NOTE

BAREFOOT IN THE KITCHEN: A RESPONSE TO JACK GOLDRING

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Jack Goldring poses a meaty question right at the beginning of "Babies and Bathwater: Tradition or Progress In Legal Scholarship and Legal Education".[1] It is whether we should discard the "whole tradition of Western European, or even common law scholarship" or use it as a base from which to "push out the frontiers of understanding".[2] I'm not sure that "frontiers of understanding" is a notion that has much sense apart from its metaphorical invocation of the wild west. But taking it at that level, I suggest that in order even to approach the "frontiers of understanding" it is necessary to be more committed, more courageous and more ingenious than Goldring's middle of the road eclecticism.

I am not concerned to defend Andrew Fraser's or any one else's version of republican social and political theory. If Goldring's critique warranted a reply on its substance, Fraser himself or perhaps another proponent of that line of thinking[3] would be able to do so far more capably than I since it is not a theory with which I agree. Nor indeed do I have any prescriptions on legal scholarship or education to offer though I will admit to dreaming of universities and law schools open to all. Rather it is Goldring's prescription of eclec-

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1 (1987) 17 U.W.A L Rev 216

2 Ibid., 218.

3. It might be noted that Fraser is not an isolated proponent of republican political philosophy with only a small personal following The republican tradition is being rethought in moral and political philosophy by some very distinguished scholars, of whom Hannah Arendt, Alisdair MacIntyre and Philip Pettit are perhaps the best known

ticism,[4] the actual eclecticism of his article, and above all his missionary zeal on the issue of keeping theory in its place — barefoot in the kitchen — which has provoked this response.

A sharper focus on the notion of "eclectic" might be a good starting point. *The Concise Oxford Dictionary* defines eclectic as: "(Ancient philosopher) selecting from each school of thought such doctrines as pleased him; (person, doctrine) borrowing freely from various sources; not exclusive in opinion, taste, etc"; and, from a philosophy dictionary[5] "eclecticism: the principle or practice of taking one's views from a variety of philosophical and other sources. The tendency is manifested in many individuals and systems that make no strenuous effort to create intellectual harmony between discrete elements (for example theosophy), but it can also form the basis of creative syncretism." Since the "syncretism" to which reference is made is exemplified by the efforts of 16th century neo-Platonic philosophers to systematize and unify the works of Plato and Aristotle with all known world religions, Goldring's eclecticism hardly falls within its paradigm. He is opposed to quests for "theoretical perfection or total rationality"[6] because, it would seem, he considers that therein lie the seeds of absolutism.

Goldring is not only in favour of eclecticism in principle. He also demonstrates it in practice. His 40 page article takes us on a Cook's tour of astonishing proportions. We begin at the Mecca of the unity of theory and practice. We end there too: in a law school where concrete theory with real value is being produced. In between, our intellectual journey takes in a concise history of legal academia, and a comparative survey of relations past and present between academic and practising lawyers in England, the United States and Australia. Codification, from Bentham and Napoleon through to modern Japan, is touched on, as are questions of methodology in sociology and economics. Philosophy of science and social science is mentioned and with truly remarkable brevity Aristotle is routed and Feyerabend is proclaimed sound. Some autobiographical

4. "To some extent the search for understanding must be a realistic and eclectic process which depends largely on the examination of empirical evidence gathered from observation of the physical world and of human activity"
5. A. Flew (ed), *A Dictionary of Philosophy* (London Macmillan, 1983)
6. Op. cit. n 1, 221

material is included as an "explanation" of this approach and there is recurrent reference to Fraser. Unfortunately the tour is too extensive to permit any careful presentation and critique of Fraser's theory. References are more to selected themes.

We do holiday briefly in jurisprudence in the course of this tour. We are billeted in a quaint, 'sixties style construction of American Legal Realism. Through its windows we get a long-distance view of American Critical Legal Studies. Tour guide Goldring fills us in on some of the details of this tendency in legal theory in the United States. It is, he tells us, left-leaning and has "divided legal academia against itself".[7] However we are reassured that nothing like that is happening in Australia (except for the work of a few "isolated" individuals), and that American Critical Legal Studies is distinctively American. The inference is that it is not likely to be transplantable to the more arid regions of sunny Australia.

This surprised me a little. American Critical Legal Studies is, in its preoccupations, its reference to legal doctrine and its style of argumentation as American as hamburgers. It would, after all, be odd if American scholars and political thinkers were oblivious to their own cultural traditions. But to say, on the authority of another learned author, that its "roots" were "almost exclusively American"[8], and that the outbreak of isolated crops of it in Europe is explicable only as a "spin-off", is very puzzling. I had thought Marx, Habermas, Sartre, Heidigger, Foucault, Freud, Derrida, and Lacan all to be Europeans. I considered whether it was perhaps the eclectic mix of these approaches in which some American Critical Legal theorists indulge that was the distinctively American "root" to which Goldring was referring. But of course that could not be what he meant since he thinks that eclectic mixtures can and should characterize legal theory in Australia.

