragraph 3). The image is presented by the Government spokesperson of a major crisis in justice and the constitutional order. Justice has to be restored. Really! The overwhelming impression from the evidence submitted to the panel suggests that the courts were simply applying the law to Government to ensure the executive operated within its legal parameters and that justice was done.

The common law has evolved, developed incrementally over time. But history, claims the Chancellor, does not tell us how to live in the future. Certainly, to be a slave to history is to be a fool, but to be ignorant of history, Cicero reminded us, is to remain a child. JR ‘spurred on by judges’ (paragraph 24) is a ‘default position’ which Parliament may remove, replace or add to at its will. ‘Parliament can create a body with plenary powers which is not subject to review on the ground that the decision is unreasonable or involved the taking into account of irrelevant consideration’ (sic) (paragraph 25). This is the Chancellor’s interpretation of *Axa General Insurance v Lord Advocate* (2011).¹³ One can see the emergence in time of the Prime Minister’s Tribunal. It has been tried before—it was called Star Chamber—and was established by statute!

How, it is asked, is legality kept within appropriate bounds of JR ensuring that Parliament remains in overall control (paragraph 28)? The Chancellor’s Response finds it impossible to distinguish between reviewing a discretion, whether conferred by statute or prerogative,

¹³ Where the Supreme Court ruled that the Scottish Parliament could be reviewed if it acted out of its devolved competence or in breach of human rights, but the Scottish Parliament, as an elected body, was not appropriate for irrational or unreasonable review. Note Lord Hope sending out a warning for government more generally: ‘It is not entirely unthinkable that a government which has [political domination] may seek to use it to abolish judicial review or to diminish the role of the courts in protecting the interests of the individual. Whether this is likely to happen is not the point. It is enough that it might conceivably do so. The rule of law requires that the judges must retain the power to insist that legislation of that extreme kind is not law which the courts will recognise’ [51].

because of illegality, and reviewing such a discretion because a judge happens to disagree with the outcome on moral grounds (paragraph 30). Courts are there to deal with specific questions not to judge merits which are ultimately for the people's assembly (paragraph 31). It seems that any legal critique of discretion exercised by ministers is an assault on the merits. Such reasoning is beyond simplistic! It should be remembered that the people's assembly comprises two chambers. While the elected chamber is the more powerful body, the upper chamber is unelected and comprises an amalgam of hereditary and appointed members, most of the latter placed there by prime ministerial patronage. Nonetheless, its inherent small 'c' conservatism often acts as a brake on political ideologies from both the left and right.

There is clear concern about the question of nullity and a finding of illegality that renders a decision null and void *ab initio* (paragraph 40ff). This has been addressed above. The courts' rulings have rendered virtually all ouster clauses ineffective to prevent JR. It is clear that the courts have made a constitutional stand on this to maintain their monopoly on the final interpretation of law and legality. And let's not forget, judicial remedies in JR are at the court's discretion.

The recommendations to reverse *Cart* and to introduce suspended quashing orders were accepted. But now the Chancellor has in his sights prospective only remedies more widely beyond quashing orders (paragraph 61). To the statement that such a reform would be a discretionary power for the court to order if it saw fit to do so, and the Government would not compel remedies to be granted with prospective effect only should be added the following. Within a few lines the Chancellor writes that the Government considers, alternatively, a 'requirement' for prospective only remedies as well as suspended quashing orders in certain circumstances could be developed (paragraph 66). 'Requirement' seems mandatory.

In its further consultation document published on 18 March 2021, the Lord Chancellor writes that legislation may provide that, for challenges to statutory instruments, 'there is a presumption, or a mandatory requirement for any remedy to be prospective *only*' (my emphasis) and legislating for suspended quashing orders to be presumed or *required*.

The Government considers that legal certainty, and hence the rule of law, may be best served by only prospectively invalidating such provisions (paragraph 68). What about the individual who suffers harm as a consequence of unlawful government action, but who is told 'Sorry, because this happened to you in the past there is nothing that can be done'. It will be better tomorrow. Ombudspersons observe! Because of

their scrutiny, Parliament-focused solutions are more appropriate where statutory instruments are impugned, the Response asserts. This is setting back administrative law to *Local Government Board v Arlidge* in 1915!

Clarification of nullity, the Chancellor continues, is required (paragraph 75). This makes it sensible for Parliament to legislate to put it beyond doubt that this theory is not the law. It has been the law since 1968 and has been successively maintained by the House of Lords and Supreme Court. Surely *prospective* thinking applies here? While Parliament may be all powerful, a reform here would usually take future effect after enactment on an appointed date. The Lord Chancellor makes it sound as if reform will have retrospective effect so that decisions of the top courts were null and void *ab initio*. Oh, what a tangled web we weave!

Nullity has two chief disadvantages, the Chancellor urges. Firstly, it is contrary to legal certainty, and therefore against the rule of law, in that it leads to a situation whereby an apparently valid legal act is actually null and void from the outset. But surely that’s the point: one doesn’t know it’s legally invalid until it’s legally tested. Secondly, to argue that a court has no remedial discretion when an act is a nullity is simply not true. Courts may decide not to quash a measure but to issue a declaration of right as in *Anisminic*. Or they may at their discretion give no remedy at all depending upon the circumstances (Woolf & Ors 2018: 18.047ff). And what about the individual who *has been* detained under a prospectively unlawful measure? There is a very selective vision of the rule of law in operation here.

