The Effects of the Hidden Curriculum in Australian Legal Education

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Declaration

I, Andrew Alan Henderson, declare that:

(a) this thesis has been composed by me, and

(b) this thesis is entirely my own work, and

(c) this thesis has not been submitted for any other degree or professional qualification, and

(d) any publications included in this thesis are my own work, except where indicated throughout the thesis.

Signed:  Date: 17 December 2021

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INTRODUCTION

The Bachelor of Laws (LLB) or the Juris Doctor (JD) at an Australian university is one means by which the academic requirements for admission as a legal practitioner in Australia can be satisfied. The Australian legal education curriculum creates a nationally uniform set of explicit learning outcomes that describe what every graduate is 'expected to know, understand and be able to do as a result of learning'.[1] The curriculum also creates an explicit expectation that Australian law schools are responsible for ensuring graduates achieve those outcomes.[2]

Not every Australian law graduate is destined for the legal profession. Although data is vague, an increasingly large proportion of graduates work in various professional settings.[3] There is no other form of testing Australian lawyers' academic abilities before their admission to the profession. Consequently, admitting authorities, employers, and the broader community rely on Australian law schools' endorsement of graduates' academic competence. Some graduates might demonstrate their knowledge, understanding or skills better than others, reflected in their grades. Nevertheless, the curriculum expects that every graduate will demonstrate at least the minimum competency in a single set of explicit outcomes.

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[1] Sally Kift, Mark Israel and Rachel Field, *Learning and Teaching Academic Standards Project - Bachelor of Laws - Learning and Teaching Academic Standards Statement* (Department of Education, Employment and Workplace Relations, 2010) 9.

[2] Ibid.

[3] Rosalind Dixon, 'Studying law is about much more than becoming a lawyer, Malcolm Turnbull', 5 February 2018) <https://newsroom.unsw.edu.au/news/business-law/studying-law-about-much-more-becoming-lawyer-malcolm-turnbull>.

However, both in Australia and overseas, critical research and commentary have argued that legal education produces outcomes that are not part of the explicit curriculum. Law schools are accused of producing combative,[4] competitive,[5] ethically flexible graduates,[6] lacking empathy[7] or motivated by external reward[8] despite the explicit curriculum's advocacy of flexibility in problem-solving, ethical conduct and community service. Alternatively, law school's role is seen as promoting outcomes inconsistent with the explicit curriculum that discourage students who reject those outcomes from completing their studies.[9] To the extent that these outcomes are not part of the explicit curriculum, they are hidden.

There are potentially long-term consequences from these hidden outcomes for individual graduates, the legal profession and the community. For example, research has suggested a connection between competition and external reward and lawyers' deteriorating wellbeing and mental health.[10] It has also suggested

[4] Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37(1) *Monash University Law Review* 43.
[5] See for example research into stress and depression in American law students; Suzanne Segerstrom, 'Perceptions of Stress and Control in the First Semester of Law School' (1996) 32 *Willamette Law Review* 593; Phyllis Beck and David Burns, 'Anxiety and Depression in Law Students: Cognitive Intervention' (1979) 30 *Journal of Legal Education* 270.
[6] Richard Moorhead et al, 'The Ethical Identity of Law Students' (2016) 23(3) *International Journal of the Legal Profession* 235; Adrian Evans and Josephine Palermo, 'Zero Impact: Are Lawyers' Values Affected by Law School' (2005) 8 *Legal Ethics* 240.
[7] Paul Savoy, 'Toward a New Politics of Legal Education' (1970) 79 *Yale Law Journal* 444; David Culp, 'Law School: A Mortuary for Poets and Moral Reason' (1994) 16 *Campbell Law Review* 61; John Bliss, 'Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in a Period of Market Crisis' (2017) 42(3) *Law & Social Inquiry* 855.
[8] Kennon Sheldon and Lawrence Krieger, 'Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261.
[9] Andrew Watson, 'The Quest for Professional Competence: Psychological Aspects of Legal Education Symposium: The Teaching Process in Legal Education' (1968) 37 *University of Cincinnati Law Review* 91.
[10] Kennon Sheldon and Lawrence Krieger, 'Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory' (2007) 33(6) *Personality and Social Psychology Bulletin* 883.

that there is inconsistency between the behaviours women perceive that law school promotes and their own values.[11]

Research and commentary on the hidden outcomes of legal education assume that law school is the primary agent and cause of the outcomes they examine. It also tends to assume a universality or uniformity in the outcomes for law students. The assumption of a mostly binary, one-way causal link between the actions of a dominant, active law school and the outcomes for a homogenous and passive law student cohort is understandable. In an Australian context, law schools are responsible for the explicit curriculum's learning outcomes.[12] It is reasonable to assume that it would be responsible for others.

However, to accept that there is a set of broadly uniform outcomes not encompassed in the explicit curriculum that affect all or even a large proportion of law students ignores two fundamental issues.

First, learning never happens in a vacuum. An approach to teaching and learning based on a behaviourist teacher-centred model of stimulus-response-reward tends to dominate educational settings.[13] However, students' learning is affected by diverse influences, including students' personal histories, experiences, and values.[14] It is also affected by agents that students consider more persuasive or

[11] See for example Catherine Weiss and Louise Melling, 'The Legal Education of Twenty Women' (1987) 40 *Stanford Law Review* 1299; Miranda Stewart, 'Conflict and Connection at Sydney University Law School: Twelve Women Speak of Our Legal Education Feminist Symposium' (1991) 18 *Melbourne University Law Review* 828.

[12] Kift, Israel and Field (n 1) 4.

[13] David Hothersall, *History of Psychology* (McGraw-Hill Education, 4th ed, 2004); Robert Levin, 'The Debate over Schooling: Influences of Dewey and Thorndike' (1991) 68(2) *Childhood Education* 71.

[14] Referred to as 'constructivism' or 'social constructivism', the concept of learning as a series of experiential transactions between the learner and external influenced has a long history; see for example; Aristotle, *De Anima*, tr CDC Reeve (Hackett Publishing Company, 2017); John Locke, *Some Thoughts on Education* (Dover Publications, 2007); John Dewey, *Experience and Education* (MacMillan Publishing, 1963); John Dewey, *The Child and the Curriculum* (Cosimo

authoritative than classroom teachers, including peers, employers, media, and family.[15] Secondly, students do not passively receive and accept learning but are actively engaged in interpreting and reconstructing the information they receive from various sources. Because the influences to which students are exposed differs from individual to individual, the outcomes can also differ.

Australian and overseas research with law students has already begun to question presumptions of uniformity in outcomes and the passivity of law students. Law students' experience of law school is being revealed as an individualised one. For example, the assumption that the Socratic method (used predominantly in American law schools) produces positive uniform outcomes for students has been challenged by accounts of loss of confidence, silence and self-doubt.[16] Australian research has begun to identify the increasing pressure from students to include practical or vocational skills in the law school curriculum, fed by perceptions of what is valuable to potential employers.[17]

Research into the relationship between law students and law school still tends to adopt a law school-centred focus, presenting a second fundamental issue. Despite the significant role of law students' characteristics and the external influences that may impact them, there is very little empirical research on the outcomes that law students perceive as flowing from law school and those that do not. Where it does exist, law student-centred research in Australia has tended

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Inc, 2010). Dewey's research, and that of other constructivists will be discussed in more detail in Chapter 2.

[15] Albert Bandura, *Social Learning Theory* (General Learning Press, 1977); Joan Grusec, 'Social learning theory and developmental psychology: The legacies of Robert Sears and Albert Bandura' (1992) 28(5) *Developmental Psychology* 776.

[16] Duncan Kennedy, 'How the Law School Fails: A Polemic' (1970) 1 *Yale Review of Law and Social Action* 71.

[17] Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012) 93-5.

to focus on individual courses or teaching techniques connected to the explicit curriculum.[18] Research into hidden outcomes is more developed in relation to women's law school experience,[19] although it still lags behind the volume of research in the United States.

To the extent that law school is accused of promoting behaviours inconsistent with the explicit curriculum, the incomplete nature of existing research, and the diversity of both causes and outcomes, present a problem. It contradicts law schools' fundamental purpose and attempts to make it responsible for outcomes that potentially harm law students, the legal profession and the broader community.

One might think while reading this thesis, 'Well, we already know these things, don't we?' The assertion is, in part, true. Experienced law teachers are likely to have seen some of the responses and outcomes that interview participants discuss. For example, in chapter 5, some participants discuss a process of tactical decision-making regarding law school assessment; interrogating law teachers about their personal perspective on an assessment in an attempt to divine which approach will net a higher mark, even if it does not accord with their personal beliefs or values. However, although empirical in the sense of being seen, anecdotal samples do not constitute robust evidence. Secondly, anecdotal accounts of law student behaviour are primarily based on the *law teacher's* perceptions of the behaviour and its cause. This thesis addresses both of these

[18] Alex Steel, 'Empirical legal education research in Australia: 2000–2016 ' in Ben Golder et al (eds), *Imperatives for Legal Education Research Then, Now and Tomorrow* (Routledge, 2020) 74.
[19] Stewart (n 11); Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996).

shortcomings. First, it provides a much larger sample size. Secondly, it asks *students* directly why they make certain decisions, rather than relying on an abstract construction of their reasoning.

This research aims to begin to address a law-student-shaped hole in Australian legal education literature about the hidden outcomes of Australian legal education, what they are, and their causes. It carefully examines and codes interviews conducted with 65 Australian law students at the Australian National University and the University of Canberra to identify the outcomes they perceive and the causes to which they attribute them. It does not attempt to diagnose or prescribe hidden outcomes or their cause. To do so would entirely contradict the methodology set out and explained below. Instead, it relies on participants' independent and spontaneous attributions to uncover the diverse influences that they perceive impact them and the outcomes they perceive are produced. However, where there are common themes or patterns in participants' attributions, it seeks to highlight them to identify whether they are consistent with some of the assumptions about outcomes that have been attributed to Australian legal education or reveal previously ignored outcomes. Alternatively, they begin to reveal how participants may instead attribute some of the hidden outcomes assumed to be attributable to law school to influences beyond law school's control.

