DISCIPLINE AND PUNISH
Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories

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In this generically experimental essay in 'situated' comparative interdisciplinary scholarship, the author takes as a starting point one set of disciplinary practices of US legal education, law review culture and the related cultural value accorded to practices of citation to legal authority. She draws on Goodrich's recent work on the relationship between rhetoric and law to theorise both the attitude of intellectual disdain for, and student anxiety in relation to, fundamental legal skills courses in US law schools in a way that might open up the possibility of productive change. She also critiques the dominant politics of the group of subaltern law teachers to whom the teaching of legal literacy is consigned.

For many a legal scholar located elsewhere, the American law school looks like the land of plenty. Research support in the forms of funding and student assistance is rarely — if ever — in short supply. Even at the less renowned law schools, the libraries tend to be well stocked and the computer facilities state-of-the-art. Since almost every American law faculty boasts at least one (normally student-edited) law journal, the fear of being unable to find a publisher seems not to exist. In academic life, as elsewhere, one looks to the United States to find lower prices and larger sizes: American law books and journals are, by British standards, generally cheap and the law reviews regularly publish articles four times the length of the average British law journal essay. From an outsider's perspective, there is much about the American academic-legal scene that looks enviable.

> Yet in every dream-home we may find heartache.[1]

Whereas American law reviews tend to follow strict rules about citation style, their English equivalents are less interested in the subject. Not only do the English lack a uniform system of citation (most law periodicals produce brief and idiosyncratic guides for contributors) but it is also possible to find

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[1] Duxbury (2001), p 23.

within as well as among the journals significant variations in citation form. This relaxed approach to citation convention is not necessarily a bad thing:

> The English, in short, do not place as much store in citation as do the Americans.[2]

Genre Piece

> I pause for a moment and gaze out the train window. My life, I think, has become one long stream of text, delivered on the run to gatherings of mostly strangers. It is a strange period in my life, watching the world whiz by, these brazen moments of intimate revelation to no one in particular in my declared challenge to the necessary juxtaposition of the personal with the private. In some odd way, it is as though the question with which I began — Who Am I? — has become reconstituted into Where Am I?[3]

> The truth, the truth, I would laughingly insist... But the voracity of her amnesia would disclaim and disclaim – and she would go on telling me about polar bears....
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> In the public debate that ensued, many levels of meaning emerged.[4]

I. Dear Reader:

You cannot imagine the relief your expatriate correspondent felt when the email arrived from Bill MacNeil and Peter Hutchings seeking contributions for this special 'Law's Cultural Mediations' edition of *Griffith Law Review*. It meant that I had a place where I could begin to write about one aspect of the often indigestible mixture of dismay, disbelief, intimations of high and wry comedy, and the by now reflexive recourse to what critical theory could offer

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2 Duxbury (2001), p 6. There have been recent efforts in both Britain and Australia to establish more-or-less uniform systems of legal citation. In Britain, on 1 January 2001, Lord Woolf CJ issued a practice direction to govern, *inter alia*, 'citations of judgments given in every division of the High Court'. Australia has seen a range of initiatives designed to standardise citation, including the influential *Melbourne University Law Review* citation manual, and the medium-neutral citation standards circulated by the New South Wales Law Foundation-based Legal Information Standards Council. The High Court implemented a variation of the media- and vendor-neutral citation standards recommended by Austlii on I January 1999, and many other Australian Courts have followed suit. As this essay will go on to show, despite these developments, neither the British nor the Australians place as much store in citations as do at least American law students and those American lawyers who have served on law review.

3 Williams (1991), p 16.

4 Williams (1991), pp 288, 234.

that would, yet again, get me out of a jam produced by the curious contours of US legal culture in the praxis of my everyday life in the academy.

These are things that it is difficult to articulate in the place from which I write, except for the rare and blissful occasion when I can talk with the filters off in the company of fellow 'displaced intellectuals'. I would not try to have them published in a US law review, for reasons that will emerge later, and also — or so it might be said — because I am by turns heterodox and pusillanimous: it is three years until a decision will be made about my tenurability. Because of the phenomenon of faculty, rather than deconal governance — a material practice that suffuses other material practices in the US legal academy including the appointment of faculty members — what used in one Australian faculty in which I worked to be scornfully labelled 'clubbability' has a particular significance.

Of course, 'clubbability' might be called other, less pejorative, things, such as a willingness to work with one's colleagues in the interests of achieving institutional goals held in common or developed through collaboration.[5] Indeed, in the institution where I presently teach, many among my colleagues are critical of the practices of US law reviews of the kind I am writing about here, and many of them are working or want to work to change them. In the writing of this essay, I am trying both to make sense of perceptions by thinking through them with the perspective offered by critical theories of subject formation, and thus also to enable myself to do the work of engaging productively with them. But those perceptions are, inescapably, foreign.

In US law schools, law reviews are often viewed as a bastion of student power that might be seen as the trickle-down product of faculty governance. They might also be perceived as much less independent reproducers of the majoritarian culture that faculty governance produces. In many law schools, faculty exert more-or-less visible control over article selection, this latter a phenomenon I will discuss at some length. At Harvard, for example, at least one faculty member reviews everything the law review publishes. At the University of Southern California, a list of all submissions is circulated by the law review to faculty inviting comment on any pieces they consider of interest. In other places, faculty advisers to law reviews can exert a significant amount of influence in more or less visible ways about what gets published. In any event, even in those places where law reviews are relatively autonomous, their practices are suffused by the dominant and relatively homogeneous culture of US legal education.

In most law schools — especially, perhaps, those that are private and fee-dependant — it is a high-risk, low-return endeavour to seem to trespass on the autonomy — essential and/or theoretical, and in either case discursively powerful — with which law reviews manage their affairs, train their junior student editors both in apprentice scholarly writing and in the practice of

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[5] For Fish (1999), pp 110–13, this would identify me as a liberal, were it not that I take the view that both the process of identification of such goals and their fashioning are inevitably matters of power and politics.

editing (perhaps it would be more accurate to call this practice 'being on law review'), and select scholarly articles for publication.

No, Dear Reader, this essay will not be what is called here 'a tenure piece'. Among other things, it does not have enough citations to authority. Nor does it pretend to what passes itself off as 'rigour'. Worst of all, perhaps, I am writing from and about my own situated experience, drawing on critical theory to read and make sense of it in the interests of imagining and thus making change — that is to say, as another colleague recently said critically of scholarship in the critical race studies, feminist and queer theoretical traditions, I am writing about myself. Worse still, and from other perspectives — perhaps quite rightly — Australianess does not confer a recognised minority status.

It may seem that I am ungrateful, biting the hand that feeds me amply. This is, of course, true. But there are other ways to tell or hear the story: this essay proceeds not just from the trials produced and insights enabled by cultural displacement; it proceeds from my passionate conviction that legal education as it is characteristically practised in the three-year Juris Doctorate (JD) programs of US law schools is in need of radical change, in the interests of students, in the interests of the lawyers we teach them to become, and in the interests of the profession they constitute, the clients they represent and the law they make in its practising. Suffice to say at this point that I cannot recall ever having worked with students as acutely distressed and reflexively angry as the first-year JD students I teach in the United States. The only experience I have to draw on that seems at all comparable is my recollection of my own bewilderment, disaffection and sense of both profound unhappiness and intellectual stultification during my law school education at the University of Sydney in the early 1980s, before the 'quiet r/evolution' that meant that the law schools in which I taught in the 1990s, Sydney and Wollongong, were apparently quite different kinds of places to teach and to learn. Or at least that was how it seemed.

I have said that I have the comforting simulacrum of being able to write about things, and in ways, here that I would not have were this essay to be destined for publication in the United States. In mediating what I say according to where I say it, I am of course also paradoxically manifesting my acculturation to what one of my colleagues recently described as the 'perversions of American free speech culture': he was referring to the phenomenon that means, among other things, that US law students are much more prone than their Australian counterparts[6] to tell one exactly what they

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[6] I spoke recently with a colleague from an Australian law school where I formerly taught who told me that he experienced similar student anger when he taught an interdisciplinary first-year legal theory course with a strong law and discourse emphasis; his view, like mine about the student reaction to first-year skills courses in the United States, was that this course destabilised the tendency of first-year doctrinal courses to suggest, however unwittingly, that law is constituted of stable rules, and that this conflict was productive of anxiety and anger, directed at the perceived medium of destabilisation. My own experiences teaching the same course some years ago did not correlate with his. One tentative possibility for the difference may be the increasing cost of tertiary education in Australia. One of the

believe, especially if their opinion is trenchantly critical, especially if the topic is at the centre of one's professional expertise, but generally only if they can do so in the anonymous context of the student evaluation of one's teaching.[7] I have learned this from colleagues' horror stories, from the semesterly cycle of breastbeating on the listservs peopled by teachers of fundamental legal skills in this country, as from students in US law schools — although, thankfully, increasingly less frequently from students whom I teach. It is in a measure ironic, then, that I have learned from aspects of the national culture of teaching evaluations[8] to speak certain kinds of 'truths', or certain kinds of opinions that would strike the listener as heterodox or uninformed or not civil, when I am freed to do so via a promise of obscurity.

But then, of course, for all my half-hearted subterfuge in publishing this in an Australian law journal, in a special edition, the title of which means that it is not likely to attract readers in the liberal mainstream that is — also because of the material practices of faculty governance — extremely dominant in the US legal academy, it will nonetheless be more or less public and accessible. And, of course, I will in all likelihood report its existence to my tenure committee this year, to justify my claims to industry, if not to scholarship.

II. If I were properly acculturated, I would have footnoted my borrowing from Foucault in naming this essay; I would also have footnoted the convention that in the United States requires that readers punctuate the salutation line in correspondence with a colon, rather than a comma; as it is, however, I remain feral.