The way out of this conundrum, created by the courts the Chancellor states, is to re-establish the void/voidable distinction in JR (paragraph 80). There were more fairy tales and legal complexities concocted around this distinction than imaginable. *Anisminic* made the vista much simpler. As Baroness Hale said in *Cart*, such an approach would ‘turn back the clocks’ [40]. All legal errors made the decision void.

More specifically, this would mean that when faced with an error the court should err on the side of concluding that the error does not lead to the decision-maker having acted outside their competence – as opposed to acting in breach of duty – i.e. a presumption in favour of concluding that a flawed decision is voidable and not a nullity (Ministry of Justice 2021b: paragraph 80.b).

What he envisages is a distinction between what the French call *l’inexistence*, *incompetence* and *détournement de pouvoir*. But French law, where JR is a constitutional principle,¹⁴ has not been dogged by attempts

¹⁴ See n°93-335 DC; n°96-373 DC.

to oust the jurisdiction of the courts¹⁵ and *droit administratif* also awards damages for *illégalité per se* whereas English law does not. The void/voidable distinction is not of significance, although legal certainty means that remedies (quashing) may be prospective in French law.

The Response continues that only the ‘purported use of power that the Government does not have would lead to a nullity, while the wrongful exercise of a power would lead to the decision being voidable’ (paragraph 81). Most public law grounds of review would subsequently render a decision voidable in which case a remedy would be prospective (paragraph 81). Where a decision-maker has competence, no error however egregious can deprive one of that power (paragraph 81.iii). Even ‘egregious errors’ will render a decision voidable. One presumes this would not affect liability in, for example, misfeasance in public office? However, in such a case the court may issue a retrospective quashing order at its discretion, although we were informed above on the limits on retrospective remedies, in particular in relation to statutory instruments. Only lack of power/competence would render a decision void.

This goes against the counsel of the expert panel. On ouster clauses, despite the panel’s recommendations, the Chancellor appears to wish to avoid mere guidance on their use and to legislate on ouster clauses (paragraphs 91-94). Toasts will be offered in the Inns of Court at the prospect of legal complexity! The reason for change:

Ouster clauses are not a way of avoiding scrutiny. Rather, the Government considers that there are some instances where accountability through collaborative and conciliatory political means are more appropriate, as opposed to the zero-sum, adversarial means of the courts. In this regard, ouster clauses are a reassertion of Parliamentary Sovereignty, acting as a tool for Parliament to determine areas which are better for political rather than legal accountability (paragraph 86).

The appearance is selective application, but might it be like Topsy—they ‘just grew’?

The Government had not conducted an economic impact as yet on its suggestions (paragraph 110). Nor did the measures involve direct discrimination, but removal of *Cart* may open up claims of indirect discrimination given the dominance of immigration cases. The figures show *Cart* successes to be minimal (paragraph 113) but, as indicated above, for the individuals the outcome is crucial.

¹⁵ Attempts in the distant past were rebuffed by the Conseil d’État: *Conseil d’État, 17 février 1950, Ministre de l’agriculture c/ Dame Lamotte CE, 7 février 1947, d’Aillières, n°79128*. I am grateful to Thomas Perroud for his assistance on these points.

[D] CONCLUSION

Make no mistake, these suggestions, which go against the panel’s conclusions, are not minimal, so the Government pronouncement that it does not think ‘the time is right to propose far-reaching, radical structural changes to the system of Judicial Review’ (paragraph 117) carries with it the prospect of future radical change after further ‘iteration’.

The Chancellor’s parting sentiment that the respective constitutional roles of Parliament, the executive and the courts must be respected (paragraph 119-120) smacks of cynicism. An executive with a huge Commons majority will always be prone to arrogance in office and a desire to be rid of anything brooking its ideological ambitions. There is no respect for anything showing independence or integrity. Today the courts, tomorrow the Lords. And then?

This is a strange and ill-considered Response to a generally sensible and balanced review. The expert IP did not give the Government what it wanted. Let’s try another audience. Before reporting on what that further audience had to say, the Government announced a Judicial Review Bill in the May 2021 Queen’s Speech. This would ‘protect the judiciary from being drawn into political questions’ and protect ‘individuals’ rights’. Its object is to confine JR, but its content is subject to the consultation following the IP’s report.

The Government appears to wish to squeeze JR into a ball covering minor legal technicalities, more to confine judges than to control unlawful erring by ministers and officials. Is this befitting for a court conducting JR, namely the High Court with an unlimited jurisdiction? The Government’s reported ambitions even mounted to replacing the Supreme Court (the *Miller* malefactor) with a body under a new name (the Upper Court of Appeal was mooted) and structure, a move that would be perceived as an ‘act of spite’, the President of the Supreme Court believed in evidence to the Lords Constitution Committee (Slingo 2021). It would be an act of ‘national self-harm’ (Constitution Committee 2021). It would, in my words, be an egregious insult to the senior judiciary in the UK.