Chapter 1 provides an overview of the influences thought to be in play in Australian legal education, their historical origins, and the uncertainty that some of those influences have created in Australian law schools' purpose and objectives. It also explains the phenomenological framework and method used

to make sense of the complex network of assumed outcomes and potential causes.

It introduces educational psychologist Philip Jackson's[20] taxonomy of the 'hidden curriculum' as a framework to logically sort and structure causes and outcomes. Jackson uses the phrase 'hidden curriculum' to describe the skills, attitudes and behaviours that 'each student must master if he (sic) is to make his (sic) way successfully through the school'. Those skills, attributes and behaviours are distinct from the demands of the formal or explicit curriculum, although the hidden and explicit curriculum are related to each another.[21]

Although Jackson never defines 'curriculum', he describes skills, attributes and behaviours as the observable outcomes[22] of three principal causes; teachers, the explicit curriculum and evaluation.

The role of teachers considers the outcomes attributable to how classroom teachers control and interact with students, for example, law teachers' conduct and interactions with law students in lectures, tutorials or one-on-one consultations.[23] The analysis is much broader than the effects of particular pedagogies, encompassing every interaction between a teacher and student regardless of whether they are recognised forms of pedagogy or not.

[20] Phillip W Jackson, *Life in Classrooms* (Holt, Reinhart and Winston, 1968).
[21] Ibid 33.
[22] In his introduction to *Life in Classrooms*, Jackson describes his method as being primarily observational and his description of a hidden curriculum as being based on his observations of the behaviour and interactions within elementary classrooms; ibid xv-xvii.
[23] Ibid ch 1 IV.

The role of the explicit curriculum considers its content and organisation.[24] For example, it focuses on how particular subjects' omission, inclusion, or structure might be perceived to transmit or reinforce particular values implicitly.

Evaluation encompasses assessment and feedback and uses them to identify the outcomes that are institutionally valued.[25] That is, the outcomes that are rewarded and praised are those valued by the institution. It also encompasses evaluation by peers as an essential part of promoting and practising certain behaviours.

This thesis uses 'curriculum' in the same way as Jackson employs it—to describe the collective outcomes that flow from a student's experience in educational settings. A 'hidden curriculum' encompasses those outcomes that are not considered in the formal, explicit Australian legal education curriculum within the Prescribed Areas of Legal Knowledge,[26] the Threshold Learning Outcomes for the LLB,[27] and the underpinning regulatory framework.[28]

Jackson's taxonomy attempts to explain *how* a hidden curriculum is transmitted to students. However, he does not explicitly examine *why* some agents or outcomes are more likely than others. This thesis supplements Jackson's by reference to two recognised theories of learning that attempt to describe why

[24] Ibid ch 1 III.
[25] Ibid ch 1 II.
[26] Law Admissions Consultative Committee, 'Prescribed academic areas of knowledge', (December 2016).
[27] Kift, Israel and Field (n 1).
[28] *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ('*TEQSA Act*'); Australian Qualifications Framework Council, *Australian Qualifications Framework* (Australian Qualifications Framework Council, 2nd ed, 2013); *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) ('*Threshold Standards*').

some events, agents or outcomes are more likely than others, namely, behaviourism and constructivism.

Behaviourism posits that student behaviour is driven principally by the promise of reward for providing the correct response to a stimulus (sometimes also referred to as a stimulus-response model).[29] There are close analogies between behaviourists construction of learning as binary and unidirectional and the assumption in some American and Australian commentary on legal education that attributes outcomes to a central and authoritative law school. Constructivists (or social constructivists) argue that learning is more complex. Students construct knowledge based on various influences that include formal education but might also include family, peers or other agents they perceive as authoritative.[30] Chapter 1 explains how these theories serve to supplement and support Jackson's taxonomy.

This thesis' focus on students' law school experiences, rather than on a hypothetical construction of a hidden curriculum, means that its discussion is more narrowly defined than Jackson's work. Jackson used observational methods, interpreting his observations to construct what he perceived was a hidden curriculum.[31] Instead, this thesis instead uses a simplified Leeds

[29] Charles Ferster and Burrhus Skinner, *Schedules of Reinforcement* (Appleton-Century-Crofts, 1957); Barrhus Skinner, *The shaping of a behaviorist* (Alfred Knopf, 1979); Burrhus Skinner, *Technology of Teaching* (BF Skinner Foundation, 2001); Burrhus Skinner, 'Why Teachers Fail', *The Saturday Review* (London, 16 October 1965) 80.
[30] John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (Collier-MacMillan, 1916); Lev Vygotsky, *The collected works of L. S. Vygotsky: Vol. 3. Problems of the theory and history of psychology*, tr Sobranie Sochinenii (Plenum Press, 1997); Bandura (n 15).
[31] Jackson (n 20), 'Introduction'.

Attributional Coding System (LACS)[32] to systematically and consistently analyse students' reflections, statements and comments. Chapter 1 explains the LACS and how it has been employed to support this thesis. The LACS was initially designed for use in social work settings to establish links between outcomes and the causes perceived by an individual to have contributed to them. It has since been used in various employment and educational settings,[33] although it would not yet appear to have been used in Australian legal education. Unlike quantitative methods that provide limited choices, LACS relies on a subject's spontaneous, independent and unprompted attribution of outcomes to causes.[34] In the context of this research, it allowed participants to identify the full range of external and internal influences they perceived impacted them and how various causes might have contributed concurrently to an outcome.

Chapter 2 draws on Australian research and commentary to populate Jackson's taxonomy and apply learning theory as they might relate to law school and establish a set of hypothetical outcomes and causes against which participants' attributions can be compared. Where Australian research is absent, it also cautiously draws on the much more developed American research body to identify other hidden outcomes.

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[32] Peter Stratton et al, *Leeds attributional coding system (LACS) manual* (Leeds Family Therapy and Research Centre, 1988); Anthony Munton et al, *Attributions in Action: A Practical Approach to Coding Qualitative Data* (John Wiley & Sons, 1999).

[33] In their review of attribution theory, Graham and Taylor noted that there had been more than 3,000 articles published applying attribution and causal analysis in a diverse field of activities between 1982 and 2014; Sandra Graham and April Taylor, 'Attribution theory and motivation in school' in Kathryn Wentzel and David Miele (eds), *Handbook of motivation at school* (Routledge, 2nd ed, 2016) 23.

[34] Harold Kelley and John Michela, 'Attribution Theory and Research' (1980) 31(1) *Annual Review of Psychology* 457.

Chapter 3 examines the role and influence of law teachers in the production of explicit and hidden outcomes. Using the LACS, interviews with participants indicate that outcomes are less likely to be attributed to law teachers when compared to other agents, suggesting that law teachers play a less significant role than that assumed in existing commentary and research. The outcomes attributed to law teachers are not significant or impactful other than in instances of aggressive or hostile behaviour. Consistent with constructivist theories, participants' attributions reveal that characteristics they perceive as personal or innate, like career intentions, age and effort, play an essential role in mitigating or negating many of the outcomes attributed to law teachers in the existing literature.

Chapter 4 examines the role of the explicit curriculum in the production of hidden outcomes. Participants' attributions affirmed existing commentary[35] that legal education promotes the adoption of a rational, emotionless and structured approach to problem-solving. However, it also finds that a proportion of participants adopted the same approach in their personal and intimate relationships as a result of their experiences at law school. Consistent with some Australian research,[36] the chapter also finds that there is pressure from students to adapt the curriculum to provide more vocational or practice-oriented courses, driven primarily by students' desire to find employment. However, the origin of that motivation is, at least among participants, difficult to identify and may be

[35] See for example Kate Galloway and Peter Jones, 'Guarding Our Identities: The Dilemma of Transformation in the Legal Academy' (2014) 14 *QUT Law Review* 15, 17. See also Bender's discussion of a similar phenomenon in the US legal curriculum; Leslie Bender, 'Hidden Messages in the Required First-Year Law School Curriculum' (1992) 40 *Cleveland State Law Review* 387.

[36] See for example Thornton, *Privatising the Public University: The Case of Law* (n 17).

the result of perceptions created by students themselves rather than external agents or causes.

Chapter 5 deals with the role of evaluation. It identifies two significant themes through the perceptions of participants. First, there is a perception that law school is responsible for promoting or reinforcing individualism. Participants attributed the perception that whether they succeeded or failed resulted from individual attributes, qualities or effort. However, law school was perceived as either affirming through evaluation that a student possessed the necessary inherent qualities or providing no support to those who did not. Secondly, and consistent with Chapter 4, participants were significantly driven in their desire to perform well in evaluation by what, they perceived, was the likelihood of finding employment. Law school itself was perceived as playing no significant role in promoting competition for grades.

Chapter 6 looks at another aspect of Jackson's evaluation model; judgment and assessment of participants by peers. It finds no firm evidence of female participants perceiving that they were being overtly or explicitly judged based on their gender. However, women's perceptions of being judged or alienated were more complex than overt exclusion or misogyny. They appeared to be mediated by the support of peers but aggravated by other criteria that participants perceived the legal profession had adopted. Chapter 6 also finds that competition, assumed to be endemic to law school, is much more complex than some commentary would suggest.[37] While participants tended to affirm that competition with, and evaluation against, peers was a feature of their experience,

[37] See for example Segerstrom (n 5); Beck and Burns (n 5).

they did not perceive that it was attributable to law school but, instead, was driven by competition for employment.