III. Of course, only some of what I have written thus far is 'the truth'. In fact, my response to the email that solicited contributions to this edition of *Griffith Law Review* was more tentative. I wrote:

Dear Bill:

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student teaching assistants in the first-year skills course I currently teach opined that the student anxiety that manifests itself in the course is the product of a combination of the financial burden law school places on students and an expectation that graduates would move frequently from employer to employer throughout their professional careers: in his view, this manifested itself 'in anticipation', as it were, of a generalised lack of regard for institutions and the conviction that any negative impression they left in their wake in any institution would be of little moment.

7 And also in emails, but generally only if one is a woman or other 'subaltern' faculty member, if one teaches in a first-year required skills course, or if one teaches in ways that do not reify doctrine; I 'luck out', as they say in the United States, on all three scores.

8 As from an early experience in the US academy that taught me that it was very bad form to engage critically with other scholars in a public forum, at least in Orange County.

> Sounds wonderful, and sorry I won't have anything ready in time, unless you'd be interested in a shortish piece that does a Foucauldian reading of the fetishization of citation in the US — I gave a couple of conference papers on it a week or so ago and it would be far too controversial to get published in the US. Let me know what you think.

I will go on to discuss the phenomena that result from just one set of the material practices of legal education in this country: the law review experience, and the associated phenomenon of the fetishising of a particular practice of citation to legal authority.[9] Before I do, I will provide a detour through the contexts in which both the practices of law reviews, and my work in legal literacy operate.

By Way of Background, or Towards a Working Cultural Literacy

The invitation to speak that gave rise to the conference papers[10] on which this essay is based came as a result of my membership of the Association of Legal Writing Directors (ALWD).

The Association is made up of directors of the required first-year skills course that is a feature of US legal education. The majority of such courses are called 'Legal Research and Writing', 'Legal Method/s', 'Legal Process' or some variation on these titles. The skills included in their curricula generally include legal analysis, reasoning, writing and research, and some basic advocacy. Some more ambitious programs, which often carry more course credits than the first group — often labelled 'Lawyering Skills' and sometimes extending beyond the first-year curriculum — generally include training in client counselling, client interviewing and negotiation. ALWD, as it is called, is (historically speaking) an offshoot of the Legal Writing Institute, the professional association for teachers of first-year skills courses; it was formed after a 1995 conference of Legal Writing Directors from around the United States. ALWD is sometimes referred to by law deans as 'the union'.

The teaching of fundamental skills in the United States has the following features:

- It is generally confined to the required first-year course — although, as I noted above, some schools (the College of William and Mary is a well-known example) have integrated first-year skills courses that extend beyond the first year: in William and Mary's case, the teaching of the required course in professional responsibility is combined with the teaching of skills.
- In addition, all accredited law schools have at least a nominal upper level writing 'program'; frequently little or no instruction is associated with the

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9 I am not the first scholar to do this; in particular, Lasson (1990) has written a scathing critique of US legal scholarship that includes an analysis of pervasive citation practices. However, I am attempting here to do something beyond critique — that is, to theorise the structural, cultural and historical reasons for this and other related practices of legal education in the United States.

10 Presented at the National Conference of Law Reviews, held at the University of Baltimore in March 2001.

requirement that students in the second or third year of the JD degree complete an extended piece of writing. A recent amendment to the ABA standards for law school accreditation[11] seems to indicate that schools will have to improve their offerings in this area to maintain accreditation.

- It is very unusual for fundamental skills to be taught in any meaningful way in other required first-year courses: the model for law teaching in the United States, with the general exceptions of clinical teaching and seminars, is the large lecture class of 70-plus students, taught via the Socratic method, and examined by a 100 per cent end-of-semester formal examination (called a 'bluebook exam' in the national vernacular, after the colour of the covers of the answer booklets; this bluebook should not be confused by my Antipodean readership with *The Bluebook*, the egregious citation manual which I will discuss at some length later in this essay). The usual teaching load for tenurable and tenured law teachers in the United States is six hours a week.
- Where it is not taught by second- and third-year law students with some basic training (an increasingly common model the higher up the food chain of eliteness in law schools one goes),[12] it is generally taught by untenured and untenurable teachers, the vast majority of whom are women, whose working conditions and rates of pay are significantly worse than those of their tenurable and tenured colleagues. Where those teachers are adjunct faculty members, rather than 'professional' teachers of fundamental skills, their rates of pay are often significantly worse than the rates of pay accorded to adjunct faculty who teach doctrinal courses. The teaching of fundamental skills in the first year course in US law schools has rightly been called a 'pink ghetto'.[13]
- First-year skills courses generally produce a great deal of anxiety in, and attract a great deal of hostility from, first-year law students; this anxiety/hostility plays itself out in a range of ways that that make teaching such a course fit somewhere on the continuum of difficult via paranoia-

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[11] A recent amendment to the ABA's accreditation standards for law schools, voted on during this past (Northern) summer replaced the requirement that law students in accredited law schools have a least one rigorous writing experience with a requirement that they have substantial legal writing instruction, including at least one rigorous writing experience in the first year and one elsewhere in the curriculum. An amendment to the standards for employment for legal writing instructors was also adopted at the same meeting.

[12] As measured by the local stand-in for Australia's recent national quality audits, the annual ranking of law schools by the *US News and World Report*, a popular, populist and influential journal given to ranking things in the United States, which, to simplify (but not much), endorses the replication of hierarchy and the status quo. Again, there are some notable exceptions to the general abbreviation of training of these student 'teachers', Brook Baker's program at Northeastern University in Boston being perhaps the most distinguished.

[13] ABA Commission on Women in the Profession (1996), pp 32–33; Edwards (1997).

inducing to harassing.[14] There are various manifestations of these student reactions. They include teaching evaluations that routinely mete out vituperative criticism of kinds unfamiliar to Australian law teachers — or at least to the Australian law teacher I used to be — and the making of complaints about the skills teacher/s or program to faculty members perceived as more influential (often — one might say, inevitably — male, white and tenured).

We are all, of course, familiar with students who complain to us about a colleague's teaching, or marking or politics. The phenomenon I am referring to here is rather different, again because of the generalised anxiety which characterises first-year law students in the United States — anxiety which manifests itself in very high rates of unhappiness, alienation and mental illness (phenomena I will discuss later in this essay).

Thus there have developed practices which are perceived generally as manifestations of democracy and free speech in a professional culture dominated by a liberal humanist mainstream and deeply imbricated with negative rights discourse, and also — more pragmatically — as pressure valves. These include 'open mike' complaints sessions in doctrinal classes, and questions specifically directed to the skills program posed in classes or in informal get-together lunches often held by faculty administrators and rather less frequently by professors. A poststructuralist perspective might see these strategies as operating to re/produce discourse about an aspect of law school that inevitably, for reasons I will go on to suggest, is the object of student dissatisfaction. Similarly, veterans of the accreditation teams that the ABA sends periodically to inspect accredited law schools report that complaints from students about the first-year skills program are a staple of such visits.

With a few notable exceptions, members of ALWD are not big on theory — indeed, they generally range from actively hostile to unaware of its existence, which might strike my readership as paradoxical, given the thoroughgoing permeation of the teaching and scholarship and politics of rhetoric and composition studies with poststructuralist theory. In 1998, when I first directed a first-year skills program in the United States, the theorist of writing *du jour* who seemed most often quoted on the legal writing teachers' and directors' listservs was Anne Lamott, the author of *Bird by Bird: Some Instructions on Writing and Life*, a fairly idiosyncratic book about the process of creative writing. The most general reason advanced for student hostility to fundamental skills courses was that writing was 'personal', and thus that the

[14] As I was writing this piece, two random — but not atypical — examples of such characteristic behaviour occurred in the institution in which I work. The first was a vituperative email (one in a series emanating from the student in question) sent to one untenured colleague; the other was a student who threatened another untenured colleague with a sex/race discrimination suit if that colleague did not raise the student's grade. At the far end of the spectrum (I have not encountered them, but then again I go to a deal of trouble to address in a structural way phenomena that I take to be structural in origin), there are examples of physical assault.

critique of student writing that came with evaluation was perceived as a personal attack.

My response was bemusement: I'd been teaching people to write different kinds of disciplinary discourses in English Departments and Law Schools in Australia and the United States since 1987, and I had never experienced anything like the student agitation and hostility that met me — and that left me, as I wrote at the time, 'gobsmacked', demoralised and riddled with self-doubt that might well have led me to the conclusion that I could not successfully make the transition to law teaching in another culture were it not for the happy accident that the semester before, when I had been a visiting professor at another US law school (and not teaching skills to first-year students) I had had some of the best and most helpful teaching evaluations of my career.

I couldn't put it down to the cross-cultural phenomenon that the Dean of the Law School where I taught, himself a distinguished skills educator, described as 'Bubba meets Australian intellectual', in part because he told me that when tenurable teachers of doctrine had taught the course they had routinely received significantly worse evaluations than they did when they taught doctrine, and in part because the traffic on the listservs informed me that across the country fundamental skills teachers were having the same kind of experience. Richard Abel also registers the phenomenon in his critical analysis of the culture and meaning of student evaluation in US law schools.[15]

It had, then, to be structural in origin — or so my reading of Foucault and Bourdieu and Threadgold told me. And so my response was structural, or rather post-structuralist. It proved possible, with Foucault and Bourdieu and Threadgold in hand (and Threadgold on the telephone when things got especially challenging) to develop strategies to tone down the venom without fundamentally changing how and what and why I taught. They worked: I was the same person teaching in the same way; only the evaluations were different. The strategies were transposable, as Bourdieu would put it: they worked in a different law school.

But the approach to solving the range of problems that beset teachers in fundamental skills courses in this country — problems that see them as produced by and in turn productive of culture, as the result of the way law students are habituated by the material practices of their legal education, and of fields that interconnect with the pedagogical, such as the architectural and historical — is not one that is generally favored by fundamental skills teachers here. If in 1998 Lamott was what passed for a theorist of writing among much of the legal writing establishment in US legal education, the current favourite is Peter Sacks, whose *Generation X goes to College: An Eye-Opening Account of Teaching in Postmodern America* lays the blame for what he presents as an aberrant generation of tertiary students at the foot of a consumerist postmodernity.