References

- Birkinshaw, P (2020a) *European Public Law: The Achievement and the Brexit Challenge* 3rd edn Alphen aan den Rijn: Wolters Kluwer.
- Birkinshaw, P (2020b) ‘Brexit’s Challenge to the UK’s Unwritten Constitution’ (2020) *European Public Law* 29.

- Committee on Ministers' Powers (1932) *Report* Earl of Donoughmore (chair) (The Donoughmore Report) Cmd 4060 London: HMSO.
- Conservative Party (2019) [Conservative and Unionist Party Manifesto 2019: Get Brexit Done – Unleash Britain's Potential](#).
- Constitution Committee (2021) [Corrected Oral Evidence: Annual Evidence Session with the President and Deputy President of the Supreme Court](#) London: House of Lords 17 March.
- Constitution Unit (2021) 77 March [Monarch](#).
- Cowburn, Ashley (2020) 'Boris Johnson Told to Keep "Populist Hands" off Judiciary after Reports He Wants Overhaul of How Government Is Challenged in Court' *The Independent* 25 July.
- Gov.UK (2020) [Terms of Reference – Independent Review of Administrative Law](#) London: Gov.UK.
- Jowell, J & D Rose (2018–2019) 'Beyond Anisminic: The Rule of Law and Ouster Clauses after Privacy International' 10 UK *Supreme Court Yearbook*.
- Ministry of Justice (2021a) [The Independent Review of Administrative Law](#) (The Panel Report), Lord Edward Faulks QC (chair) CP 407 London: Ministry of Justice.
- Ministry of Justice (2021b) [Judicial Review Reform: The Government Response to the Independent Review of Administrative Law](#) CP 408 London: Ministry of Justice.
- Reed, Rt Hon Lord (2020) 'Response to a Call for Evidence Produced by the Independent Review of Administrative Law Panel' October.
- Slingo, J (2021) '“Act of Spite”: Lord Reed Decries Proposals to Change Supreme Court's Name' *Law Society Gazette* 18 March.
- Woolf, H, J Jowell & Ors (2018) *De Smith's Judicial Review* 8th edn London: Sweet & Maxwell.

Legislation Cited

Constitutional Reform Act 2005

European Convention on Human Rights

European Union (Withdrawal Agreement) Act 2020

EU–UK Trade and Cooperation Agreement 2020

Fixed-term Parliaments Act 2011

Fixed-term Parliaments Act 2011 (Repeal) Bill

Freedom of Information Act 2000

Human Rights Act 1998

Senior Courts Act 1981

Case Cited

Ahmed v HM Treasury No 2 [2010] UKSC 2 and 5

Anisminic Ltd v Foreign Compensation Commission [1968] UKHL 6

Axa General Insurance v Lord Advocate [2011] UKSC 46

Begum v Secretary of State for the Home Department [2021] UKSC 7

Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9

Gillick v West Norfolk and Wisbech AHA [1986] 1 AC 112

Huang v Secretary of State for the Home Department [2007] UKHL 11

Local Government Board v Arlidge [1915] AC 120

M v Home Office [1992] QB 270, 314

Poole BC v GN [2019] UKSC 25

R v Criminal Injuries Compensation Board ex parte Lain [1967] 2 QB 864

R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd [1995] 1 WLR 386

R (Cart) v Upper Tribunal [2011] UKSC 28

R (Evans) v Attorney General [2015] UKSC 21

R (Gentle) v The Prime Minister [2008] UKHL 20

R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs [2019] EWHC 221 (Admin)

R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills [2012] EWHC 201 (Admin)

R (Litvinenko) v Secretary of State for the Home Department [2014] EWHC 194 (Admin)

R (Lord Carlile) v Secretary of State for the Home Department [2015] AC 945

R (Miller) v Secretary of State for Exiting the EU [2017] UKSC 5 (*Miller No 1*)

R (Miller) v The Prime Minister [2019] UKSC 41 (*Miller No 2*)

R (Privacy International) v Investigatory Powers Tribunal [2020] AC 491

R (Wilson) v The Prime Minister [2019] EWCA Civic 30

University of London Refugee Law Clinic Online Launch

CARL STYCHIN

Director the Institute of Advanced Legal Studies

On 20 May 2021, the University of London hosted an online launch of its new Refugee Law Clinic. The Clinic is an innovative project providing *pro bono* legal advice for refugee clients based on a model of Clinical Legal Education for its diverse student body. It began operating in 2020. The Clinic's work focuses on advising and preparing fresh claims for asylum—an area identified as underserved in the current legal landscape—and complements the work of law firms and other service providers in London. So far, the clinic has supported over 25 clients towards submitting their fresh claims and has undertaken various activities to promote good practice around fresh claims in the sector.

The Clinic is supported by the Central University and by ten of the University's Member Institutions. Delivered in partnership with two leading international law firms based in London—Macfarlanes and Clifford Chance—the Refugee Law Clinic also provides opportunities for lawyers to undertake *pro bono* work. The Institute of Advanced Legal Studies is proud to host the Clinic on the fifth floor of Charles Clore House.