Chapter 7 concludes the thesis by summarising its findings, specifically those hidden outcomes attributable to legal education, those that appear to be co-constructed with law students, and outcomes attributable to external agents, including law students themselves. However, it also strays beyond the bounds of its focus to consider, having gathered this information, to what purpose should it be put? It offers some observations and suggestions on how this data might guide efforts by law schools to address issues like competition or to mitigate the unyielding pressure law students appear to place on themselves to find employment. It also considers where research is still lacking and directions for future empirical research based on these findings.

CHAPTER 1 – THE EFFECTS OF WHAT WE DO

> Educators are frequently unaware of the potent and value-laden lessons they teach through the content, structure, context, assumptions, and pedagogy of legal education.[1]

I INTRODUCTION

For Australian university students, completing the undergraduate Bachelor of Laws (LLB), or the postgraduate Juris Doctor (JD), is the principal means of demonstrating the academic requirements for admission as a legal practitioner.[2] Since 2010, there has been a nationally consistent set of learning outcomes explicitly addressed to the LLB.[3] Each year, thousands of students graduate from LLB and JD programs across Australia with what is presumed to be broadly similar knowledge, skills and attributes determined by reference to the LLB and JD explicit curriculums.[4] However, contemporary research and commentary have begun to question the extent to which Australian law students' experiences are entirely consistent with the explicit curriculum or whether a hidden curriculum within legal education produces additional or potentially inconsistent outcomes.[5]

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[1] Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 21, 22.

[2] Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A report commissioned by the Australian Universities Teaching Committee* (Department of Education, Science and Training, 2003).

[3] Sally Kift, Mark Israel and Rachel Field, *Learning and Teaching Academic Standards Project - Bachelor of Laws - Learning and Teaching Academic Standards Statement* (Department of Education, Employment and Workplace Relations, 2010). A consistent set of learning outcomes for the JD would be implemented two years later; Council of Australian Law Deans, *Juris Doctor Threshold Learning Outcomes* (Council of Australian Law Deans, 2012).

[4] Nick James, "Australian law schools are producing too many law graduates'. Oh, really?', *LinkedIn* (Blog Post, 2 March 2018) <https://www.linkedin.com/pulse/australian-law-schools-producing-too-many-graduates-oh-nickolas-james>; Rosalind Dixon, 'Studying law is about much more than becoming a lawyer, Malcolm Turnbull', 5 February 2018) <https://newsroom.unsw.edu.au/news/business-law/studying-law-about-much-more-becoming-lawyer-malcolm-turnbull>.

[5] See for example Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37(1) *Monash University Law Review* 43; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing

The concept of hidden, implicit or unseen learning outcomes in education settings is not new. Aristotle argued that learning was a process of students interpreting their experiences and constructing a unique understanding, suggesting that learning outcomes may be equally unique to the student.[6] In the 1960s, Phillip Jackson coined the phrase 'the hidden curriculum' to refer to the unseen outcomes that flow from classroom interactions, the explicit curriculum and evaluation.[7] He also argued that students' responses to the hidden curriculum were diverse and may be influenced by agents and causes outside the classroom.

Despite the large number of law schools and law graduates, and the diversity of theoretical commentary on legal education's effects, there is very little empirical research to support that commentary and even less empirical research with law students. This chapter lays a foundation for the thesis that there is a law-student-sized hole in what we know about the hidden outcomes of legal education and the effects of what we do as law teachers and law schools. It begins by setting the scene of Australian legal education in the 21st century, including assertions about its hidden outcomes, and establishing a hypothesis to guide the research. It describes and justifies the methodologies adopted in this thesis before providing an overview of the data gathering process.

This chapter does not engage in a detailed review of the literature. That is presented in chapter 2 as a means of fleshing out the initial aims and hypotheses of this thesis by establishing what are thought to be the hidden outcomes of legal education. The

May Begin in Year One' (2011) 2 *The International Journal of the First Year in Higher Education* 49; Hall, Townes O'Brien and Tang (n 1). This is discussed in more detail in section II A below and chapter 2.

[6] Aristotle, *De Anima*, tr CDC Reeve (Hackett Publishing Company, 2017). See also section IV C below and ch 2.

[7] Phillip W Jackson, *Life in Classrooms* (Holt, Reinhart and Winston, 1968).

methodologies adopted in this thesis are novel to empirical legal research (although known to education and psychology). Consequently, it is necessary to set out and explain them and the justification for their adoption in some detail.

II AUSTRALIAN LEGAL EDUCATION: SETTING THE SCENE

Australian universities most commonly offer the LLB as a three-year full-time course of study, or more if taken in conjunction with another undergraduate degree. For a law degree, the content and learning outcomes are set (in varying levels of detail) by the Australian Qualifications Framework (AQF),[8] which applies to all tertiary qualifications, the Law Admissions Consultative Committee,[9] and the Threshold Learning Outcomes for the LLB[10] and JD.[11] Unlike the United States, school-leavers can immediately enrol in a law degree after high school graduation. The JD requirements are similar to the LLB, but it is offered to students who have completed an undergraduate degree in another subject.

The advent of university-based legal education in Australia is a comparatively new development. Throughout its history, Australian legal education has changed its focus from a system of articles or pupillage rooted in English traditions and entirely within the control of the legal profession to a University-based degree.[12] The change in

[8] Australian Qualifications Framework Council, *Australian Qualifications Framework* (Australian Qualifications Framework Council, 2nd ed, 2013). The role of the AQF will be discussed in more detail below.

[9] Law Admissions Consultative Committee, 'Prescribed areas of knowledge', (October 2019). Referred to as the 'Prescribed areas of knowledge', determined by the Law Admissions Consultative Committee (LACC); ibid. The LACC is sometimes referred to as the Priestley Committee after its original Chair; Law Admissions Consultative Committee, *Background Paper on Admission Requirements* (Law Council of Australia, 2010). The 11 prescribed subjects are, consequently, sometimes referred to as the 'Priestley 11'. The Priestley 11 is discussed in more detail in chapter 2.

[10] Kift, Israel and Field (n 3).

[11] Council of Australian Law Deans (n 3).

[12] Johnstone and Vignaendra (n 2); Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24(3) *Melbourne University Law Review* 965; Susan Bartie, 'Towards a History of Law as an Academic Discipline' (2014) 38 *Melbourne University Law Review* 444.

structure has also brought with it a change in the stated purpose of legal education — from an almost exclusive focus on teaching the substantive knowledge and practical skills necessary for legal practice[13] to an inclusive, extended or combined[14] purpose of developing professional attitudes[15] and promoting critical reflection on the purpose and role of law in society. [16] For example, the AQF requires that LLB or JD graduates demonstrate knowledge beyond merely technical information. They must also be able to demonstrate skills in thinking, communication, self-management, autonomy and responsibility.[17] The Threshold Learning Outcomes describes the Bachelor of Laws as 'assist[ing] law graduates to enter diverse professional and vocational fields', not solely legal practice.[18] The *Standards for Australian Law Schools*, published by the Council of Australian Law Deans, requires the implemention of a curriculum that develops 'knowledge, understanding, skills *and values*' (emphasis added), suggesting a more profound or more comprehensive set of learning outcomes.[19]

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[13] Michael Pelly and Caroline Pierce, *Defending the Rights of All: A History of the Law Society of New South Wales* (New South Wales Law Society, 2016); Committee of Inquiry into Legal Education in New South Wales, *Legal Education in New South Wales: Report* (New South Wales Government, 1979).

[14] Michael Coper, 'Legal Knowledge, the Responsibility of Lawyers, and the Task of Law Schools' (2008) 39(2) *University of Toledo Law Review* 251; David Barker, *A History of Australian Legal Education* (Federation Press, 2017).

[15] See for example the Committee on the Future of Tertiary Education in Australia, *Tertiary education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australia Universities Commission* (Commonwealth, 1964) vol 2. This objective was also given some emphasis by the Pearce Committee in Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A discipline assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987). It was also enthusiastically re-endorsed in 1990 by the Senate Standing Committee on Employment, Education and Training in its report on proposed reforms to tertiary education; Senate Standing Committee on Employment Education and Training, 'Priorities for Reform in Higher Education' (1990).

[16] See for example Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709; Richard Johnstone, 'Rethinking the Teaching of Law' (1992) 3(1) *Legal Education Review* 17; Charles Sampford, 'Law, Ethics and Institutional Reform: Finding Philosophy, Displacing Ideology' (1994) 3(1) *Griffith Law Review* 1; Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' (2008) 39(2) *University of Toledo Law Review* 233; Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012).

[17] Australian Qualifications Framework Council (n 8).

[18] Kift, Israel and Field (n 3).

[19] Council of Australian Law Deans, *The CALD Standards for Australian Law Schools* (Council of Australian Law Deans, 2009) [2.3].

The incorporation of an extended objective for Australian legal education beyond technical knowledge or vocational skills to include professional attributes in law students is consistent with both sociological models of professions and the evolution of the Australian legal profession. In the early 1900s, Emile Durkheim argued that the inculcation of a shared expectation of behaviour marked professional ethics as a distinct form of control.[20] British sociologists had identified the training and socialisation of individuals leading to a professional identity as one marker of a profession as early in the 1930s.[21] In an Australian context, the concept of 'professional training' for lawyers had been part of the push for change in colonial legal education since at least 1815,[22] which gathered momentum in the mid-19th century.[23]

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[20] Durkheim gave a series of lectures between 1890 and 1900 on morality and rights in which he also discussed professional ethics; Emile Durkheim, *Professional Ethics and Civil Morals*, tr Cornelia Brookfield (Taylor & Francis, 2nd ed, 2003) 7-8; Emile Durkheim, *Moral Education*, tr Everett K Wilson and Herman Schnurer (The Free Press, 1965).