Goldring fails to anticipate an important objection to eclecticism which applies particularly to legal theory. Legal theory tends to pick up baubles. Simplified versions of ideas and arguments, advanced in other disciplines in which the legal theorist takes a dilettante's interest, adorn its pages. They make a show but the show should

7 Op cit n 1, 219

8 Op cit. n 1, 220.

never be confused with serious inter-disciplinary work. Where it is so confused, two conditions for useful theoretical work on law are excluded. One condition is rejection of the dilettante's attitude to other disciplines. The other is a considered appraisal of the place in specific research programmes for doctrinal knowledge and understanding. I do not think either of these conditions is met by eclecticism.

However, eclecticism is not his only article of faith. Common sense, realism and practicality are also to guide us within an overall holistic view of the universe. True to his own eclecticism there is no consistent espousal of empiricism (common-sense realism), realism (in its Platonic, materialist or critical forms), or pragmatism. Had pragmatism, as a philosophical view, not already gone beyond the stage of development it was at when the American Legal Realists wrote, Goldring's combination of these elements could be described as pragmatist; but pragmatist philosophy has become rather more sophisticated since the early decades of this century.

There is a certain kind of courage required to follow ideas through to their often bitter end. Few have the inclination to this task and those who do soon realise that they have left the reassurances of conformity and often of acceptability behind. Ideas are part of our social reality, but tracing the way in which they emerge from forms of social life is a task which entails endlessly changing horizons. As the theories and concepts which seem to individual thinkers to have the greatest power and this-worldliness are refined, and as their implications and inferences, necessary and probable, speculative and practical, are traced, the easy answer, the answer of which one was once so sure, reveals its weakness.

Women and men who do choose this form of work, more particularly in the social sciences and humanities than in mathematics and the natural sciences, are conventionally said to be out of touch with "reality". But where one of the foremost questions in philosophy of science and social science concerns the nature of reality and of social reality, how can Goldring be so certain that the world of which he is aware is the real one? I make no appeal to esoteric arguments from illusion here. Nor is this an appropriate place to engage in contemporary debates in jurisprudence, philosophy and sociology on realism. It is enough to say that the understanding of realism with which Goldring works has little to do with serious realist

positions.[9]

Goldring admits that he may have misunderstood Fraser's work. But then he complains, even if he has, he still does not like its prescriptive tone of voice. Yet Goldring is himself prescribing an eclectic approach and from his opening quotation concerning the evils of despotism to the end of this long article, he argues that his way, his eclectic way, is the one right way to confront despotic tendencies in legal and social theory. He may do better to borrow from Ronald Dworkin on this one and argue that in normative discourse one is "entitled — indeed obliged"[10] to assert the truth of one's principles. But then were he to do so, he would justify his own prescriptions at the expense of making his argument against Fraser's nonsense. Since he may indeed have misunderstood Fraser, this is perhaps too great a risk to take.

Goldring complains that in seeking to compensate for the atheoretical approach of formalist (that is, rules and concepts oriented) legal scholarship, "legal scholars have tended to concentrate on the formulation of theories at the expense of the substance to which those theories must be applied".[11] Now it is of course a counsel of perfection to achieve that unity of form and content in any human artefact which makes each the perfect complement of the other. Yet Goldring is against "theoretical perfection".[12] How is this contradiction to be resolved? What is Goldring telling us we should do?

We might look for the answer to this question to the substance of Goldring's own article. It is an article on legal scholarship and legal education. In it, as I have indicated, Goldring discusses many things. What he does not discuss are the practical issues facing law students and aspiring law students today. We hear of the practising profession and of legal academics in this article, but students' concerns and needs and preoccupations are almost totally absent. Issues of fees, admissions policies and modes of entry to the pro-

9 See V Kerruish "Epistemology and General Legal Theory", in G. Wickham (ed.), *Social Theory and Legal Politics* (Sydney: Local Consumption, 1987) for references to contemporary debates concerning realism

10 R. Dworkin, "Do we have a right to pornography?" in *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), at 350

11. Op. cit n 1, 221.

12. Ibid.

fession receive no mention. The rote learning, mindless technicism and definitional stop which students too often have to put up with in Australian law schools (and which no more deserves to be called "traditional common law scholarship" than a quick read and regurgitation of a "great work" deserves to be called philosophy) passes without notice. If this is practical, then the end of such practicality can only be to train students to forget their own ideas, sit on their needs, doubt the "reality" of concerns other than those their examiners and future employers treat as credible, and conform to directions and agendas set by others.

However, if that is the tendency of Goldring's eclectism, I doubt that it is what he actually intends. So to get at that perhaps I should state the message of his article in a more down to earth way. It is this: we need a little bit more theory than conventional law schools allow, but not too much. All things in moderation, particularly dangerous things like thinking. Theory, after it has thrown the baby out with the bathwater, must learn its place in the legal order — barefoot in the kitchen cooking horrible stews.