The host for the launch was Professor David Cantor, Director of the University of London Refugee Law Initiative and Chair of the Clinic's Governing Board. Professor Cantor highlighted the intercollegiate and collaborative nature of the Clinic and the work that has been accomplished, to date despite the challenges of the pandemic. The 'virtual ribbon' was then cut by the Vice Chancellor of the University of London, Professor Wendy Thomson; Louise Zekaria of Macfarlanes; and David Boyd of Clifford Chance. Professor Thomson explained how the Clinic fits the civic role of the University, which is one of the key aspects of the current University strategy.

The Clinic Coordinator, Susie Reardon-Smith, and Supervising Lawyer, Frances Trevena, then explained the achievements of the Clinic to date.

They emphasized the importance of legal work on fresh claims in the asylum field. Claims handled by the Clinic have focused on disputed nationality issues; human trafficking; and rectifying poor legal advice which clients had previously received. A national client network has been created through ongoing work with referring partner organizations.

Next to speak were Paige Achilles (Macfarlanes) and Olivia Johnson (Clifford Chance), two of the volunteer lawyers at the Clinic. They explained how the work to which they have been exposed has been very different from their usual areas of practice. Not surprisingly, this has been a steep, but intellectually rewarding, 'learning curve'. They stressed the collaborative nature of clinic work (including working with students) and the real-world impact of volunteering.

This was followed by a panel discussion which considered the Government's 'New Plan for Immigration' and its impact on the asylum system in the United Kingdom. Louise Hooper (Garden Court Chambers) emphasized that there was much that was not new in the Plan, and many of the ideas previously had been found to be unworkable or unlawful. She anticipated that, rather than limiting the number of fresh claims for asylum, the Plan instead would lead to an increase.

Professor Elspeth Guild (Queen Mary, University of London) described the Plan in terms of the frontloading of efficiency ideas into asylum processes. She predicted that this, in turn, will lead to an enormous number of fresh claims until the evidence is finally properly considered. The emphasis on efficiency has obvious implications for the 'rule of law' which was being undermined in the process.

Finally, Kamena Dorling (Helen Bamber Foundation) described the Plan as extending the longstanding 'hostile environment' and 'bogus asylum' ethos, which have been propagated by successive governments. She underscored that fresh claims to asylum are no less likely to be valid and are frequently upheld. This is due in part to the fact that expert evidence is finally commissioned in the context of the fresh claim. She concluded that we should not lose sight of the precarious existence which asylum seekers experience while waiting for their claims to be determined.

Professor Cantor closed the event by expressing the hope that opportunities for in-person events hosted by the Clinic at Charles Clore House will be possible as the pandemic recedes. He expressed his hope that the Clinic's supporters will be able to visit in person in the near future.

NEWS AND EVENTS

COMPILED BY ELIZA BOUDIER

University of London

Completion of IALS Transformation Project

The second and final phase of works on the lower floors of Charles Clore House was completed in May. This second phase consisted of new lighting on the book storage floor, the transformation of the toilets on the three lower floors, the upgrading of the Institute's Archive Storage facility, and the re-carpeting of the ground and lower ground floor lobbies. In recognition of the generous financial contribution made to the project by the Clore Duffield Foundation, the Archive Room will be named after Dame Vivien Duffield.

Artworks Installed at IALS

As part of the Transformation Project, IALS has loaned modern artworks from the university of London Collection. Ten large modern artworks have been installed in Charles Clore House to fit with the style of the Denys Lasdun designed building which was opened in 1976. Sean Scully, Claude Rogers, Jack Simcock, John Edwards and Andrew Yates are among the artists represented: see [website](#) for further details. .

Veeder-Roebuck Conference Room and the History of Arbitration Project

The IALS Conference Room is to be renamed the Veeder-Roebuck Conference Room in honour of contributions to the Institute by the late Professor Derek Roebuck and Mr Johnny Veeder QC.

Professor Derek Roebuck's association at IALS stretched back fifty years. A Senior Associate Research Fellow at IALS, his landmark twenty-year investigation into the history of arbitration was associated with and subsequently hosted at the Institute. Johnny Veeder QC, a long-time and staunch supporter of Derek Roebuck's work and one of the most eminent and influential members of the arbitral community, was instrumental in fundraising for the completion of the 18th-century volume, *English Arbitration and Mediation in the Long Eighteenth Century*, co-authored by Dr Francis Calvert Boorman and Dr Rhiannon Markless. Both Derek Roebuck and Johnny Veeder died in 2020 and the history of arbitration project continues in their memory. The University of London Development Office embarked upon a highly

successful fundraising campaign to continue the project with a volume dedicated to the 19th century, and Dr Francis Boorman has started work on it. The generous response thus far from the legal community is a tribute to the high regard in which Mr Veeder and Professor Roebuck are held. The project, and the naming of the conference room, will provide a fitting and lasting tribute to them.

Georg Schwarzenberger Prize

The Georg Schwarzenberger Prize was created as a memorial to the former Emeritus Professor of International Law at the university following donations from friends and family. It is awarded annually by the Director of IALS to a student in the university considered to be outstanding in the field of public international law. Each of the university's law schools nominates a candidate and both undergraduates and postgraduates are eligible.