[21] Alexander Carr-Saunders and Paul Wilson, *The Professions* (Clarendon Press, 1933); WA Rudlin, 'The Professions' (1934) 44(174) *The Economic Journal* 322. It is, however, only one of a 'cluster of related concepts' that are thought to mark a profession or the professionalisation of an occupation; Meryl Aldridge and Julia Evetts, 'Rethinking the Concept of Professionalism: The case of journalism' 6th European Sociological Association Conference, 26-28 September 2003) 22. For a brief history of the development of the sociological study of professions in England, France and Germany and the difficulties in definition see David Sciulli, 'Continental Sociology of Professions Today: Conceptual Contributions' (2005) 53(6) *Current Sociology* 915; Maria Malatesta, 'Comments on Sciulli' (2005) 53(6) *Current Sociology* 943; Julia Evetts, 'Short Note: The Sociology of Professional Groups: New Directions' (2006) 54(1) *Current Sociology* 133.

[22] The first formally trained judge appointed to the NSW colony in 1815, Jeffrey Bent, considered the local legal system as 'loose and slovenly' and refused to allow emancipated convicts or lawyers struck off in the United Kingdom to appear in the Supreme Court; Manning Clark, *History of Australia* (Melbourne University Press, 1993) 55; CH Currey, 'Bent, Jeffery Hart (1781–1852)', *Australian Dictionary of Biography* (Web Page, 2006) <http://adb.anu.edu.au/biography/bent-jeffery-hart-2228/text1985>. Just three years later, an inquiry into aspects of the NSW colony's administration by former Chief Justice of Trinidad, John Bigge, expressed dissatisfaction with the effect of convicts, emancipated convicts, and others who were not 'professionally trained' on the judicial system. His report argued that the absence of professionally trained personnel opened the system to abuse by both individuals and the colonial administration and increased the likelihood of unfair trials. John Thomas Bigge (United Kingdom), House of Commons, *Report of the Commissioner of Inquiry on the Judicial Establishments of New South Wales and Van Diemen's Land* (Report, 21 February 1823). Bigge's views were, however, potentially influenced by his personal opposition to emancipation generally.

[23] The influence and origins of a concept of 'professionalism' in Australian legal practice and education in the mid-19th century is traced in detail by Linda Martin; Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9(2) *University of New South Wales Law Journal* 111.

However, the development and application of successive levels of policy and regulation to Australian legal education that has emphasised *both* vocational skills and the development of professional attributes[24] has created an increasing sense of confusion or tension about what legal education is intended to do. Adopting a national, explicit curriculum for Australian legal education would not appear to have resolved the concern. In 2017, Barker's history of Australian legal education referred to the continuing division between:

> those who regard legal education in instrumental terms, namely training individuals as future legal practitioners, and those who regard it as an academic discipline with its own intrinsic value.[25]

National governments' attempts to achieve consistency have compounded or amplified the issue.[26] For example, the Pearce Committee's review of Australian education in the 1980s described Australian legal education as something betwixt and between vocational training and liberal education, advocating a greater focus on lawyering skills *and* professional skills. However, the Pearce Committee's recommendations

[24] The Pearce Committee's review of Australian education in the 1980s identified a series of concentric objectives: university based liberal education; university based professional education; legal professional education; legal profession expectations; legal academy expectations and resources. The final two appear in that order since the Pearce Review tends to paint the academy as responsive rather than directive in terms of aims and objectives; Pearce, Campbell and Harding (n 15). In the post-reform and partially regulated tertiary environment that exists today, this set of nested objectives might now be adapted to include university-based performance measures and the expectations of fee-paying students; For an overview of the reforms to Australian tertiary education, see Department of Education and Training, *Higher education in Australia: a review of reviews from Dawkins to today* (Department of Education and Training, 2015). For a discussion of the reforms as they have been applied in Australian law schools see Thornton (n 16).

[25] Barker (n 9) 3. James puts the division as one between vocationalism and professionalism; Nickolas James, 'More than Merely Work-Ready: Vocationalism Versus Professionalism in Legal Education' (2017) 40(1) *University of New South Wales Law Journal* 186.

[26] There have been successive attempts at the development of consistent or uniform regulation in various areas. Most recently, most Australian jurisdictions moved to adopt model legislation for regulation endorsed by the Standing Committee of Attorneys-General and the Council of Australian Governments while NSW and Victoria have adopted uniform legislation. For an overview of the chronology of developments see GE Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 21-24; David Robertson, 'An Overview of the Legal Profession Uniform Law' [2015](Summer) *Bar News : The Journal of the New South Wales Bar Association* 36.

were subsequently criticised as lacking conceptual clarity[27] and failing to articulate what type of legal education was appropriate[28] or what 'good' teaching looked like.[29] A decade later, the absence of clarity had resulted in the development of a 'holistic and effective educative process … proceed[ing] slowly'[30] that would not appear to have been resolved in the years since.

Alongside the changes to the purpose of legal education have been changes to the regulatory structure applicable to it. Following reforms to the Australian tertiary education sector between the 1980s and early 2000s, especially the 'uncapping' of the number of undergraduate enrolments universities could accept in 2012,[31] the number of students enrolled in tertiary education in Australia has grown consistently. The number of undergraduate students engaged in 'law and legal studies' has also increased, although at a slightly slower rate than other disciplines.[32] The number of law schools also rapidly increased between 1989 and 2015—10 new schools opened between 1989 and 2000 and another 15 between 2000 and 2015.[33] At the same time, regulatory reforms to the tertiary sector reduced funding to universities, increasing pressure to expand enrolments to replace lost revenue. The consequent drive for

[27] Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Printing Service, 1994) 258.
[28] John Schlegel, 'Legal Education - More Theory, More Practice' (1988) 13(2) *Legal Service Bulletin* 71, 71.
[29] McInnis and Marginson (n 27).
[30] Sally Kift, 'Lawyering Skills: Finding their Place in Legal Education' (1997) 8 *Legal Education Review* 43, 44.
[31] For an overview of the reforms see Denise Bradley et al, 'Review of Australian Higher Education' (Report, Department of Employment, Education and Workplace Relations, December 2008); Conor King and Richard James, 'Creating a demand driven system' in Simon Marginson (ed), *Tertiary Education Policy in Australia* (Centre for the Study of Higher Education, 2013) 11; Department of Education and Training (n 24).
[32] Data compiled by the Commonwealth Department of Education indicates that between 2008 and 2018, the number of new domestic Bachelor degree students has increased from 180,542 to 259,547. The number of ongoing domestic Bachelor degree students has also increased from 371,379 to 512,373. Between 1989 and 2000—the years for which the Department publishes data—the total number of students enrolled in Bachelor level law and legal studies programs increased from 8,662 to 27,945; Australian Government Department of Education, 'Enrolments time series', *Selected Higher Education Statistics – 2018 Student data* (Web Page, 15 October 2020) <http://tiny.cc/vdzfiz>.
[33] Barker (n 9).

efficiency threatened a return to a simplified 'chalk and talk' pedagogy focused on doctrinal understanding.[34] The recent introduction of reforms to the tertiary sector by the Australian Government, with an emphasis on 'job-ready graduates', is likely to continue to aggravate the divide between a narrow vocational focus and a broader liberal education.[35]

Although the debate over the purposes of legal education would appear to be unconnected to the effects of legal education on law students, it has been argued that attempts to both make uniform and streamline the explicit curriculum have had a series of implicit or hidden effects.

A *Implicit outcomes from the explicit Australian curriculum*

The implementation of national frameworks for tertiary education, and the adoption of a single set of curriculum documents for legal education, apply an explicit curriculum. The adoption of a generally consistent set of explicit learning outcomes also suggests that law students should be subject to a broadly consistent experience. The explicit curriculum encompassed in the AQF, Priestley 11 and Threshold Learning Outcomes are, according to the Council of Australian Law Deans (CALD), intended to provide all law graduates with:

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[34] Eugene Clark, 'Australian legal education a decade after the Pearce Report: A review of McInnis,C. and Maginson,S. Australian law schools after the 1987 Pearce Report ' (1997) 8(2) *Legal Education Review* 213, 220.

[35] For an overview of the reforms, see 'Job-ready Graduates Package', *Department of Education, Skills and Employment* (Web Page, 16 October 2020) <https://www.dese.gov.au/job-ready>. For a brief summary of the effect of changes on law students see; Andrew Norton, '3 flaws in Job-Ready Graduates package will add to the turmoil in Australian higher education', *The Conversation* (Web Page, 9 October 2020) <https://theconversation.com/3-flaws-in-job-ready-graduates-package-will-add-to-the-turmoil-in-australian-higher-education-147740>; Australian Law Students' Association, 'ALSA Submission Higher Education Support (Job Ready Graduates and Supporting Regional and Remote Students) Amendment Bill 2020', *ALSA (Australian Law Students Association)* (Facebook Post, 17 September 2020) <https://www.facebook.com/ALSAonline/>.

> a comprehensive foundation in the sources of law and fundamental areas of legal knowledge, together with the development of other relevant knowledge, skills and dispositions.'[36]

Superficially, it could be assumed that law students leave law school with a generally uniform set of knowledge, skills and experiences that reflect the explicit curriculum and its learning outcomes. However, theoretical research and an emerging body of empirical research with Australian law students have started to question the extent to which legal education is achieving its objectives. Alternatively, research has begun to suggest that Australian law schools may be producing outcomes that are at odds with their objectives.[37]

The fact that law school has an effect beyond the explicit or formal curriculum should be unsurprising. The time expected to be committed to a full-time LLB or JD is substantial. Depending on the law school, law students are expected to spend up to three contact hours a week in four (or five) subjects each semester in addition to the hours they may spend studying outside class. Students' interactions and engagement with peers and educators, the designation of specific units as compulsory; the structure and sequence of individual units; and the way that content is delivered mean that they also receive implicit messages about the priority given to certain types of skills, knowledge, social and cultural values in law school and the legal profession.