The practical problem with these kinds of diagnoses of the characteristic difficulties in teaching fundamental skills courses in the United States is that

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[15] Abel (1990), p 421.

there is more or less nothing that can be done about a problem that is diagnosed as phenomenological, because writing is 'like that', or today's consumers of tertiary education are 'like that'. More than this, however, these theories — such as they are — are profoundly revealing of a characteristic of ALWD politics: its leadership, at least, is wedded to theories and strategies that are essentially liberal humanist in nature. Thus, as I will go on to argue, even their instigation of the citation manual wars — arguably the most radical of ALWD's attempts to destabilise the kinds of cultural and pedagogical practices that keep its members and other teachers of fundamental skills both subaltern and marginalised — have little capacity to alter what I take to be the fundamental cause of these problems: the profoundly hierarchical structures and practices of US legal education.

Perhaps the most significant feature of ALWD politics is its rights-based advocating of a 'separate but equal' status for teachers of fundamental legal skills. My labelling of ALWD initiatives in this way derives from the recent abortive attempt[16] to have the ABA accreditation standards for law schools

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[16] I am including the full text of the ABA's Council on Accreditation Standards' proposed amendments to the standard applying to legal writing teachers in part because it is a masterpiece of evasion, and also because what was achieved fell so far short of the equality with clinical teachers, themselves the second-class citizens of the US legal academy, that the ALWD sought the following revision:

'The Council further considered the question whether Standard 405(d) should be changed to provide specific security of employment for legal writing directors and instructors. The revision that the Council has authorized for distribution and comment is as follows:

'Standard 405. PROFESSIONAL ENVIRONMENT

(d) ~~Under Standard 405(a), law schools employing full-time legal writing instructors or directors shall provide conditions sufficient to attract well qualified legal writing instructors or directors.~~ A law school shall have an announced policy designed to afford legal writing teachers whatever security of position and other rights and privileges of faculty membership that may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(2), and (2) safeguard academic freedom.'

The Council further authorised the distribution for comment of a new interpretation to Standard 405:

'Interpretation 405-9:

'A law school may offer short-term or non-renewable contracts to full-time legal writing faculty provided that the use of such contracts does not have a negative and material effect on the quality of its legal writing program.'

Many — perhaps most — law schools today choose to have their legal writing instruction delivered by full-time teachers and administered by a full-time director. Many law schools have taken the additional step of providing security of employment through long-term contracts or other means to legal writing directors and faculty. The Standards Review Committee did not conclude, however, that these employment arrangements should be mandated by the Standards as the exclusive way to offer a sound legal writing program.

Considerable discussion at the public hearings and in the written commentary focused on whether a law school's use of short-term or non-renewable contracts

mandate the same employment conditions for teachers of legal writing as clinical law teachers, who are entitled, under Accreditation Standard 405c to 'a form of security of position and non-compensatory perquisites reasonably similar to those provided other full-time faculty members'.[17]

I was among many ALWD members who testified before the Council at the hearings that led to the drafting of this proposed amendment. The Council's attention was repeatedly drawn to the gender discrimination that the current standard re/produced; claims were also made about the cost to educational standards that the current marginalisation of writing teaching produced: good teachers could not be attracted or retained if law schools offered short-term contracts with no possibility of renewal beyond a specified number of years, the argument ran, and teachers of legal writing spent time that could have been devoted to teaching looking for their next job. Yet ALWD's vigorous campaign achieved at best a Pyrrhic victory. Law schools can do what they want, provided they announce it. The negative impact on fundamental skills teaching of the third-class terms and conditions of employment of the people who do it has to be proven on a case-by-case basis. The proposed amendment's nod to academic freedom is the trace of the repressed: third-class academic citizens who are so positioned in the law school, and whose discipline so marginalised in ways I have described and for reasons I will go on to theorise that to speak of academic freedom is at best ironic, at worst both cynical and disingenuous.

Let me take just one example of the kind of disciplining scrutiny to which fundamental legal skills teachers are routinely subjected: if students complain to tenured faculty about the skills course, which they do everywhere across the nation, a proportion at least of those faculty members will conclude that there is a problem with the skills course and/or its teachers, not with the structures and practices of legal education in the United States — structures and practices in which they themselves are profoundly implicated. In turn, some of those faculty members will intervene in ways which range from conducting covert campaigns of destabilisation of the skills program and/or its teachers (such as the circulation of gossip among all the faculty except those teaching skills — who might then be in a position to address any real or perceived deficiencies — to the effect that the skills program is deeply troubled, the validating of student complaints to students themselves, and the passing on of complaints to deans) to the generation of an open faculty movement to change (scrap and reinvent) the first-year skills program, another characteristic of the law school landscape in the United States. Legal writing teachers are perceived as the handmaidens of the real business of educating lawyers, which involves

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prevents a law school from offering a sound legal writing program. While such employment arrangements might disrupt or interfere with a law school's offering of a sound legal writing program, it was not possible to conclude that such employment arrangements would always have those effects. The new interpretation is designed to focus on whether such contracts have a negative and material effect on the school's legal writing program.

[17] ABA Accreditation Standard 405c.

inculcating in them in fairly inefficient ways a modest amount of doctrine[18] in the standard first-year doctrinal courses — contracts, torts, civil procedure, property, criminal law and sometimes constitutional law — and in a much more efficient way what Duncan Kennedy has called 'training in hierarchy'.

Why did the ABA turn a deaf ear to — or, perhaps more accurately, thumb its nose at — ALWD's advocacy? On its face, ALWD's attempt to improve the working conditions of fundamental legal skills teachers is difficult to fault: there is a rights-based gender discrimination claim and a claim that blends pragmatics and an appeal to educational quality.

My assessment of the reason for the campaign's failure is that it had three fundamental problems, in addition to — and at least as significant as — the pragmatic one: to heed the claim would have put a significant financial burden on law schools, something that the peak body of law school deans, who opposed ALWD's campaign, were clearly concerned about. The first, which I will go on to discuss in this essay, is that legal writing as a sub/discipline is regarded in the US legal academy as intellectually inferior to legal doctrine; I will argue that Goodrich's recent work on the relationship between rhetoric and law provides a basis for theorising both this attitude of intellectual disdain and student anxiety in relation to fundamental legal skills courses in a way that might open up the possibility of productive change. The second is that, together, the liberal[19] grounding of the campaign in rights discourse and its strategy of seeking a separate but equal career track for legal writing teachers were inadequate to the task of the disturbing the profoundly inscribed hierarchies of value that characterise legal education in the United States precisely because those hierarchies are predicated on liberal humanist as well as post-Enlightenment rationalist views of the world, and because — as the history of law and race in the United States has demonstrated — claims for separate but equal status translate readily and perhaps inevitably — given raced, gendered and classed hierarchies of power — into practices of discriminatory segregation or marginalisation that the dominant majority can justify. This second problem is intimately connected with the third, just as it is a transposition across fields of the phenomenon that grounds the first problem with the ALWD campaign: it overlooks the 'merit' question. What none of ALWD's current political campaigns nor the scholarly critiques of the status of legal skills teachers does is address the argument that deans and others can make to justify the relatively impoverished working conditions and wages of legal writing skills teachers: that they generally lack the credentials that would secure them tenurable positions in the US legal academy (or, indeed, in the

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[18] US casebooks are generally significantly less demanding in the kinds and quantities and breadth and depth of coverage of subject matter they anticipate that law students will read and comprehend than are their Australian equivalents.

[19] Using rights discourse for political ends can of course be a strategic move that is not grounded in a liberal humanist view of the world, as the work of critical race theorists in the United States, for example, has shown. As my discussion of scholarship that has sought to advance the ALWD rights-based agenda will suggest, ALWD's strategy is fundamentally liberal humanist in its grounding.

Australian legal academy, because relatively few of them publish scholarship),[20] and thus are appropriately treated differently.

The vast majority of teachers of fundamental legal skills, of course — like the vast majority of law teachers in the United States generally — do not have a research degree, the route to tenurable law teaching jobs most often being via a JD taken at one of the recognised elite 'feeder' schools: Yale, Harvard, Chicago, NYU, Columbia, Stanford, Berkeley, Michigan, Duke, Georgetown, Virginia and Pennsylvania;[21] graduating at or near the top of the class at such schools; holding a high office on law review; and securing post-graduation elite law practice experience such as Federal Appellate clerkships and work at prestigious private commercial firms or prestigious federal government or public interest practices. Published scholarship in not a requirement for entry-level tenure-track positions, nor is any evidence of teaching skills, except that which can be gleaned from the 'jobtalk', the presentation on a scholarly subject a shortlisted candidate gives to the faculty at large. The genre and performance of the jobtalk is a subject for another day, but suffice to say that work that is solidly doctrinal in approach, linear in construction and liberal in politics seems to be safest, and that the kinds of interdisciplinary work informed by critical theory that it has been increasingly possible to do legitimately in Australia are risky.