The 2021 prize was awarded to Rebecca Hacker. Rebecca completed an LLM at the LSE specializing in public international law in 2020 and achieved distinctions in all of her courses. In her dissertation, Rebecca examined whether—and on what basis—nationality deprivation should be recognized as a form of persecution for the purpose of the 1951 Refugee Convention. During her LLM, Rebecca also wrote a

major research essay on the case for indigenous self-determination for the stateless Bidoon of Kuwait.

IALS Library

The summer opening hours are Monday to Thursday 9am to 8pm, Fridays 9am to 5pm and Saturdays 10am to 4pm.

IALS Library Roadshows

Each year the IALS Librarians take to the road to meet MPhil and PhD students and academic staff at law schools across the UK. Whilst it is currently not possible to visit in person, IALS Library is continuing the tradition with a series of virtual roadshows instead. To organize a virtual IALS Library Roadshow at your law school, contact Alice Tyson, IALS Library's Access Librarian: at alice.tyson@sas.ac.uk.

Selected Upcoming IALS Events

2021 Online Advanced Course on Post-Legislative Scrutiny

2–30 July 2021

IALS and the [Westminster Foundation for Democracy](#) are happy to announce the launch of the [Advanced Certified Course on Post-Legislative Scrutiny](#). The course explores in depth the theory and practice of post-legislative scrutiny as an oversight tool. It adopts a holistic outlook that

places post-legislative scrutiny in the legislative cycle. The course will apply post-legislative scrutiny as a scrutiny tool for gender issues and legislation in key sectors like the environment/climate change or corruption.

IALS Legislative Drafting and Language Workshop

7 July 2021, 6pm

At this [Legislative Drafting and Language Workshop](#), scholars and experts in the field of law, legislative drafting and linguistics will explore the research space around law and language, focusing on the gender-neutral strategies adopted by drafters in various jurisdictions. The ambition is to envisage ‘a way forward’ in legislative drafting and to generate ideas that might challenge prevailing practices and beliefs, to cross the traditional boundaries of disciplines such as law and linguistics, and eventually to interact successfully with scholars from different fields.

Financial Technology— Challenges for the Law: Online Seminar and Book Launch

3 September 2021, 11:30am

This seminar addresses recent developments of financial technology and the related legal and regulatory challenges combined with a book launch introducing the *Routledge Handbook of Financial Technology and Law* edited by Iris H-Y Chiu and Gudula Deipenbrock. The Handbook discusses the innovative

technology-driven transformation of services, products and markets in the financial sector from the legal perspective. Topics of the Handbook include policy issues, high-level principles and perspectives as well as legal challenges of Fintech in the realms of credit, payments, investment, insurance, cryptocurrencies and assets, markets and trading as well as Regtech and Suptech. See [website](#) for details.

Podcasts

Selected law lectures, seminars, workshops and conferences hosted by IALS in the School of Advanced Study are recorded and accessible for viewing and downloading from the [SAS IALS YouTube channel](#).

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Moscatti, Michael Palmer & Marian Roberts (eds) *Comparative Dispute Resolution* (2020); Michael Palmer, T Bodenhorn & John Burns (eds) 2020 'Special Issue: Higher Education in Greater China' (244) *The China Quarterly* 903-1167; and He Xin & Michael Palmer (eds) 2020 'Special Issue: Chinese Family Law in Action' 15(2) *Journal of Comparative Law* 1-249. He has also contributed significantly in the past to the development and administration of various training programmes for mainland Chinese legal professionals, including the Lord Chancellors' Training Scheme for Young Chinese Lawyers, the Lord Chancellor's Training Scheme for Young Chinese Judges and the EU-China Legal & Judicial Cooperation Programme. Email: michael.palmer@sas.ac.uk.

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Board. He began his career with a decade in the City, working as an environmental lawyer, first at Freshfields and then at Latham & Watkins. Email: steven.vaughan@ucl.ac.uk.