[36] Kift, Israel and Field (n 3).
[37] Discussed in more detail in the sections that follow.

> Thus, they may make judgments about what really matters in law school from their incomplete perspective and perceive meaning through participation in classes and experiences whether those meanings are intended or not.[38]

One of the primary sites for discussion over inconsistent or unforeseen effects of legal education has centred around the common mission statement associated with law school—training law students to 'think like a lawyer'. According to Harvard scholar Frederick Schauer, the phrase has been adopted 'the world over'.[39] It has even made its way into popular culture through characters like Professor Kingsfield in *Paper Chase*.[40] What it means in practice is not easily defined. Nevertheless, critics have used it as a touchstone or central theme to argue that a series of implicit or hidden outcomes flow from the explicit curriculum.

One line of argument within this broader theme of 'thinking like a lawyer' focuses on Australian law schools' approach to teaching legal reasoning. Lord Coke first articulated the law's rational, rules-based approach to legal reasoning in 1628.[41] Despite the absence of any comprehensive survey of Australian legal teaching methods, a rules-based or doctrinal approach is still perceived to be the principal method of teaching the cognitive skills perceived to be required in lawyers.[42] The Threshold Learning Outcomes for the LLB adopt a similar approach to reasoning and

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[38] David Moss, 'The Hidden Curriculum of Legal Education: Toward a Holistic Model for Reform' (2013)(1) *Journal of Dispute Resolution* 20, 20-1. See also Linda McGuire and Julie Phye, 'The hidden curriculum in medical and law schools: A role for student affairs professionals' (2006)(115) *New Directions for Student Services* 59.

[39] Frederick Schauer, *Thinking like a lawyer : a new introduction to legal reasoning* (Harvard University Press, 2009) 1.

[40] 'You come in here with a skull full of mush, and if you survive, you'll leave thinking like a lawyer.'; *Paper Chase* (20th Century Fox, 1973).

[41] Edward Coke, *The First Part of the Institutes of the Laws of England: Or, A Commentary Upon Littleton : Not the Name of the Author Only, But of the Law Itself* (J & W Clarke, 19th ed, 1832) vol 1, 97b.

[42] See for example, Duncan Bentley, 'Using Structures to Teach Legal Reasoning' (1994) 5 *Legal Education Review* 129; Kate Galloway et al, 'Working the Nexus: Teaching Students to Think, Read and Problem-Solve Like a Lawyer' (2016) 26(1) *Legal Education Review* 5.

problem-solving in the explicit curriculum,[43] referring to familiar reasoning and problem-solving formulae like IRAC (Issue-Rule-Application-Conclusion) or ILAC (Issue-Law-Application-Conclusion).[44]

It has been argued that training law students to approach legal reasoning and problem-solving in a rational or analytical way excludes emotion or empathy. For example, some commentary has adopted American research on the effects of rational or mechanistic problem-solving into Australian legal education to argue that it narrows legal reasoning to the strict application of doctrine[45] and excludes consideration of emotion.[46] Alternatively, advocates of clinical legal education in Australia have sought to argue that clinics provide an environment more conducive to understanding emotion in problem-solving and fostering 'emotional intelligence' than doctrinally-focused classrooms or lecture theatres.[47] While there is little empirical evidence to support a causative link, there is limited evidence that training students to think like a lawyer has an effect.[48] The perceived division between rationality and emotion mirrors the debate in the purposes of legal education. As Coke argued, rational and analytical problem-solving is what lawyers *do*. However, as CALD and the TLOs suggest, the social and

[43] Kift, Israel and Field (n 3).
[44] Ibid 18.
[45] Kate Galloway and Peter Jones, 'Guarding Our Identities: The Dilemma of Transformation in the Legal Academy' (2014) 14 *QUT Law Review* 15; Lesley Townsley, 'Thinking like a Lawyer Ethically: Narrative Intelligence and Emotion' (2014) 24 *Legal Education Review* 69; James (n 25).
[46] See for example Colin James and Jenny Finlay-Jones, 'I Will Survive: Strategies for Improving Lawyers' Workplace Satisfaction' (2007) 15 *European Journal of Legal Education* 32; Hall, Townes O'Brien and Tang (n 1); James (n 25).
[47] See for example Ross Hyams, 'Nurturing Multiple Intelligences through Clinical Legal Education' (2011) 15 *University of Western Sydney Law Review* 80; Adrian Evans et al, *Best Practices Australian Clinical Legal Education* (Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education, 2013); Nicky McWilliam, Tracey Yeung and Annabelle Green, 'Law Students' Experiences in an Experiential Law and Research Program in Australia' (2018) 28(1) *Legal Education Review* 1.
[48] Law School Reform, *Breaking the Frozen Sea: The case for reforming legal education at the Australian National University* (ANU Law Students Society, 2010); Townes O'Brien, Tang and Hall (n 1).

emotional context within which problems arise requires a broader understanding of the community to which the law is being applied and the law's purpose.[49]

As an extension to the argument that legal education focuses on a rational, rules-based approach, it has also been accused of encouraging a perception that there is no uncertainty in the law, that there is a 'winning' argument and, consequently, an adversarial approach to problem-solving. Again, despite there being no comprehensive survey of teaching practices in Australia, American research has been adapted to argue that adversarialism is implicit in the Australian explicit curriculum.[50] It is argued that the focus on adversarial problem-solving is implicit in the selection of Priestley subjects or in the preponderance of appellate court materials used to teach them that emphasise victorious arguments.[51]

As a further extension of one or both the themes outlined above, it has also been argued that the objectivity that rational decision-making encourages invites opportunities to rationalise what might otherwise be unethical decisions. For example, perhaps as a consequence of the separation of the self from a decision that rational decision-making allows, the adoption of an adversarial role encourages the manipulation of facts and events to rationalise conduct to benefit one's clients.[52]

Running parallel to these themes is the assertion that the broader regulatory reforms to tertiary education, law school and the legal academy, which it is argued are driven by

[49] See Council of Australian Law Deans, 'Australian Law School Standards' (2020), [2.3.3]; Kift, Israel and Field (n 3).
[50] See for example Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law StudentWellbeing, Thinking Styles and the Law Curriculum' [150] (2011) 21(2) *Legal Education Review*; Townes O'Brien (n 5).
[51] Ibid.
[52] Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 3rd ed, 2018) 337. For a unique but consistent view from the United Kingdom, see Nigel Duncan, 'Addressing Emotions in Preparing Ethical Lawyers' in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education* (Routledge, 2016) 257, 259-61.

a neoliberalist agenda, have either driven or entrenched a vocational approach within Australian legal education. For example, Thornton's interviews with law school staff and administrators paint a compelling picture of the top-down effect of reforms on Australian and New Zealand, UK and Canadian law schools.[53] Interviewees refer to narrowing the scope of research and teaching to focus on 'job ready' graduates, excluding critical perspectives or niche subjects. The formal curriculum, pressed from above and below, has been compelled to prioritise specific knowledge, skills and attributes above others. The consequence is that there may be implicit messages given to students about what is considered essential and what can be ignored.[54] While many of the academics that Thornton interviews discuss the downstream effects of reform on students, many also suggest that the pressure comes from students themselves. Enthusiastic about making sure that they are employable and wary of the debt they now carry, law students have a greater interest in learning vocational skills. There is, consequently, less interest in critical legal studies or social justice.[55]

The emphasis on vocational or professional success is also thought to have longer terms effects on law students. For example, students attempting to balance academic success and clerkship experience—perceived to provide an advantage in getting a job after law school—while managing their social and family lives may be at greater risk of stress and mental illness.[56] It is argued that neoliberalism values self-reliance and

[53] Thornton (n 16); see also James (n 25); Margaret Thornton, 'Among the Ruins: Law in the Neo-Liberal Academy' (2001) 20 *Windsor Yearbook of Access to Justice* 3; Paula Baron, 'A Dangerous Cult: Response to 'the Effect of the Market on Legal Education" (2013) 23(1/2) *Legal Education Review* 273; Margaret Thornton and Lucinda Shannon, "Selling the Dream': Law School Branding and the Illusion of Choice' (2013) 23(1/2) *Legal Education Review* 249.
[54] Moss (n 38).
[55] Thornton, *Privatising the Public University: The Case of Law* (n 16).
[56] Baron (n 53). In a related context, research with law students at the University of Western Australia found that greater satisfaction with home, family and friends may be a predictor of lower levels of self-reported anxiety; Natalie Skead and Shane Rogers, 'Do law students stand apart from other university students in their quest for mental health: A comparative study on wellbeing and associated behaviours in law and psychology students' (2015) 42-43 *International Journal of Law and Psychiatry* 81.

individual success.[57] Consequently, the perception that falling short of internally or externally-imposed measures of success is a *personal* failure may aggravate law student distress. Systemic or structural disadvantages are irrelevant.[58] The cascading effect is that law students may perceive that they also need to manage their distress alone.[59]

The difficulty with these assertions about the implicit outcomes of Australian legal education is that, when examined closely, they rarely rely on empirical evidence to establish a causal link between law school and the perceived effects on law students.[60] Where they do draw on empirical data, it is commonly American and not Australian. There is an exceptionally small body of theory-led research that examines causative links between Australian legal education and its effects on its students. [61]

[57] There is an exceptionally large body of literature on neo-liberalism, its definition and its interpretation. However, these two fundamental concepts are generally consistently identified by both critics and supporters of economic liberalisation or neo-liberalist reforms. See for example; Pierre Bourdieu, 'The essence of neoliberalism', *Le Monde diplomatique* (online, 8 December 1998) <https://mondediplo.com/1998/12/08bourdieu>; Taylor C. Boas and Jordan Gans-Morse, 'Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan' (2009) 44(2) *Studies in Comparative International Development* 137-161; Baron (n ; Dieter Plehwe, 'Neoliberal Hegemony' in Simon Springer, Kean Birch and Julie MacLeavy (eds), *The Handbook of Neoliberalism* (Taylor and Francis, 2016) 121; Thornton, 'Among the Ruins: Law in the Neo-Liberal Academy' (n 53).