The hostility of legal writing skills teachers in the United States to (critical) theory, then, seems at least in part due to the ways in which teachers of fundamental skills are trained. It also, no doubt, stems from a lack of scholarly work as well as a lack of conventional scholarly training. Because the number of fundamental skills teachers in tenurable positions is extremely low, there is accordingly little pressure on them to produce scholarship, and little support for them to do so. Likewise, because they characteristically teach in ways that involve continuous assessment of student work, they have comparatively less time than their tenurable colleagues to devote to scholarship. That said, they generally have lesser demands on their time professionally than do Australian law teachers in tenurable positions. Goodrich suggests another reason — one especially relevant in the context of this essay:

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[20] Another ALWD-associated strategy for making the 'separate but equal' claim is the project currently being undertaken by a prominent ALWD member to document the scholarship of legal writing teachers. The prerequisite for having one's scholarship included in the list is that one avows that legal writing is one's primary area of expertise. As a result, a significant number of the most productive scholars who teach fundamental skills do not have their work included in the current list, because they would identify their primary area of scholarly expertise differently; I am one of them. A year ago I was summonsed to an early morning discussion by the compiler of the list, who sought to exert various kinds of suasion on me in order that I might identify myself appropriately and thus be included; one of her strategies was to inquire whether I had heard of racial 'passing', which she told me was analogous to what I was doing in not complying with the necessary self-definition. I could 'pass' as someone other than a legal writing teacher, and it was both shameful and a denial of my essential identity that I chose to do so.

[21] Neumann (2000), pp 318–20.

in 'Rhetoric and Somatics: Training the Body to do the Work of Law',[22] he examines Abraham Fraunce's critique of law's 'hostility to scholarship'. The 'separate but equal' politics of ALWD support and reproduce the privileging of doctrine; it is little wonder, then, that its members are at least as hostile to critical and interdisciplinary theory-work as are the privileged citizens in the doctrinal mainstream of the US legal academy.

To the extent that there is a theory and scholarship that looks to structural reasons for the 'pink ghetto', it is largely feminist and/or quantitative.[23] This work, revealing and damning as it is, is more interested in employment discrimination in the obvious senses: lower pay rates, conditions of employment that have to do with tenurability or contract status, duration of contracts, research support, teacher–student ratios and faculty governance rights than in the student response to learning the fundamental legal skills of analysis, reasoning and writing that form the genesis of this essay.

Like the political campaign to have the ABA accreditation standards for employment of legal writing teachers changed, the theory and scholarship of the 'pink ghetto' also has a blind spot about the obvious riposte that a dean or the ABA[24] might want to make about why the largely female skills teachers who make up an extraordinarily significant proportion of women law teachers in the United States[25] — a significant enough proportion, as Neumann shows, to belie the popular wisdom that it is more difficult for men to be hired as tenurable law teachers in the United States than women[26] — should be paid less than, and have working conditions inferior to, tenurable law teachers. They lack the gold standard for merit — the kinds of qualifications, described above, that characteristically equip one to secure a tenurable position in a US law school.

As Neumann and others have shown, that gold standard is itself gendered: women do disproportionately badly when compared with men in achieving membership of law review at a significant body of the law schools that characteristically graduate future law professors,[27] and women perform less well academically at law school than men with equal entry-level qualifications.[28] But, although no work has been done that examines the comparative entry-level qualifications of teachers of fundamental skills who do not belong to the small minority of tenurable teachers in these positions, my own observation of hiring processes and recruitment pools suggests that they are less 'well-qualified' in terms that are conventional in the US legal academy than their brethren who secure tenurable appointments, most often in the

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22 Goodrich (2001).

23 Edwards (1997); Neumann (2000).

24 Which, as I have indicated above, sets the standard for law school accreditation that allows schools to hire legal writing skills teachers under significantly worse terms and conditions than doctrinal faculty of clinicians.

25 Neumann (2000), Table 22, Appendix.

26 Neumann (2000), pp 340–345.

27 Neumann (2000), pp 343–344.

28 Neumann (2000), pp 320–322.

United States in doctrinal teaching areas. A certain kind of common sense suggests that the statistics would bear observation out: why get a comparatively badly paid job where you will be treated as a third-class citizen (behind clinical teachers, who have long been accorded second-class citizen status in the US legal academy) if you can get a law teaching job that is highly paid and makes relatively modest demands on you as a teacher (compared with the situation of law teachers in Australia or New Zealand, say)?

My point here is not to argue that the analyses of the subaltern status of fundamental skills teaching which demonstrate that it is gendered are wrong, nor to suggest that it is not wrong or discriminatory that it is gendered. I wish, rather — taking a lead from my colleague Christine Farley, who has written that 'it is not clear whether women are steered into Legal Research and Writing because it is low status, or it is low status because it is done by women'[29] — to suggest that the feminisation of this part of the industry is not enough, of itself, to explain why fundamental skills teaching is so persistently devalued, and to draw some connections between this and another phenomenon I am concerned with here: the acute manifestation in fundamental skills courses of the generalised distress of law students in this country. My purpose in theorising what is going on in the employment conditions of legal writing skills teachers, the institutional positioning of the subject that they teach, and the manifestation in fundamental skills course of the habituation of law students is to attempt to identify productive possibilities for change.

Examining the material practices by which law reviews function to discipline the bodies and the subjects both of those students who achieve membership of their staffs (and those who do not) in ways other than the disproportionate accrediting of men and the non-accrediting of women seems a particularly useful trajectory from which to generate such theoretical work. This is, of course, because law reviews — like fundamental legal skills courses — teach and practise how to write the law. But there are other reasons. First, the differences between how law reviews operate and what they mean, institutionally and culturally, in Australia on the one hand and in the United States on the other are stark. Familiar enough to give a reference point, they are — like the domestic arrangements of the Kabyle for Bourdieu — so bizarre as to make the ways they construct the *habitus* visible. Second, law reviews play a critical role in credentialling law teachers: not only, as I have already noted, does membership of law review itself operate to credential those who seek tenurable law teaching appointments, but the student editors of law reviews, sometimes with visible faculty guidance, select for publication the scholarly articles whose publication is essential for tenure and for promotion. More than this, publication in elite law reviews is a well-established route for movement of law teachers up the institutional food chain, to law schools ranked more highly by the *US News and World Report* than the one in which they currently teach. Finally, and most importantly for my purposes here, there is the feature that connects each of these reasons to ground my theoretical project in what law reviews do with the practice of teaching legal writing in

[29] Farley (1996), p 353.

the United States and in turn with Goodrich's rhetorical theorising of law: citation to legal authority.

A Note on Terminology

I use the terms 'fundamental legal skills' and 'legal writing'/'legal research and writing' interchangeably in this essay; the variation speaks to a number of conflicts. ALWD's separate but equal politics has as one of its platforms the 'professionalisation' of what is called 'LRW' teaching, even though the focus of the organisation's activities is on the professionalisation of writing teaching. This may be because, even though many first-year skills teachers teach research skills, this pedagogical work is also often done by librarians or student teaching assistants. Because of ALWD's promotion of the professionalisation of legal writing teaching, the centrepiece of its separate but equal politics, many in the ALWD hierarchy are actively hostile to courses in fundamental lawyering skills that extend beyond the standard training in analysis, reasoning, writing and research.

An alternative to the vision of fundamental skills teaching imagined in dominant ALWD politics would be the model recently privileged — in theory, if not in practice — in Australia: the explicit inclusion in the law school curriculum of training in a range of fundamental legal skills, and in many places the integration of doctrine, theory and skills as a model of law school teaching. This model explicitly seeks to undermine the reifying of doctrine whereas, I suggest, the ALWD-favoured model (however unwittingly) reinforces the dominance of doctrine in US legal education. At the same time, as I will go on to argue, it is in the relationships of law and writing that the problems of the dominant model of fundamental legal skills course in the United States can be discovered.

At Last, an Introduction

In March this year I spent a week (the academic Spring Break) writing two conference papers I had been invited to deliver at the National Conference of Law Reviews, to be held by the University of Baltimore Law School later that month, examining a PhD thesis in cultural studies, and rereading Foucault. To call the week schizophrenic would not do it justice. The thesis struck me, at that time and in that place, as extraordinarily Australian, for reasons I have already suggested: a feminist interdisciplinary reading of texts that linked the legal with the (popular) cultural and in turn with the masculine literary critical establishment. The papers I had been asked to give by the conference organisers, themselves editors of Baltimore's law review, were on citation and on ethics — the first topic given to me and the second chosen by me as a topic to speak about at the workshop for managing/executive editors of law reviews from around the country.

The connection between the two projects was citation, which Goodrich lists among the specialised rhetorical figures that he more broadly characterises as repetitions and analogies, which in turn make up one of the three groups of devices that characterise what he calls legal dialogue. For Goodrich: 'Legal texts are historically and rhetorically organised so as to

suppress the conflict of differently orientated social meanings. The monologue of the legal text is simply a *dialogue* aimed at controlling the hearer by means of authority rather than persuasion, coercively rather than ... by means of reasoned dialogue.'[30] Citation to legal authority, then, is a coercive practice, operating to suppress critical perceptions of law's claims to autonomy and logic. It is also profoundly imbricated in the disciplinary practices of legal education. Goodrich writes:

> However much it might benefit lawyers and judges to claim the status of rationality for the workings of precedent ... [t]he law deals in probabilities and the claim to logic is therefore to be understood rhetorically, that is as a peculiarly persuasive form of argument or as a conscious attempt to produce a specific effect upon the audience. The logical argument is, in terms of its historical origins within the European tradition, a doctrinal one. It is primarily a form of classification and of teaching and as such it requires the subordination of the pupil to the teacher or of the hearer to the knower. The devices of legal argument ... have their origin in this conception of the legal text as doctrine or 'doctrination' — as instruction in legal values and the legal order as a way of life.
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> ...
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> For rhetorical purposes, the best or most persuasive legal speech is the one which appears the most authoritative ... such a requirement finds expression in the logical form in which most legal arguments are presented. It is also to be found in the general educational character of the legal judgment as a statement of legal teaching (doctrine), a statement of the general attitudes, perspectives and moral beliefs of the legal institution. The legal text can always cover its tracks and it can always appear to be simply restating previous law or doctrine.[31]

In a thought-provoking aside, the candidate whose thesis I was examining described citation to authority as dutiful, foreclosing other readings by walking in the footsteps of the master, which in the case of law involves being dutiful to law's hermeneutics, its own sanctioned reading practices. She was also, as a textual/political strategy, extremely sparing in the use of her citation to authority, in a way that would have seemed alarmingly heterodox to the students in my first-year legal skills class, who at that time were both completing their final major written assignment in that course for the year, and in most cases also trying to 'write on' to one of the institution's four law reviews and/or writing an appellate brief that might entitle them to competitive selection for one of the school's moot court teams. The second- and third-year students who would pass judgment on their efforts would in turn have been incredulous/outraged/profoundly alarmed by this foreign PhD thesis's apparent disregard of one of the most significant identity-building and merit-confirming aspects of their everyday life in the institution: proper citation form.