CHINA'S THREE INTERNET COURTS

YANG LIN¹

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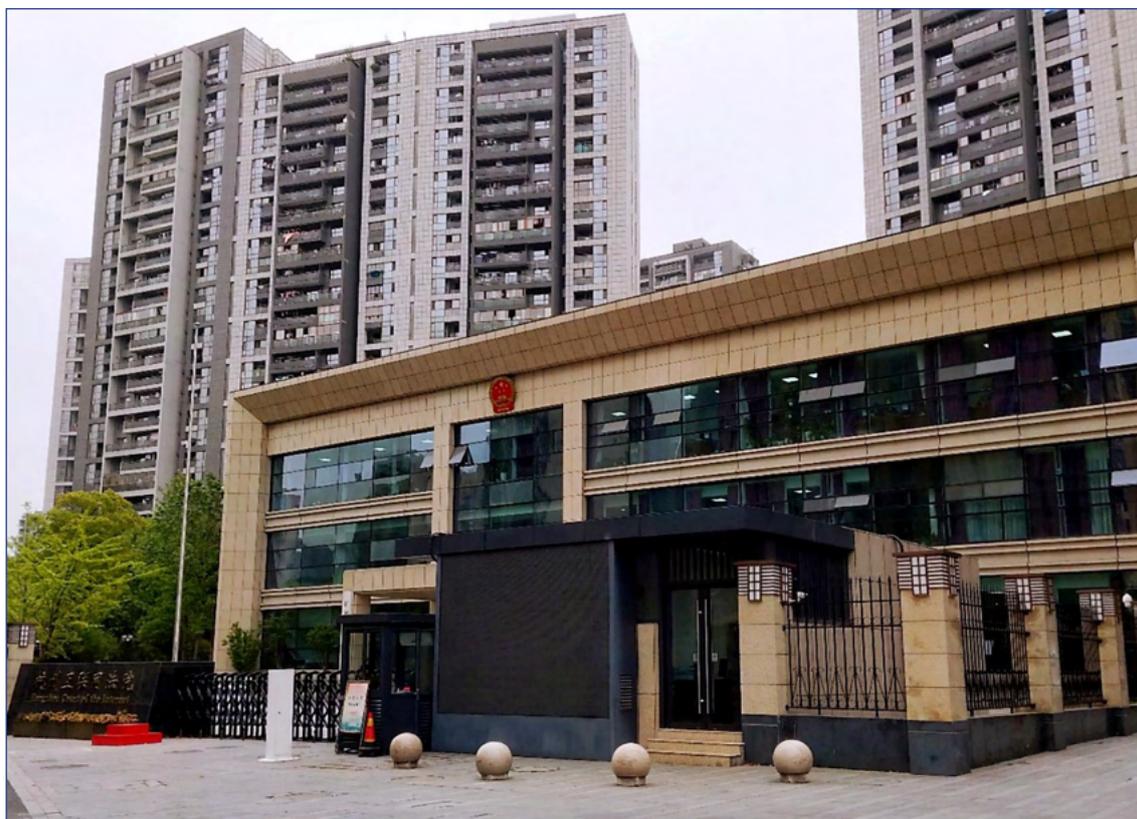
With arguably the most developed e-commerce business in the world, the People's Republic of China has recently set up several Internet Courts to handle internet-related cases. Alongside this new development in information technology use by the Chinese judiciary, there have also been reforms in the direction of 'diversified dispute resolution' processes, encouraging greater processual pluralism. The development of internet courts is part of China's larger project of 'judicial reform' and combines deployment of new information and communication technologies. The internet and other information technology tools are used to handle litigation more efficiently and are also seen as contributing to the building of a more pluralistic dispute resolution system. China's Supreme People's Court in particular is encouraging digitization and utilization of cyberspace and technologies such as blockchain and cloud computing to streamline the handling of cases within China's vast court system. China established three Internet Courts in Hangzhou, Beijing and Guangzhou on 18 August 2017, 9 September 2018 and 28 September 2018, respectively. The emergence of Internet Courts as sites of court 'informatization' and multiple processes of dispute resolution has led to new discussions within China about such issues as potential challenges to the traditional rules of judicial adjudication, and how best to integrate emerging technologies with the processes of trial and adjudication in the court.

Hangzhou, the capital seat of Zhejiang Province in central East China, in the past a famed retreat for Mao Zedong and other senior Chinese Communist Party (CCP) officials (Barmé 2011) has now become known as the 'E-commerce capital of China' and is home to many internet technology companies such as Alibaba and NetEase. It is now also the site

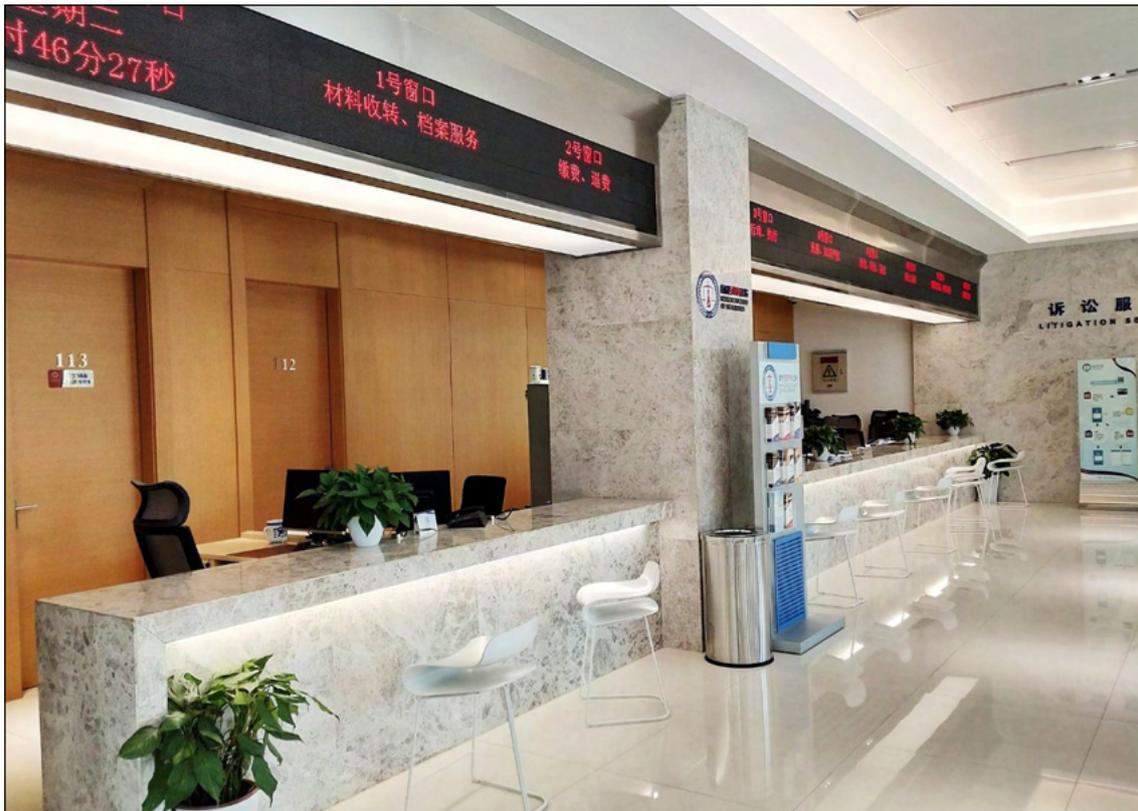
¹ This is a short summary of the Internet Court in my PhD thesis in progress. I should like to express my gratitude to Professors Zhao Yun and Michael Palmer for their help and suggestions.