[58] Baron (n 53).

[59] Ibid; Christine Parker, 'The 'Moral Panic' over Psychological Wellbeing in the Legal Profession' (2014) 37 *University of New South Wales Law Review* 1103; Hilary Sommerlad, 'The commercialisation of law and the enterprising legal practitioner: continuity and change' (2011) 18(1-2) *International Journal of the Legal Profession* 73; Richard Collier, 'Wellbeing in the legal profession: reflections on recent developments (or, what do we talk about, when we talk about wellbeing?)' (2016) 23(1) *International Journal of the Legal Profession* 41, 51; Richard Collier, '‘Love Law, Love Life’: Neoliberalism, Wellbeing and Gender in the Legal Profession—The Case of Law School' (2014) 17(2) *Legal Ethics* 202.

[60] Thornton’s work (n 16) with legal academics is a notable exception, but focuses on academics’ perceptions of students, rather than on the effects as student’s perceive them.

[61] Alex Steel, 'Empirical legal education research in Australia: 2000–2016 ' in Ben Golder et al (eds), *Imperatives for Legal Education Research Then, Now and Tomorrow* (Routledge, 2020) 74.

The exception is a small but developing body of literature on women's experiences in the law and legal education. Personal accounts like that of Stewart[62] or Poole[63] of their experiences with the masculine context of law and law school provide detailed stories of the exclusionary or alienating effect on women as a result of a mismatch between what is perceived to be the rational/male approach to legal reasoning and the female/empathic approach to conflict resolution.[64] Thornton's[65] more comprehensive qualitative analysis of women in Australian law schools and the legal profession found the sense of alienation to be more widespread and women's responses to it to be diverse, ranging from acceptance to defiance. Although significant, this body of research represents the experience of a cohort within the larger body of Australian law students.

III THE PROBLEM: THE LAW-STUDENT-SIZED HOLE

While there is a substantial body of literature on what law school is thought to teach law students that is not part of the explicit curriculum, the proportion of that literature based on empirical research is much smaller—and smaller again in an Australian context. A survey of Australian empirical research in legal education identified 124 peer-reviewed publications, addressing 246 topics, between 2000 and 2016.[66] Sorted into a broad taxonomy, they represented a diverse range of studies—from law student

[62] Miranda Stewart, 'Conflict and Connection at Sydney University Law School: Twelve Women Speak of Our Legal Education Feminist Symposium' (1991) 18 *Melbourne University Law Review* 828.
[63] Melanie Poole, 'The Making of Professional Vandals: How Law Schools Degrade the Self' (Honours Thesis, Australian National University, 2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029993>.
[64] For a more comprehensive discussion of the differences see for example Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1993).
[65] Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) ch 2.
[66] Steel (n 61) Steel notes that the number of topics is greater than articles since many of the articles addressed more than one topic.

well-being to the quality of sessional teaching. They also represented a broad focus—from student attitudes to the effectiveness of specific pedagogical approaches.

Despite the breadth of research suggested, Australian legal education research has been accused of being too narrowly focused in its object or method. For example, theoretical or doctrinal approaches largely dominate. 'Non-doctrinal' research was either poorly defined or treated as distinct from law.[67] Consequently, the legal academy had little exposure to a diversity of research techniques.[68] Commenting on the current state of research on learning in practical legal training space, Greaves puts the consequence bluntly:

> A recurrent trope [in the research reviewed] involved observations about the need to remedy a dearth of empirical research on a topic—yet the paucity of empirical research suggests there were few scholars willing or able to undertake it. This is consistent with findings from earlier research showing that even those practice-based legal educators who were interested in pursuing [scholarship of learning and teaching] research struggled with institutional symbolic and material support for the activity, or felt they were not yet capable of undertaking the work due to lack of research skills.[69]

Despite the law inherently being about people and their relationships, there is little guidance on 'doing' empirical legal research. While there is a substantial amount of

[67] Committee on the Future of Tertiary Education in Australia (n 15) 65; Pearce, Campbell and Harding (n 15) vol 1 ch 9; McInnis and Marginson (n 27) 181. Social science or interdisciplinary research methods were still largely absent from Australian undergraduate law degrees in 2002; see Terry Hutchinson, 'Where to Now?: The 2002 Australasian Research Skills Training Survey' (2004) 14(2) *Legal Education Review* 63. It has been suggested the current state of research training is a mystery, there having been no detailed study of Australian law school course content; see Anthony Bradney, 'The Place of Empirical Legal Research in the Law School Curriculum' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 1025.

[68] Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32(3) *Melbourne University Law Review* 1065.

[69] Kristoffer Greaves, 'A meta-survey of scholarship of learning and teaching in practice-based legal education' in Ben Golder et al (eds), *Imperatives for Legal Education Research: Then, Now and Tomorrow* (Routledge, 2020) 107, 115.

theoretical and practical guidance on empirical social research generally, and across a range of different fields of human activity, discussions of the methodology behind empirical legal research, where it has been conducted, is slim.

Tools for qualitative and quantitative social research are generally universally applicable with some adaptations and modifications. However, the application of those tools in specific environments raises unique problems:

> [I]n virtually every discipline - law not excepted - scholars discover methodological problems that are unique to the special concerns of the area. Each new data source requires at least some adaptation of existing methods, and sometimes the development of new methods altogether.[70]

One of the reasons offered for the comparatively slim body of empirical legal study methodology is that between the mid-1930s and the beginning of the 1960s, as human activity became more complex, the amount of data available consequently became very large, and the technology did not exist to allow for any large scale empirical investigation of law or its application.[71] This explanation is seductive, but it does not sit comfortably with the parallel development of methodologies in, for example, psychology, medicine or education. The better explanation may be that the emergence of legal academics with multi-disciplinary training in law and social sciences in the 1950s alongside access to better resources prompted the application of social science methods to legal research.[72] That would be consistent with the perception that qualitative empirical research is often more closely associated with social sciences or

[70] Lee Epstein and Andrew Martin, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 902.
[71] Herbert Kritzer, 'The (Nearly) Forgotten Early Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 875.
[72] Ibid 897.

the humanities than legal research, even though lawyers will often use similar techniques in their research.[73]

While empirical research has evolved in Australian law schools,[74] despite the absence of a 'hospitable' reception,[75] its application to legal education is still considered an 'emerging area'.[76] Nevertheless, it continues to be subject to criticism where it has been applied. For example, it has been characterised as narrowly focused on the effectiveness of teaching techniques,[77] consequently giving rise to a 'cottage industry' approach.[78] Alternatively, it adopts 'teaching environments and practices' as the object of study, focussing on an apolitical study of *how* to teach, rather than *why*.[79]

The difficulty in adopting a predominantly top-down or explicit curriculum-centred approach as a means of identifying the effects of legal education is articulated succinctly by Hall, Townes O'Brien and Tang:

> While legal educators tend to focus on imparting doctrinal knowledge and professional skills, the important task of forging a professional identity occurs as an almost-accidental by-product of legal education. Educators are frequently unaware of the potent and value-

[73] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *Oxford Handbook to Empirical Legal Research* (Oxford University Press, 2010) 927.
[74] In 2002, Manderson and Mohr suggested that there was more empirical research going on in Australian law schools than had been acknowledged; see Desmond Manderson and Richard Mohr, 'From Oxymoron to Intersection: An Epidemiology of Legal Research' (2002) 6(159) *Law Text Culture*; Felicity Bell, 'Empirical research in law' (2016) 25(2) *Griffith Law Review* 262. Cownie suggests that empirical research in legal education has increased in sophistication over time in 'the best work in the area'; Fiona Cownie, 'Legal Education and the Legal Academy' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010), 854.
[75] Bradney (n 67) 1032.
[76] Peter Burdon, 'Neoliberalism in legal education research' in Ben Golder et al (eds), *Imperatives for Legal Education Research: Then, Now and Tomorrow* (Routledge, 2020) 31; Ben Golder et al, 'Legal education *as* an imperative' in Ben Golder et al (eds), *Imperatives for Legal Education Research: Then, Now and Tomorrow* (Routledge, 2020) 3.
[77] Cownie (n 74).
[78] Golder et al (n 61) 4; Burdon (n 76).
[79] Golder et al (n 61). Burdon (n 76) undertakes a meta-analysis of 117 peer-reviewed papers on legal education from two American and Australian journals, finding that they were 'weighted toward skills over critique and has little to say about the political or economic context of our work.'

> laden lessons they teach through the content, structure, context, assumptions, and pedagogy of legal education.[80]

As the summary of Australian legal education outcomes earlier in this chapter suggests, law students' experience at law school exposes them to more than the formal or explicit curriculum.

In addition to the rare use of empirical research and the reliance on American studies, Australian research has not yet reached some of the same areas of examination that appear in United States literature. For example, it is difficult to find any examination of the role of individual law teachers, rather than law schools, in producing outcomes.[81] There is very little discussion of the perceived effects of assessment, grading or mark standardisation in promoting competition among law students.[82] There would appear to be no examination of the effects or outcomes associated with relationships with peers, despite the substantial amount of time that Australian law students spend with one another.