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30 Goodrich (1986), p 193.

31 Goodrich (1986), pp 195–96.

The thesis and its bringing to mind of Goodrich's rhetorical analysis of legal citation reminded me very forcefully of the uses of citation in addition to its two fundamental instrumental ones — that is, acknowledging sources and providing a means for the interested reader to pursue research into the sources used by an author. The thesis of this essay is that it is extraordinarily important to maintain the perspectives on the material practices of the academy offered by theory. It is easy in my professional life to lose perceptions other than the instrumental; one needs to actively teach citation to JD students, and it is painstaking work.

I was surprised to find that JD students find citation so difficult. In the context of my own experience in both Australian law school teaching and as a graduate humanities candidate and teacher (the latter in both Australia and the United States), it would seem redundant to do anything more than point the student at the relevant citation manual or much less comprehensive set of guidelines and let them get on with it. Admittedly the dominant citation manual in use in the United States (at least by current and former members of law reviews), *The Bluebook: A Uniform System of Citation*,[32] is a document of 389 pages, organised — if such a characterisation is merited — in Byzantine fashion, and inculcating (via law review culture rather than on its face, as the manual itself is often obscure and sometimes silent on such matters) extraordinary pedantry about such matters as spacing, punctuation and tyepface conventions. Paradoxically, while US law students find it difficult to apply rules specified in citation manuals — whether the *Bluebook*, the *Maroon Book*,[33] the *Green Book*[34] or the most recent entrant into the citation manual market, ALWD's *ALWD Citation Manual: A Professional System of Citation*[35] — they often express the view that citation form is the most important thing they can learn in a first-year skills course.

Let me explore that paradox. One source of students' difficulty in applying citation rules is that they don't consult the manual, relying instead on memory or instinct.[36] Why, then, would I repeatedly see expressed in student evaluations the view that not enough time was allocated nor coercive techniques such as graded learning drills applied to teaching citation? One answer seems to lie in the cultural significance of citation, inculcated via law reviews.

Law reviews in my own institution have a number of egregious practices relating to citation. First, they specify that student work submitted for publication have a fixed quantity of footnotes to a given quantity of text: in some cases, this is two-thirds of a page of footnotes to one-third of a page of text, while one review has recently moved to requiring a 1:1 ratio. When conducting what is generally called 'cite-checking' ('spading' in the vivid

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32 Harvard Law Review Association (2000).

33 The University of Chicago Law School's citation manual.

34 The University of Texas Law School's citation manual.

35 Association of Legal Writing Directors and Darby Dickerson (2000).

36 One could theorise this as proceeding from the anxiety about legal authority which I will go on to discuss — or, in ALWD vein, ascribe it to the idleness of Gen X.

local vernacular) of articles submitted by non-student authors and accepted for publication, law review staff often add significant quantities of footnotes that contain citation to 'authority' (it is a standing joke among some of my colleagues that our law reviews would require the citation to authority in the case of a textual reference to Tiger Woods in the following vein: 'unprecedentedly successful Stanford-educated golfing professional of Asian and African-American heritage'). Unsurprisingly, authors often object to these amendments; I imagine many readers of this article would think it inappropriate to cite to authority when one made a textual reference to an intellectual movement like Critical Legal Studies or Legal Realism, say. Likewise, 'spading' of the work of student authors can result in more-or-less explicit charges of plagiarism where every reference to a source text that repeats any of that text without quotation marks — even if it is the name of an organisation or a repeated reference to a legal standard quoted very recently in the text, and even though it has a footnoted citation. Finally, they advocate to student authors the copious use of 'parentheticals' and a rich variety of 'signals'. The former are phrases enclosed in parentheses, beginning with a present participle, that follow a reference to textual authority and tidily sum up what the authority is said to stand for. They operate, then, to reify the idea that legal authority is capable of a single, simple meaning, which in turn reinforces the dominant doctrinalism of first-year law teaching in the United States, with its emphasis (at least on the part of students) on identifying black-letter legal rules. Signals will be familiar to this audience from their reading of US law review articles, those italicised '*Cf*s, '*Accord*s' and '*Contra*s' in footnotes used to introduce vast lists of textual authority that doesn't directly support the proposition footnoted. They are, then, a tidy way of consigning contingency to the textual margins, and the fact that their skilful and varied use is advocated to student authors and candidates for law review membership rewards the capacity to marginalise complexity and likewise reifies rigid doctrinalism.

To the extent that the most bizarre of these practices may be aberrant (and I simply don't know if the only likely candidate, the specification of volume of text to footnote, is), they seem to me nonetheless to be characteristic of a legal discourse culture in which citation is extraordinarily powerful. A (or perhaps the) dominant form of mainstream US legal scholarship (published, of course, in law reviews) is the extraordinarily long (by Australian or British standards) article, advancing a thesis of relatively modest complexity, padded out with a vast bulk of footnotes — what Martin Jay calls (in another context)[37] 'sheer opinion', given the weight of authority by an extraordinary density and proliferation of citation. As Terry Threadgold notes of the history of the writing strategies that enable science to be written as fact:

> To deal with the opposition and control debate ... [Newton] had to develop an authorial voice and rhetorical modes of positioning the reader which would construct his discoveries indeed as facts, not

[37] Jay and Flax (1993), pp 296–310.

> personal discoveries, and which would, more importantly, persuade the rest of the scientific community to see the same world he saw.[38]

The arbiters of merit who decide[39] which articles will be published are most often law students. Massive citation, then, and a comparative scarcity of the 'original' critical or imaginative or interdisciplinary or theoretical work of scholarship that one might anticipate finding in recent Australian legal periodicals,[40] is a feature both of the work of those running law reviews and those whose work they accredit — who are often, of course, former law review editors themselves.

The modes of selection of articles for publication form the second set of practices of law reviews to which I wish to draw attention. Law reviews in the United States do not use either blind reviewing or peer refereeing as a basis for article selection. I understand from conversations with law review staffs and editors within and beyond my own institution that, apart from capacity to engage the imaginations of law review editors[41] and accessibility to a reading audience whose legal education has been generally narrowly doctrinal, the most significant influence on whether an article is accepted for publication is the status of its author. The submission letter will identify the institution at which the author teaches and/or the law practice in which she or he works; this and other information about status may be included in the first footnote of the submission itself. Student editors also routinely get on the Web and obtain information about authors, such as where the author was educated and where he or she has been published before. This bears out the results of a recent article by Subotnik and Lazar,[42] who write:

> Of all criticalist charges, the most provocative for academics — and it is relevant to our inquiry — is the one directed at educational institutions. At its heart is the notion that objective merit is, to a large extent, a fiction. As Richard Delgado bluntly puts it: '[M]erit is that which I, the preexisting and presituated self, use to judge you, the Other. The criteria I use sound suspiciously like me and the place where I stand.' In this view, knowledge and epistemology are indissolubly tied to political power; educational philosophies reflect the hegemonic interests of insiders; and school entrance tests such as the SAT and the LSAT

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38 Threadgold (1997), p 18.

39 It will be clear from what I have written earlier that I am not implying here that their decisions emanate from autonomous liberal subjects.

40 Which may reflect the dominant doctrinalism of US legal education, which I take to be re/produced significantly by a first-year curriculum that lacks the characteristic Australian first-year course in legal theory/sociology, history, etc, and is characterised both by the dominant Socratic teaching method and by the nearly ubiquitous assessment method of hypothetical problem-based final examinations.

41 Thus simplicity and certain kinds of (extremely doctrinal) outrageousness of thesis and copious citation might be expected to yield dividends.

42 Subotnick and Lazar (1999).

discriminate against minorities — indeed may have been selected for that precise reason — and their use should be severely curtailed.[43]

That the top law reviews in fact disproportionately publish in-house work is well established. A 1983 study found these in-house publishing percentages: 33 per cent for Harvard's law review, 35 per cent for Stanford's, and 29 per cent for the University of Chicago's.[44]

Perhaps more stunning, faculty at the leading schools published from about 50 to almost 90 per cent of their work in their own school's law review. It is no doubt because of the leverage they have over editors at their own schools that junior faculty have been encouraged to publish elsewhere.[45]

Charles W Collier, who was an articles editor at the *Stanford Law Review* in 1984, has described the evaluation process: 'Articles by ... authors at well-known, prestigious institutions — such as Harvard, Yale, and Michigan — were automatically given a full first reading. And articles by Stanford law professors came to us with such a heavy presumption in their favor that they were almost never rejected, regardless of their quality.' A similar sentiment, albeit in favor of Harvard Law faculty, was expressed by another editor at an unidentified top school. An articles editor at Duke in 1991 conceded, with some embarrassment, an 'assumption that an appointment at a top-ten school probably represented an effective proxy for merit.' Several recent law review articles unabashedly rate law reviews according to the institutional status of their authors. It should not be surprising, then, that the most extensive study of the law review selection process concludes that 'the lack of blind review seriously compromises the credibility of the manuscript review process,' a conclusion to which the present authors heartily subscribe. The study ends with a call for blind reviewing. There appears, then, to be good reason to undertake a serious examination of the review process.[46]

James Lindgren's experience is also informative. He has told us about a 'nonscientific study' he once did. He mailed an article to a huge number of law reviews, five times as many as usual for him, 'on the same day in the same mailbox — part on Chicago-Kent stationery and part on University of Chicago stationery.' (At the time, Lindgren was a professor of law at Chicago-Kent and a visiting scholar at Chicago.) He emphasizes that '[t]he manuscripts (including the star footnote) were

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43 Subotnick and Lazar (1990), p 603.