of China's 'comprehensive cross-border e-commerce pilot zone'. Given the rapid commercial development in the Hangzhou area—where local residents claim that the city was a pioneer in inventing money and is now the pioneer in developing a cashless economy—it is not surprising that the court system in Hangzhou in recent years came to handle a large number of e-commerce-related cases. While 600 cases were filed in 2013, more than 10,000 were handled in 2016. Thus, in 2015 (*Legal Daily* 2018) the Zhejiang Provincial High Court selected within Hangzhou three local ('grassroots') courts and the intermediate courts above them as pilot e-commerce cyber courts in order to handle internet-related cases. This system was the predecessor of the Hangzhou Internet Court. The specific establishment of the Hangzhou Internet Court can be traced back to the decision reached at the 36th meeting of the CCP's Central Leading Group for Comprehensively Deepening Reforms on 26 June 2017 (Xinhua 2017).

The Hangzhou Internet Court, with Supreme People's Court approval (and see Supreme People's Court 2018), is responsible for hearing first instance civil and administrative cases related to the internet in the Hangzhou area.



The Hangzhou Internet Court building at No 22 Qianchao Road, Hangzhou, Zhejiang Province: photo by Yang Lin.



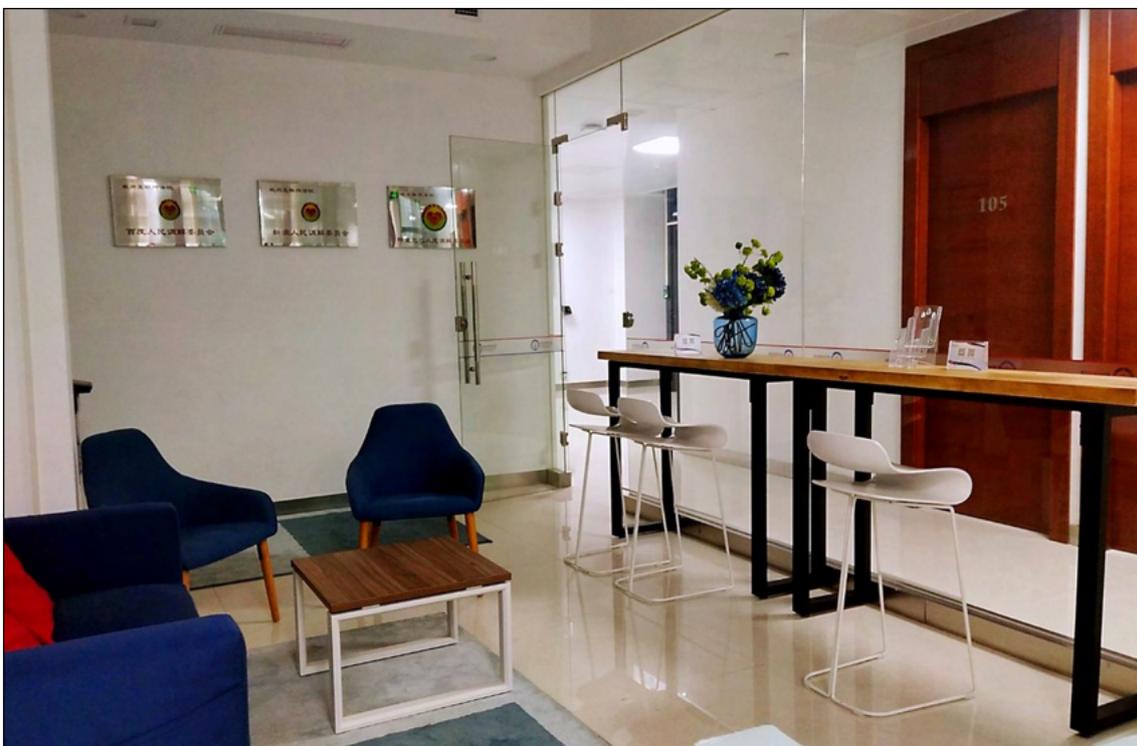
Hangzhou Internet Court's Litigation Service Centre: photo by Yang Lin.