A *Why should we care?*

Identifying implicit or hidden outcomes of the explicit curriculum, supported by empirical data, provides a new approach to understanding Australian legal education's consequences. It deepens and widens the field of inquiry beyond presumptive links between a law school-centred analysis and the effects on law students. It allows us to

[80] Hall, Townes O'Brien and Tang (n 1) 22.
[81] See for example Orin Kerr, 'The Decline of the Socratic Method at Harvard' (1999) 78 *Nebraska Law Review* 113; Lowell Bautista, 'The Socratic Method as a Pedagogical Method in Legal Education' (2014) *Faculty of Law, Humanities and the Arts - Papers* 1481; Jenny Morgan, 'The Socratic Method: Silencing Cooperation' (1989) 1 *Legal Education Review* 151.
[82] See for example Helen Stallman, 'A qualitative evaluation of perceptions of the role of competition in the success and distress of law students' (2012) 31(6) *Higher Education Research & Development* 891.

identify other influences that might reinforce, mediate or even subvert the explicit curriculum's objectives.

In and of itself, this may appear to be a small step. However, by more clearly identifying the causal links between the outcomes to flow from Australian legal education and the influences that produce them, we can begin to identify where, how and even *if* law schools can play a role in changing, interrupting or mediating them.[83] Ultimately, an investigation of those causal links leads to a better understanding of 'the effects of what we do' as law teachers and an overall improvement in the efficacy and quality of law teaching.

IV AIMS, HYPOTHESIS AND METHOD

The primary aim of this thesis is to test the assumption in Australian theory and commentary that law school is the primary or dominant cause of the hidden outcomes perceived to flow from it.

It argues that while law school may be wholly or partially the agent for *some* changes in *some* law students' thinking or identity, there is a myriad of agents beyond law school's direct control that have a similarly significant effect.

The intention is to fill the 'law-student-sized hole' in research and commentary on the hidden effects of the Australian explicit legal education curriculum. It subverts the traditional top-down approach to research by asking law students to identify *in their own words* whether they perceive a hidden curriculum in law school, what it encompasses, how it is transmitted and whether there are other influences beyond law

[83] Chapter 7 provides some examination and suggestions on how law school might play a role in mediating some of the outcomes identified in this thesis.

school's control that reinforce, mitigate or negate the effects of law school. Instead, it adopts a bottom-up approach based on learning theory that explains that no two students are identical in the way in which they make connections between their experiences at law school and the outcomes that they perceive result from those experiences.

Rather than being a lengthy student feedback survey, this thesis analyses student interviews using an attributional coding methodology to identify perceived agents and their associated outcomes to establish a causal link between the two. Coding and responses are discussed by reference to three broad themes according to a recognised taxonomy; relationships with law teachers, the explicit curriculum, and evaluation. The content of interviews is analysed using a deductive and inductive method based on recognised learning theories.

The following sections explain and justify the theory underpinning the structure of the thesis, the construction of the hypothesis and the methodologies adopted.

A *Sorting influences and outcomes: Using the 'hidden curriculum' as a taxonomy*

Since the 1960s, educational theorists, psychologists and sociologists have begun to examine the implicit or hidden outcomes of formal or explicit curriculums. The phrase 'hidden curriculum' was first used in 1968 by educational theorist and psychologist Phillip Jackson. Jackson used it to capture a range of social behaviours and social knowledge that elementary (primary) school students learned from being present and participating in school life.

Studies into the hidden curriculum have tended to focus on primary and secondary schools.[84] However, greater access to tertiary education in the late 20th century has encouraged researchers to assess how the hidden curriculum impacts and is present in college and university classrooms.[85] It has since been applied and extended to tertiary education settings[86] in a range of different contexts to describe how students develop an understanding of conduct and behaviour in areas as diverse as medicine,[87] journalism,[88] engineering[89] and law.[90]

Among the most widely cited studies of a hidden curriculum in tertiary education[91] are sociological studies of United States college students conducted by Becker, Geer and Hughes in 1968,[92] and Snyder in 1971[93] and of students at the University of Edinburgh in 1974 by Miller and Parlett.[94] Although, as noted above, there have been more recent

[84] Henry Giroux and Anthony Penna, 'Social Education in the Classroom: The Dynamics of the Hidden Curriculum' (1979) 7(1) *Theory & Research in Social Education* 21.
[85] Benson Snyder, *The Hidden Curriculum* (Alfred A Knopf, 1971); Eric Margolis et al, 'Peekaboo: Hiding and Outing the Curriculum' in Eric Margolis (ed), *The Hidden Curriculum in Higher Education* (Routledge, 2001); José Víctor Orón Semper and Maribel Blasco, 'Revealing the Hidden Curriculum in Higher Education' (2018) 37(5) *Studies in Philosophy and Education* 481.
[86] John P. Portelli, 'Exposing the hidden curriculum' (1993) 25(4) *Journal of Curriculum Studies* 343; Michael Apple and Nancy King, 'What Do Schools Teach?' (1977) 6(4) *Curriculum Inquiry* 341; Giroux and Penna (n 84); Orón Semper and Blasco (n 85); Margolis et al (n 85). It has also been suggested that online tertiary environments, particularly in professional disciplines have their own 'hidden' curriculum as a result of differences in access to technology; see Terry Anderson, 'Revealing the hidden curriculum of E-learning' in Charalambos Vrasidas and Gene Glass (eds), *Distance education and distributed learning* (Information Age Publishing, 2002) 115.
[87] McGuire and Phye (n 38).
[88] Aldridge and Evetts (n 21).
[89] See for example Idalis Villanueva et al, '"There Is Never a Break": The Hidden Curriculum of Professionalization for Engineering Faculty' (2018) 8 *Education Sciences* 157.
[90] McGuire and Phye (n 38); Moss (n 38).
[91] See the comprehensive review of sociological research in higher education in Mitchell Stevens, Elizabeth Armstrong and Richard Arum, 'Sieve, Incubator, Temple, Hub: Empirical and Theoretical Advances in the Sociology of Higher Education' (2008) 34 *Annual Review of Sociology* 127. The prevalence of the research by Becker et al, Snyder, and Miller and Parlett is discussed at 131. A more recent search of academic databases on the hidden curriculum in tertiary education tended to support the observations of the Stevens, Armstrong and Arum review: see Gordon Joughin, 'The hidden curriculum revisited: a critical review of research into the influence of summative assessment on learning'(2010) 35 *Assessment & Evaluation in Higher Education* 335, 337.
[92] Howard Becker, Blanche Geer and Everett Hughes, *Making the Grade: The Academic Side of College Life* (Taylor & Francis, 1968).
[93] Snyder (n 83).
[94] CML Miller and Malcolm Parlett, *Up to the mark: A study of the examination game* (1974, Society for Research into Higher Education).

studies of a hidden curriculum in professional education, there would appear to have been little contemporary development of a methodology or taxonomy for examining the hidden curriculum.[95] It has been argued that the longevity of works like those of Jackson, Becker and others may have been the result of a period in which research of its kind was popular and well-funded.[96] Alternatively, it is the product of editorial choices, being 'written in highly accessible styles designed for academic but non-specialist audiences'[97] with 'findings were expressed clearly, sometimes dramatically, and in ways that led the reader into the life world of contemporary students.'[98] More recently, it has been suggested (perhaps sarcastically) that studies of the hidden curriculum have been overtaken by discussion and analysis of the 'student experience'.[99]

This thesis uses Jackson's work on the hidden curriculum as a structure to make sense of the diverse connections between law school and law students and the learning outcomes that flow from them of the hidden curriculum. It uses Jackson's work as a foundation in preference to other 'ubiquitous'[100] studies for two reasons. First, there is a significant emphasis in the work of Becker et al, and Miller and Parlett, and to a lesser extent Snyder, on the role of assessment as a driver for a hidden curriculum.[101] Jackson's approach encourages examination of the broader environment. Secondly, those other studies are sometimes unclear in how they have deconstructed the range of

[95] See (n 91).
[96] Joughin (n 91), 336.
[97] Ibid.
[98] Ibid.
[99] James Atherton, 'Sending Messages: Managing the Hidden Curriculum' (Speech, International Society for the Scholarship of Teaching and Learning, 14–16 October 2005).
[100] Joughin (n 91), 336.
[101] For example, Becker et al (n 92) examine the role of the 'grade point average perspective' on student behaviours. Miller and Parlett's work is explicitly focused on examinations (n 94). Although Snyder considers the role of students' social networks in establishing behaviours, it tends to be secondary to the role of assessment.

influences that might act on students. As Parlett suggests on a review of Snyder's work, it tends to be 'impressionistic' rather than structured.[102]

This thesis's attempt to apply some structure to the analysis therefore required the more structured and less impressionistic foundation that Jackson's work offered, a foundation Jackson describes using a (slightly misleading) shorthand of power, crowds and praise.[103] The phrase 'hidden curriculum' is used to describe learning outcomes that are not incorporated in the explicit curriculum and that flow from each set of activities encompassed under the three limbs of Jackson's structure. This is explored in more detail below.

The aim is not to diagnose how Australian legal education creates a hidden curriculum or prescriptively determine a single or even dominant cause. Its objective is to uncover the diverse influences that law students perceive impact them, and the outcomes they perceive are produced based on their independent and spontaneous attributions. These objectives require the deliberate adoption of particular methods and the exclusion of others.

The empirical data that supports this research is drawn from 65 face-to-face,[104] semi-structured interviews, collected over nine months, with students enrolled in the Bachelor of Laws and Juris Doctor programs at the ANU and the University of Canberra. Almost all interviews were recorded.[105] The transcription or notes were

[102] Michael Parlett, 'Undergraduate teaching observed' (1969) 223 *Nature* 1102, 1102. Interestingly, in response to the impressionistic nature of earlier research, Parlett adopted what he referred to as a social anthropological approach that involved embedding himself in undergraduate classrooms and observing students in addition to interviews and questionnaires (ibid).
[103] Jackson's shorthand is explained in more detail below.
[104] From May 2020, when the campuses of both universities were closed as a result of COVID-19, most interviews were conducted using online video-conferencing platforms like Zoom.
[105] A small number of participants declined recording. The author consequently made notes of the interview on which the coding was based.

coded using attributional coding based on the Leeds Attributional Coding System (LACS).[106] The LACS allows for the identification of causes and their agents, and outcomes and their targets.