44 Subotnick and Lazar (1990), p 605.

45 Subotnick and Lazar (1990), see n 28.

46 Subotnick and Lazar (1990), pp 606–7.

> identical.' The results were not: 'From the 30 reviews that I contacted from the University of Chicago — even though I had a nonprofessional title — I received offers from the main law reviews of Penn and Northwestern. From the partly matched 25 reviews that I contacted from Chicago-Kent the best offer I received was from Arizona.' Further, Lindgren reports, 'at about 21 days after the mailing, I had received 2.5 times more acknowledgments of my manuscript from Chicago submissions.'[47]

Let me draw together these two sets of practices: citation and article selection. Law review practices around citation discipline law students, and perhaps most powerfully the ones who perform most successfully in the most elite places within the limits and structures of the US legal academy as they are presently constituted, who are disproportionately male, to pay obeisance to narrowly doctrinally construed legal authority. Article selection practices operate to reproduce that set of values at the same time as inculcating an equation of hierarchy with merit; not surprisingly, there is evidence in disciplines other than law that scholarly articles known to be written by women are valued less than those known to be written by men.[48] Credentialled by law review membership, those members of law reviews go on to become law teachers in disproportionately high numbers, and the scholarship they produce — which is published at disproportionately high rates — becomes the currency for professional merit. If Bourdieu is right, their *habitus* informs their pedagogical practices, and as they are dominant in the institution those pedagogical practices and the values they reproduce in students are likewise dominant.

Let me make one final point. Publication in elite law reviews is enormously professionally significant in the United States. I recently had conversations with two law professors, each of whom taught in elite US law schools. One, in his final year leading to tenure, said that if the article he was writing made it into an elite law review, his tenure should be unproblematic, but that if it was published somewhere else, there would be difficulties. The other, a senior tenured professor at a 'top twenty' school, and the author of the kind of theoretical, radical and interdisciplinary scholarship that is — or so it seems to me — under-represented in US law reviews, reported a shift in faculty policy, driven by the ubiquitous *US News and World Report* evaluation, which has as a key ranking criterion the reputation of a school's faculty among professors at other law schools — that is (largely) to say, the frequency with which their scholarship is published in the law reviews of elite law schools. The policy explicitly valued scholarship published in top ten law reviews: in tenuring and promotion decisions, in salary rates and in a system of cash bonuses and other benefits awarded to faculty who were most successful according to this criterion.

Merit and hierarchy — that doubled set of values — and the valuing of doctrine are caught up with the significance of citation practice. I will go on to

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47 Subotnick and Lazar (1990), p 610.

48 Neumann (2000), p 349.

tease out the implications of all of this for the central concerns of the article in *Theory Work* below. First, however, let me turn to some local and particular manifestations of the phenomenon I wish to theorise.

Fear and Loathing in the Legal Academy, or What We Did with Spring Break

As I have already noted, because 'being on law review' is a shortcut to consideration for particular kinds of elite legal jobs, including tenurable law teaching, it has enormous cultural significance for law students. Coming near the top of one's class at the end of the first year of the JD is the most conventional way of securing this status. In many law schools, including the one in which I teach, students can also participate in one or more competitions to 'write on' to law reviews. What most of my students (and most of their colleagues in the first-year class) were doing over Spring Break in addition to completing the assignment for my class (an Appellate Brief) and often a second Appellate Brief (this one, like the 'short write-on' competition run by the law reviews, under very tight time constraints) that might secure them a position on moot court — another (if somewhat less reliable) shortcut to consideration for elite legal jobs — was digesting approximately 400 pages of different kinds of legal texts and producing an apprentice version of the law review student comment which, together with the student note, is the standard form of student law review publication in the United States.

They were, as you might imagine, extraordinarily overworked — and thus stressed and anxious. Had they known the practices by which their law review submissions would be evaluated, they might have been more anxious still: because there were no meaningful criteria for evaluating them other than strictures relating to citation and formatting, and because the students doing the evaluating had no training in evaluating apprentice scholarly writing, the evaluation saw some submissions criticised for reliance on the primary legal authority in the large bundle of legal texts they were set to read by way of preparation for the task of writing, others for reliance on the secondary authority provided.

The currently influential school of 'therapeutic jurisprudence' concerns itself with the unhappiness of law students in this country and of the lawyers that they become. While much of this work devises speculative therapies for this malaise drawing on sources such as Maslow's theory of peak experiences, one of the best examples of the scholarship is Susan Daicoff's 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism'[49] which, among other things, draws together data on the mental health of first-year law students in the United States and of practising lawyers. Daicoff's synthesis of empirical research on the mental health of law students and lawyers concludes that:

> At least since 1970, studies have consistently found that [US] law students report an unusually high level of stress, psychiatric symptoms,

[49] Daicoff (1997).

> substance abuse, anxiety, depression, and internal conflict soon after beginning law school. They develop a greater than average amount of psychological distress during the first year of law school which continues after graduation, manifesting itself primarily as anxiety, depression, obsessive-compulsive symptomatology, isolation, and paranoia.[50]

While only 3–9 per cent of the 'general population of industrialised nations' suffer from depression:

> 17–40% [of law students in a reliable empirical study] reported significantly elevated levels of depression, and 20–40% of the same group 'reported other significantly elevated systems, including obsessive-compulsive, interpersonal sensitivity, anxiety, hostility, paranoid ideation, and (psychoticism) social alienation and isolation'.[51]

A 1994 report of the AALS noted both high levels of alcoholism and drug-dependency among American lawyers,[52] and reported that US law students both increasingly depend on alcohol as they progress through law school and have 'higher usage rates for alcohol, psychedelic drugs (other than LSD), tranquilizers and barbiturates' than US college graduates in their age cohort.[53]

It was in part my (pedagogical) fault that my already psychologically distressed students were anxious over Spring Break, above and beyond the fact that they were completing an assignment for my class while attempting to secure one or more of the glittering institutional prizes to which they aspired. The fault was because of the way I had decided to teach them legal citation — specifically the text I had chosen to teach them legal citation. That text was the new ALWD citation manual, which was the topic of one of the papers I wrote while my students struggled that Spring Break. Trained on that manual, my students had to use the *Bluebook* for the purposes of the write-on competition.

The ALWD citation manual was published as I took up my current position, my second tenurable skills directorship in the United States. I determined before seeing it that I would not adopt it for the course, as experience had taught me that I would use up too much 'director capital'[54] if I did so, because I was sufficiently acculturated to know that such heterodoxy would be interpreted as inviting the end of civilisation as we know it.

The *Bluebook* is compiled by the editors of the law reviews of four elite law schools: Columbia, Harvard, Penn and Yale. It is currently in its seventeenth edition. Editions come and go with regularity, each with a modest number of changes that make one wonder why they bothered except for the practical reason that a new edition is a generous cash-cow for the four law review associations that hold the copyright: the seventeenth edition was

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50 Daicoff (1997), p 1407.

51 Daicoff (1997), p 1379.

52 Daicoff (1997), p 1427.

53 Daicoff (1997), p 1382.

54 A scant and valuable commodity, for reasons I have described above.

revisionist, undoing changes to signals in the previous edition that had caused consternation in some circles.

This publication has been so dominant in US citation practice that legal citation is colloquially referred to as 'bluebooking'. That is to say that it has dominance, at least among present and former law review members and first-year law students. In law practice, it is a fetish for paralegals and a dead-letter for lawyers in the many practice settings that either have their own in-house citation system for intra-office documents or use a citation form that complies with local jurisdictional rules. There are some judges and judicial clerks and lawyers, however — as I will go on to show — for whom prowess in memorising as well as applying *Bluebook* citation form is synonymous with legal competence. Among my colleagues, attitudes towards citation vary from sardonic criticism of the kind of citation culture promoted by the *Bluebook* to a practical unconcern that figures student editors of the law reviews to which one submits one's articles will do the citation work for one, to cultural reverence that is sometimes combined with a scholarly interest in citation.

Why did I change my mind and reap the partly predictable whirlwind? Not, to articulate a reason for adoption recently articulated by one ALWD notable, because I was naïvely convinced that in doing so I would challenge the hegemony of Columbia and Harvard and Penn and Yale. But because the ALWD citation manual — for all that it, too, raised citation to the level of a fetish — was designed as a teaching tool and had only minor variations in rules from the *Bluebook*. I anticipated — and in this I was correct — that it would be easier to teach students the rudiments of legal citation with it. I thought that its focus on adopting the citation rules used in practice in jurisdictions around the country would provide a good justification for using it, and that its adoption by about half the fundamental legal skills programs in the country[55] would minimise the appearance of heterodoxy. And we would deliver some workshops to ease the transition from the ALWD manual to the *Bluebook* before the write-on competition.

I over-estimated the force of these arguments that might justify change, and under-estimated the kind and volume of the response. There were vituperative student criticism in course evaluations. There were colleagues passing on (to me and/or to students) criticism from alumni that I would be disadvantaging students in the law review, rather than the professional context, and there was at least one incident where a judicial clerk (a graduate of my law school) grilled a candidate for a summer clerkship about the appropriateness of using anything other than the *Bluebook*. This last incident was recycled via a colleague who had been receiving student complaints about the course in the lunches he'd been holding for students all semester. He passed the complaints on to white, male, tenured colleagues, but not to me — at least not until I heard about it indirectly. My eventual discussion with him, during which he suggested that by assigning the ALWD manual I was disadvantaging our students in the local employment market as against graduates of the two local elite law schools, Georgetown and George Washington, took place just before

[55] But relatively few in elite schools.

Spring Break. It was thus, then, that I turned to Foucault, with impetus to apply theory to practice.