While traditional court proceedings are increasingly facilitated by using web-based resources, the Internet Court is distinctive because the actual proceedings are conducted online. It is argued that such an approach can reduce to a certain extent the litigation and court costs paid by the parties, as well as the sometimes burdensome transportation expenses and time costs. The Internet Court provides guidelines to assist disputants in their litigation preparations. The [official website](#) of Hangzhou Internet Court also provides 24/7 access and services as an online litigation platform. At the same time, the court does provide more traditional offline litigation services—it is equipped with the latest hardware facilities to assist in the provision of assistance for the disputing parties. The court is physically located in Jianggan District, Hangzhou City, Zhejiang Province, and the office building was formerly an annex to the Holiday Inn Hangzhou CBD, so it is stylishly decorated and (unlike many Chinese court buildings) relaxed in tone.

Because parties may submit pleadings and initiate case applications at any time, they are no longer restricted by the working hours of traditional courts. Parties are free to file a lawsuit at any time of their choice and to pay the court's litigation fee online. After filing suit, parties can check the progress of the case and upload information and electronic evidence on



Facilities at the Hangzhou Internet Court for welcoming and assisting parties to litigation: photo by Yang Lin.



Mediation room in the Court for conventional face-to-face mediation, with three plaques on the wall indicting close links with people's (community) mediation: photo by Yang Lin.



Reporters visit the online mediation room inside the Beijing Internet Court: photo taken on 9 September 2018 by Ju Huanzong, Xinhua News Agency.

the webpage of the litigation platform. In addition to the webpage access on the litigation platform, different forms of access interface, including mobile apps, have been developed for parties to select and use, making the platform more convenient for the parties. In pre-litigation mediation, the parties can conduct online negotiation and mediation through the litigation platform in the form of web video and voice conversation. This approach is also applicable to formal hearings of the court. In such hearings, the parties do not need to go to the offline physical courtroom of the court to participate in trial proceedings, as the trial is conducted via the internet. At the end of the trial, the judge will read the judgment in court and upload it to the litigation platform for the parties to view and will also mail offline a copy of the paper judgment to the parties. In terms of enforcing the outcome, the parties may apply for the execution of the official verdict online. For such applications, the court will accordingly activate its own internal (quite powerful) information system to enquire about and preserve the property of a defendant, or conduct further offline enforcement to the extent that such enforcement is possible. For cases that have been closed, the court will file and store the automatically generated electronic files of the case.



Beijing Internet Court: photo by Beijing Daily.



Guangzhou Internet Court: photo by Guangzhou Internet Court.



Guangzhou Internet Court hearing: photo by YCWB.

Of course, internet courts do not offer a perfect system, and their development is limited by various factors, such as the local level of economic development, infrastructure construction progress (especially the level of information system construction), the education level of the internet users (that is, local residents), the degree of legal professionals' understanding of technology, the computing competence of judges and other judicial personnel, and so on. For persons without internet access, it is a matter of concern if they are not to be assured access to judicial remedies. For persons that do have access to the internet and who are able to conduct litigation online, important issues include how best to adapt to this emerging online dispute resolution system and, for the judiciary, how best to popularize and meet the needs of users—including provision of a user-friendly interface (Long 2018). Changes are emerging in styles of courtroom proceedings, etiquette, and parties' trial strategies in the online trial setting, and issues are arising from the application of a range of new technologies, especially artificial intelligence.

Like the Hangzhou Internet Court, the Beijing Internet Court and the Guangzhou Internet Court also handle internet-related cases in their respective jurisdictions.

In their unfolding practice, the three Internet Courts look to the application of new technologies, including blockchain technology, to better handle internet cases. The pressures created by the Covid-19 epidemic have further reinforced the importance of online dispute resolution processes. The establishment and operation of the Internet Court can

also be regarded as a typical example of the construction of specialized people's courts in China's judicial system reform (*Legal Daily* 2021).

References

- Barmé, Geremie R (2011) '[Mao Zedong's West Lake: The Revolutionary Retreats Liu Villa 劉莊 and Wang Villa 汪莊](#)' 28 *China Heritage Quarterly* China Heritage Project, Australian National University 28 December.
- Legal Daily* (2018) '[The Past Life of Hangzhou Internet Court](#)' 25 January.
- Legal Daily* (2021) 'Specialized People's Court Becomes China's Judicial International Business Card' 26 March.
- Long Fei (2018) 'Eight "Key Words" for the Construction of Intelligent Courts' 2 *People's Rule of Law* 33–37.
- Xinhua (2017) '[China Focus: China Launches First Internet Court in e-Commerce Hub](#)' 16 August 2017.

Normative Documents Cited

- Supreme People's Court (2018) 'Zuigao Renmin Fayuan Guanyu Hulianwang Fayuan Shenli Anjian Ruogan Wenti de Guiding' (Rules on Several Questions regarding the Hearing of Cases by Internet Courts) (Fa Shi [2018] No 16) 3 September 2018, and in force 7 September 2018)

Websites

[Beijing Internet Court](#)

[Guangzhou Internet Court](#)

[Hangzhou Internet Court](#)