Theory Work

> The separation of law from literature is accompanied by a correlative disjunction of theory and practice in ... the legal academy.[56]

> The 1986 study shows that law students and new lawyers have a higher incidence of psychological distress than does the normal population. The authors asset that law school may be responsible for this phenomenon, suggesting that law schools has such a pervasive, socializing effect that it causes law students to become unduly paranoid, hostile, and obsessive-compulsive.
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> ...
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> Law school's exclusive emphasis on 'objective thought, rational deduction and empirical proof'' likely exacerbates ... tendencies [to disproportionately rely on analytic thought to make decisions], perhaps resulting in emotional distress present throughout law school and for years thereafter.[57]

The paper on ethics that I delivered to the (largely uncomprehending) participants in the workshop for managing/executive editors of law reviews — the people chiefly charged with the disciplining and punishing of the law review staffers my students were jockeying to become — took as its thesis Foucault's exhortation that 'a demanding, prudent, "experimental" attitude is necessary; at every step, step by step, one must confront what one is thinking and saying with what one is doing, with what one is'.[58] It introduced them to Foucault's theories of the disciplining of bodies in institutions and Bourdieu's notion of the *habitus*, and problematised some specific aspects of the ways law reviews operate and thus teach: the processes of selection of scholarly articles for publication; the modes of production and selection of student work for publication and its contribution to the ways in which students learn to become lawyers; some of the material practices of law review work; and some aspects of the relationships between law review editors and staff and student contributors.

I posed some questions to the participants. What were their policies and practices doing: to the disciplining of the docile bodies and *habituses* of their staffs? To the lawyers they become and the legal profession they constitute? To the maintenance of hierarchy in the US legal academy? I spoke to them, as I have written in this essay, of selection processes and modes of evaluation of scholarship submitted for publication; of work practices; of the supervision

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[56] Goodrich (2001a).

[57] Daicoff (1997), pp 1379–1381.

[58] Foucault (1984), p 374.

and evaluation of staff writing projects; of the disciplining and punishing of suspected plagiarism.

More specific questions that I asked were as follows:

> What standards of merit do your practices reflect and reproduce? Are there other standards of merit that might usefully be substituted for them? What ethics of intersubjective relations do your practices teach your staff and student authors? What standards of what is scholarly as well as who is a publishable scholar do you use and thus transmit to audiences that in turn see those standards as norms?

And I told them that I wanted to emphasise the significance of the little things, the micropolitics of power, the detail of practices of everyday life in the law review office in the formation of subjects and cultures and values, such as the proportion of text to footnote that is prescribed by some law reviews. Finally, I read Subotnik and Lazar's text against the grain, and pointed to what their statistical analysis showed but they could not see: that power is everywhere, is capable of many different investments, and that local and particular uses of power can have remarkable effects: in some years particular editorial boards at elite law schools behaved in strikingly uncharacteristic ways and reversed the trend of privileging the privileged in article selection.

The second paper was on the uses of the ALWD citation manual. The title given it by the conference organisers was revealing in ways that would vindicate Bourdieu: '*ALWD* — Another Way to Cite Check'. My riding instructions, similarly revealing, were as follows:

> The ALWD panel will involve a brief history of ALWD and why it was created as another way to cite check. The panel should also discuss the major differences between ALWD and the *Bluebook*, and a little bit about the ALWD citation system.

Dear Reader, I did not do as I was bid. What I in fact did was to begin to articulate the theory-work that I desperately needed to do that Spring Break, near the end of an academic year during which I struggled with the anger and distress attendant on teaching fundamental legal skills in the US academy.

Law represents itself as being about rules and bright lines and firm principles as a means to legitimate a much more partial and culturally constructed way of exercising power. In the central importance citation assumes in law review culture and in the multiple connections I have traced between citation and scholarly power, that model of law is reproduced and accorded legitimacy.

What does this have to do with the ALWD manual? The public story is that it is designed as a teaching tool and designed by an expert in citation who thought some of the *Bluebook* rules, and certainly the more or less arbitrary changes in them edition by edition, were sufficiently troublesome to merit generating an alternative. The context to that public story is, as I have indicated, that the ALWD manual is the product of an organisation formed by a feminised, marginalised and disenfranchised group of law teachers. ALWD's

entry in the citation manual wars, then — or so it seems to me — is about trying to make people — law students — see the world differently from the way it is seen from the perspective of Columbia, Harvard, Yale and Penn, and the editors of their law reviews and the professors they go on to become. Thus the ALWD manual's focus on citation in the law practice context and its refusal to follow the *Bluebook* in privileging a system for citation for law reviews that is different from the system it uses for practice documents function to attempt to oppose the hierarchy that privileges law reviews and all they stand for over law practised on behalf of clients.

The institutional responses to the adoption of the ALWD citation manual that I have described here are characteristic of the responses to first-year skills teaching more generally and, theorised, bring the structural reasons for those responses into stark relief. Writing and then delivering the paper on the ALWD citation manual in the context/s I have described enabled me to theorise what seems to me to be the most fundamental reason for the difficulty of teaching and learning fundamental legal skills in the United States.

Teaching fundamental skills, or teaching students how to read and write the law, inevitably teaches that the law is contingent, that textual authority in law is a performance with generic markers that can be counterfeited. Massive citation, on the other hand — like spading, and the practices of article selection followed by law reviews — teaches that the law is 'laid down' by respect for status and authority and obedience to predecessors and predecessor texts; it legitimates a rhetoric of authority, of repetition of the already legitimated, rather than one that is 'genuinely' rhetorical, which perceives law as made in and by argument, by the contestation of different meanings — or, in Goodrich's terms, alternative jurisprudences. These alternative lessons about the law have the capacity to produce different kinds of lawyers: those who can 'pass themselves off' as reading and writing and practising the law in authorised ways at the same time as understanding the possibilities for making law in other ways, and those who are acculturated to do the helot work routinely assigned to new lawyers in large elite law practices.

The US legal academy, inscribed as it still is by Langdell's imagining of legal science,[59] is dominated by hierarchical models of teaching and assessment that also (because of the sheer size of classes) militate against being able to teach anything very complex, even where first-year teachers of doctrinal courses have a theory and politics of law and of law teaching which does not reify doctrine, as many of them do. Casebooks and the supplementary texts used by students, 'treatises' and 'nutshells' and so on,[60] are all structured generically so as to suggest that, likewise, the law can be reduced to rules.

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[59] Langdell wrote that 'what qualifies a person ... to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of causes, not experience, in short, in using law, but experience in learning law ... the experience of the Roman jurisconsult': Langdell (1887), p 124.

[60] These are highly culturally valued by students in the United States and, as their generic names suggest, are significantly generically different from the equivalent British or Australian legal textbooks, just as British and Australian casebooks

As my reference to Threadgold's critique of Newton suggests, a highly authoritative mode of citation is a rhetorical means for disciplining alternative accounts of the world, as for rendering contingency and the grounds of contestation science. Goodrich has suggested[61] that, in the world of US law reviews, citation is significant ontologically rather than epistemologically: citation justifies hierarchy, rather than the 'truth' of the proposition it authorises. It is also (like the phenomena of student editing and absence of formal peer review, both of whose symptom it is) a way in which legal scholarship (which in the kind of US context I am examining here can be equated with doctrine) is at once differentiated from other university disciplines and made to obscure its paradoxical aspirations towards scientism and anxiety about its parvenu status as a university discipline. The second paradox inherent in this one is that attempts to obscure in fact make visible, via the trace that excessive citation constitutes.

To a disturbed and anxious student clientele, rules seem comforting, contingency troubling. Thus perhaps one of the angriest student criticisms of the ALWD citation manual was that it didn't give you rules, just principles (in some cases, ALWD rules — unlike their *Bluebook* brethren — allow a choice between a couple of acceptable conventions, rather than prescribing one sanctioned approach). Citation may be so hard to teach and learn because it emerges from a part of the first-year curriculum which goes against the dominant grain, making it evident that rules are something much more slippery than legal science would promise, and yet it is paradoxically important to students because it seems to promise that there is authority in the law.

My argument here is that the difficulties of teaching and learning fundamental skills have to do not with Gen X or Lamott's phenomenology of creative writing, but with the relationships of law and language, or discourse. I have already identified citation's function as a legitimating discourse of authority. Goodrich has described the relationship of law and rhetoric as a history of proximity and intense rivalry, of a conflict between the two disciplines.[62] The one makes visible the performativity and generic linguistic moves by which the other is constituted.[63] Rhetoric exposes law's pretensions to pre-human authority and thus its claims to legitimacy (as it is presently imagined), and attracts 'the hostility of jurists'.[64] In the practice of his own modern legal rhetoric,[65] the one is a strategy for reading the law disrespectfully against the grain of its own authorised reading practices.

As Goodrich's work on law and literature and the feminine in *Oedipus Lex* and *Law in the Courts of Love* suggests, that disrespectful reading is also the feminine other of the law currently written and practiced and above all

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differ significantly from their US equivalents in the ways in which they reify doctrine and suggest that law is indeed reducible to rules.

61 Private correspondence, on file with the author.

62 Goodrich (2001b).

63 Goodrich (2001b), p 417.

64 Goodrich (2001b), p 417.

65 Articulated in Goodrich (1986).

taught and learned. To suggest that there are multiple ways to read and write the law 'threatens the institution by indicating not only its contingency but also its disorder, its polemics'.[66] The 'other faces of the common law would coalesce around its histories of repression and its narratives of failure. They would include the faces of ... women.'[67] And as woman is the 'spectre of creativity in law' she is also the specter of the death or the 'contingency and fracture of such doctrine, dogma, or jurisprudence that claims the singularity, unity, or closure of legal forms'.[68]

Poignantly, one of the ALWD manual's most significant differences from the *Bluebook* is its citation form for books, which is much closer to what is done in the humanities than the *Bluebook*'s revealing and idiosyncratic prescription that publishers are only provided where the text cited has been published previously by someone else.[69] Place of publication is never provided. This emanates from a known and stable universe, where law reviews are the only significant publishers, except where the phenomenon of a classic monograph (illustrated by references to Locke, Stephen, Dickens and Foucault) requires the inclusion of that which is usually elided.

In their article on the feminist teaching of law and literature,[70] Carolyn Heilbrun and Judith Resnik register the level of hostility visited on them as women teachers by students in a law school course on law and literature taught from a feminist perspective. Heilbrun notes that she bore the brunt of it more than Resnik did, speculating that this was to do with their differences in age, and notes that courses on gender theory in US law schools characteristically are targets of student anger.[71] It may be — if my reading of Goodrich and the application of his rhetorical theory to the phenomenon of teaching fundamental skills course is correct — that the hostility had more to do with Heilbrun's disciplinary training, and thus to questions of law and gender, than it did with her age.

What I have identified as the principal reason for the difficulties of teaching and learning fundamental legal skills in this country — the fundamental opposition between rhetoric and law — is connected with other reasons for those difficulties, all to do with the disruption of law by the feminine. In a context where the paradigmatic law professor is male, skills teachers are overwhelmingly female. In an institution whose practices — from pedagogy to architecture — are profoundly inscribed by a history of hierarchy, signals abound that the teachers of this discipline, and thus its material, are inferior: the teachers' subaltern status is signalled by a range of markers from differential titles (instructor, rather than professor, say; or exclusion from

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66 Goodrich (1995), p 35.

67 Goodrich (1995), p 37.

68 Goodrich (1995), pp 37, 38.

69 It is a topic for another day, but *Bluebook* rule 15 is an extraordinarily rich text for a deconstructive reading.

70 Heilbrun and Resnik (1990).

71 Heilbrun and Resnik (1990), p 1921.

faculty governance), by offices that are characteristically segregated from faculty offices, windowless and cramped.

Their marginality is confirmed in students' eyes by the willingness of many among their colleagues to invite criticism of their work and lay at their feet the blame for the unhappiness of students that derives from the practices of legal education in the United States. Dominant pedagogical models in skills teaching do not keep students in the places, in tiered lecture theatres, that they are assigned at the beginning of each semester and must keep, so that they can answer, or fail to answer, when called on in the Socratic performance of subject formation that suggests that doctrine, like law students, must be kept in place. In skills courses, student competence is judged by women in a context where women are not the paradigms of legitimate judges, in a continuous assessment model that opens up decision-making process and decision-maker to the possibility of challenge in the way that does not happen in the case of a grade, issued after the close of the pedagogical relationship, for a formal examination where the student text will not be returned and grounds for evaluation will rarely be inscribed on the individual student text. It will thus be disembodied and authoritative.

It is also signalled by the way their disruptive — because not paradigmatic, not 'normal' — women's bodies are read in the context of the law school: in the last few months, one of the relatively few tenurable directors of a skills course in this country has been denied tenure, by the dean of her law school, against the advice of both faculty and university committees which recommended that she be granted tenure. The ostensible grounds for the dean's decision related to the quality and quantity of her scholarship. There was evidence of an ideological dispute between dean and director about a scholarly area in which they both practised: the uses of technology in law school pedagogy. In a revealing media interview, the dean made it clear that in his view those who taught legal skills and tenurable legal scholars were two separate cadres of people: it was a case, he said, of a square peg in a round hole.

To go a step beyond Goodrich's work on law and rhetoric, and draw on his work on law, the feminine and psychoanalysis, it as though we have in students' reaction — and the larger institutional reaction — to the 'discipline' of legal writing as it has developed in contemporary US legal education the return of the repressed, law's early marginalisation as a discipline in the universities before Langdell's disciplinary legitimation of it through a system of doctrination, of pedagogical discipline that suppresses differences, of which the paradigm in law is the feminine. Tracing the genre of scientific discourse creation, Threadgold notes that the embodied masculine subject of the scientist gradually disappears from the scene of his work as a genre of the writing of science that performs objectivity develops.[72] The multiple footnote that is the paradigm of the US fetish for citation is the performance of the discursive objectivity of law; the banality and sheer opinion of the contents are what it is trying to write away, and also the formation of the body of law in the way law

[72] Threadgold (1997), p 21.

students are disciplined and punished by the Socratic classroom and the case method, such that their knowledge of law is bounded by a prevailing legalism and riddled with anxiety about anything unauthorised, in the realm beyond that which can be cited. It obscures, too, the masculine subject who is the paradigm of the law professor, the legal scholar; no wonder that a foreign body who threatens to make the hidden gender of law visible by her difference, her corporeal and pedagogical squareness in a round hole, as the dean of Chicago-Kent law school would have it, must be confined to the margins of the institution.

Un/disciplined

> Once upon a time there was a society of priests who built a Celestial City with gates secured by word-combination locks. The priests were masters of the Word and, within the City, ascending levels of power and treasure became accessible to those who could learn ascendingly intricate levels of Word Magic. At the very top, the priests became gods; and because they then had nothing left to seek, they engaged in games with which to pass the long hours of eternity. In particular, they liked to ride their strong, sure-footed steeds around and around the perimeter of heaven: now jumping word hurdles, now playing polo with concepts of the moon and the stars, now reaching up to touch that pinnacle, that splinter of Refined Understanding called Superstanding, which was the brass ring of their merry-go-round.
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> ...
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> Under the Celestial City, dying mortals cried out their rage and suffering, battered by a steady rain of sharp hooves whose thundering, sound-drowning path described the wheel of their misfortune. At the bottom of the Deep Blue Sea, drowning mortals reached silently and desperately for drifting anchors dangling from short chains far, far overhead, which they thought were lifelines meant for them.[73]

I close, as I opened, with the invocation of Patricia Williams, gestures that speak to anxiety about a theory-based critique that includes among the practices it examines the grassroots political practice of a group largely comprising — if not necessarily led by — disempowered women law teachers, and which is written by someone who can 'pass', and is thus exempted from much of the discrimination they suffer.

Those of you who are familiar with Williams' thesis in *The Alchemy of Race and Rights* will register that the quotation from her epigraph that I in turn use as epigraph to this closing part of my essay leaves out a section that draws attention to a critical aspect of her central thesis: her condemnation — one common at a point in the reasonably recent past to many critical race theorists in the United States — of the trashing of rights discourse by the Critical Legal Studies establishment. Williams skewers the rebellious pilgrim-priests who tired of the brass ring of the merry-go-round in the Celestial City, and left on the passage to the 'knowledge of Undoing Words': her implication is that they

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[73] Williams (1991), epigraph.

replicated what the doctrinalists in the kingdom inherited from Langdell,[74] and that the legions and classes of the disenfranchised in this kingdom of the law, as Tom Paine would have it, were ignored by these *soi-disant* radicals. I have elsewhere[75] criticised two of the grand old men of both the CLS revolution and its poststructuralist fellow-traveller in this country and a group of their intellectual sons on similar grounds, noting both their desire for a transcendentalising space from which to speak and (this criticism of particular relevance in the context of this essay) and their abstraction of their work from the material practices of legal education in the institutions in which they teach.

Like these CLS scholars — theoreticians — before me, I have in this essay used critical theory to trash the rights talk practised by the LRW establishment and to make an argument for the foreclosure of change that is the price paid for its hostility to theory. These are not necessarily inconsistent positions. Williams herself writes:

> In the law, rights are islands of empowerment. To be unrighted is to be disempowered, and the line between rights and no-rights is most often the line between dominators and oppressors. Rights contain images of power, and manipulating those images, either visually or linguistically, is central in the making and maintenance of rights. In principle, therefore, the more dizzyingly diverse the images that are propagated, the more empowered we will be as a society.[76]

The sentence that succeeds this paragraph — 'In reality,[77] it was a lovely polar-bear afternoon' — along with the narrative of multiple interpretations of the mauling to death of a child by polar bears in Brooklyn Zoo that in turn follows it, and the book's closing gambit, an anecdote about an encounter with the clients of 'an all-white, very expensive, affirmative-action program for the street-deprived' which closes in a meditation on the theme of polar bears, and thus on perspectivity and interpretability, I take to inject some uncertainty into Williams' claim for the power of rights discourse. Surely there is some measure at least of irony in the representation as an advance in rights discourse of her own exultant unpacking (at 'the plenary session of the national meeting of the Law and Society Association',[78] no less) of the bears' attack and the child's death and the interpretive heteroglossia that swirled around it; an intimation of Pyrrhic victory in the sentence 'Juan's Hispanic-welfare-black-

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74 At the most recent annual meeting of the Association of American Law Schools, a panelist at one of the sessions I attended noted, without any evident chagrin, that if one walked into a Contracts class in a US law school today it would not appear appreciably different from the same class at Langdell's Harvard. Of course, I wasn't there in Langdell's day — it isn't my history, after all — but my reading and my experience of classes in the subjects in the required first-year curriculum in this country suggests that he was correct.

75 Pether (1999).

76 Williams (1991), p 234.

77 By contrast with 'in principle'.

78 Williams (1991), p 235.

widow-of-an-alcoholic mother decided to sue'? In the same vein, I read as an acknowledgment of the persistence of hierarchies of power in the United States Williams' closing 'polar-bear musings', juxtaposed with the encounter with the sons of white privilege that concludes: 'The Dartmouth Summer Basketball Camp raised its collective eyebrows and exhaled, with a certain tested nobility of exhaustion and solidarity' in the face of her articulation of her rights.

Williams' claim for rights talk, it seems to me, is above all strategic, and grounded both in theory and in the material realities of her life and the contours of power in nation and academy. It is hard, now — although of course not impossible, especially since the events of September 11 — for American intellectuals to justify unequal treatment of persons on the basis of race or gender; the same does not apply to 'merit' or scholarly legitimacy. And the strategic (rather than naïve) deployment of rights talk, after all, sets itself against doomed claims for separate but equal treatment.

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