Each of these aspects is discussed further below.

B *What does 'hidden' mean? Adopting a phenomenological method*

According to Jackson, some outcomes were 'hidden' because they were not part of the explicit or formal school curriculum.[107] At the same time as Jackson, American sociologist Robert Dreeben had begun to publish his work on how schools implicitly teach social norms through the structure of the school day.[108] British sociologists had also begun to adopt a similar focus in the early 1970s.[109]

The concept of a 'hidden' curriculum has been used in some research to denote learning outcomes with an intentional objective of replicating economic or social structures. That process of replication might happen in one of two ways. The explicit curriculum's content is thought to prioritise certain forms of knowledge disconnected from the 'real-life' of some students. As a result, students who performed poorly were more likely to be assessed as inherently being less capable as assessed against a dominant theory of knowledge.[110] Alternatively, education (alongside family and

[106] Anthony Munton et al, *Attributions in Action: A Practical Approach to Coding Qualitative Data* (John Wiley & Sons, 1999).
[107] Jackson (n 7).
[108] Robert Dreeben, 'The Contribution of Schooling to the Learning of Norms' (1967) 37(2) *Harvard Educational Review* 211. Dreeben went on to publish additional studies of the structure of schools and how they contribute to teaching social norms from a sociological perspective, writing at about the same time as Jackson, but in parallel to one another; see Robert Dreeben, *On what is Learned in School* (Addison-Wesley Publishing Company, 1968); Rebecca Barr and Robert Dreeben, *How Schools Work* (University of Chicago Press, 1983).
[109] Geoff Whitty, *Sociology and School Knowledge* (Taylor and Francis, 2003) 8; Michael Young, *Knowledge and Control: New Directions for the Sociology of Education* (Collier-Macmillan, 1971).
[110] This approach was, in the 1970s, characterised as the 'new sociology of education', originating from the work of English sociologist Michael Young; see Young (n 5). The 'new sociology' argued that English schools' curriculum was the creation of middle-class culture. Working class students were,

other social networks) serves to embed existing social and cultural structures in students that are:

> permanent manners of being, seeing, acting and thinking, or a system of dispositions that are long-lasting (rather than permanent) schemes or schemata or structures of perception, conception or action.[111]

For Bourdieu and Passeron, academic success depends on the extent to which a student 'acculturated' to manners and dispositions in an academic setting[112] and is closely associated with students' success in adopting the linguistic capabilities to succeed at school. By the time students reach university, those practices or habits have become established, and the academic 'gap' between students has largely begun to disappear.[113]

The difference between a top-down hidden curriculum in schools, assumed by Dreeben, and bottom-up acculturation leading to academic success might appear fine. However, the former tends to focus on the active exclusion of some students from a dominant social structure. The latter focuses on how students are acculturated into that

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therefore, placed at an immediate disadvantage (see Young; Nell Keddie, *Tinker, tailor ... : the myth of cultural deprivation* (Penguin Books, 1978).) Among its strongest advocates were sociologists and educators working in music education, John Shepherd and Graham Vulliamy. They argued that the focus on 'serious' music to the exclusion of 'popular' music (like rock or jazz) created a classification of 'good music' considered to be a superior form. Failure to engage or succeed in music education focused on 'good music' led to students being perceived as inherently or personally unsuccessful, rather than being the outcome of systemic faults or disadvantages; see for example John Shepherd, 'Media, social process and music' in John Shepherd et al (eds), *Whose Music?: Sociology of Musical Languages* (Taylor & Francis, 2017) 1; Graham Vulliamy and John Shepherd, 'The Application of a Critical Sociology to Music Education' (1984) 1(3) *British Journal of Music Education* 247.

[111] Pierre Bourdieu, 'Habitus' in Emma Rooksby and Jean Hillier (eds), *Habitus: A Sense of Place* (Taylor & Francis, 2017) 43, 43-4.

[112] Pierre Bourdieu and Jean-Claude Passeron, *Reproduction in Society, Education and Culture* (London, 1990) 71.

[113] Ibid 74-6. For Bourdieu and Passeron, this progressive acculturation also has benefits for the university. They argue that education becomes more efficient when there is a smaller difference between students' experience and the 'dispositions' to which the university is attempting to expose them: 'The specific productivity of all pedagogic work other than the pedagogic work accomplished by the family is a function of the distance between the habitus it tends to inculcate (in this context, scholarly mastery of scholarly language) and the habitus inculcated by all previous forms of pedagogic work'; ibid 72.

structure. Both, however, adopt a 'macro-sociology' perspective.[114] That is, schools are just one site within a much larger system of cultural replication. For example, neo-Marxist educational sociologists argue that the replication of social structure is the *purpose* of contemporary education to benefit a capitalist society.[115] From this perspective, 'hidden' is interpreted as the past participle of 'to hide', or a synonym for 'concealed'. The principal line of inquiry then becomes 'by whom?' or 'for whose benefit?'.[116]

Research into implicit or hidden messages within education has often focused on how education replicates community-wide socio-economic structures. Micro-level or phenomenological studies are, it is argued, naïve, too narrowly-focused or ignorant of this larger picture:

> Phenomenological description incline us to forget that there *are* objective institutions and structures 'out there' that have power, can control our lives and our very perceptions.[117] (emphasis in the original)

For lawyers steeped in a tradition of liability, fault and accountability, the suggestion they are imposing a social or cultural structure, either at the macro-level or even as part of a profession, might attract a sceptical or even hostile response. Even discussing this research with some legal academics has prompted responses like 'I have never

[114] Olive Banks, 'The Sociology of Education 1952–82' in James Arthur, Jon Davison and Richard Pring (eds), *Education Matters : 60 Years of the British Journal of Educational Studies* (Taylor & Francis Group, 2012) 109, 113-4.
[115] See for example Rachel Sharp, Anthony Green and Jacqueline Lewis, *Education and Social Control* (Routledge & Kegan Paul, 1975); Geoff Whitty and Michael Young, *Society, state and schooling : readings on the possibilities for radical education* (Falmer Press, 1977).
[116] See John Shepherd et al, *Whose Music?: Sociology of Musical Languages* (Taylor & Francis, 2017).
[117] Michael Apple, 'Power and School Knowledge' (1977) 3(1) *Review of Education, Pedagogy, and Cultural Studies* 26, 43.

done that', 'I would never do that' or 'I have never heard anyone [student or law teacher] say that'.

This thesis does not reject the idea that the curriculum transmits cultural and social structures. That idea forms an essential aspect of both the method and the data. However, this thesis uses 'hidden' in the same way as Jackson; as a synonym for 'implicit' 'undiscovered' or 'unintentional'. It adopts the perspective that to determine what *is* hidden, we need to ask students themselves what *they* perceive their experience at law school has revealed to them. It assumes that there *are* practices, beliefs and attributes transmitted to law students. Rather than examining for whose benefit that happens, it attempts to test the 'what' and 'how' of that process of transmission or replication based on students' attributions. Therefore, it is primarily phenomenological,[118] acknowledging the accusations of naivety or ignorance that phenomenological research may attract.

1 *What does 'curriculum' mean?*

Jackson does not use 'curriculum' in its older sense as a prescribed course or program of study.[119] He also does not use it in a broad sense encompassing all of the environments in which a student might be exposed to influences that contribute to their overall development, including those outside formal educational settings.[120] Instead,

[118] Bernard Weiner, the original proponent of an attributional approach to understanding cause and effect, for example, notes that 'the study of attribution is part of a phenomenological pursuit'. This is discussed in further detail below; Bernard Weiner, *An Attributional Theory of Motivation and Emotion* (Springer, 1986) 22.

[119] For a discussion of the historical origins of the use of 'curriculum' in educational settings to denote a program of learning, see David Hamilton, *Towards a Theory of Schooling* (Routledge, 2014) ch 2.

[120] A distinction is sometimes drawn between curricular and extra-curricular activities. However, there is a body of research that examines the extent to which schools' sponsorship of activities that occur outside a formal educational setting might form part of, or contribute to, their achievement against curriculum objectives. Arguably, the involvement of schools in extra-mural activities raises difficult definitional questions about what is curricular, extra-curricular and non-curricular with which this thesis does not engage; see for example Boaz Shulruf, 'Do extra-curricular activities in schools improve

he uses it to encompass a menu of learning outcomes that can draw a causal link from the role of teachers in classroom settings; the formal outcomes expressed in the explicit curriculum and how they are scheduled or administered; and assessment and feedback practices. That is also how it is used in this thesis.

2 *What does 'hidden curriculum' mean?*

Drawing these two elements together, one can define a hidden curriculum therefore for the purposes of this thesis as unintentional learning outcomes caused by law teachers; the formal outcomes expressed in the explicit curriculum; and formal and informal evaluation. This is described in more detail below, and applied to the hidden curriculum perceived to exist in legal education in chapter 2.

C *Jackson's Taxonomy of the Hidden Curriculum*

As noted earlier, discussion of the outcomes and causes of Australian legal education tends to adopt a focus on top-down influences, tracing their origins in the explicit curriculum, structure of legal education or structural reform. It has begun to engage with an implicit or hidden curriculum. However, it assumes law school itself plays an influential role albeit acknowledging that there may be a diverse array of influences that contribute to an individual's response, behaviour or percpetions.[121] As Jackson, Dreeben and others have emphasised, other factors may play an important role. Jackson grouped influences under three broad headings: power, crowds and praise.[122] Regrettably, in driving for a catchphrase on which to hang the hidden curriculum, all

educational outcomes? A critical review and meta-analysis of the literature' (2010) 56 *International Review of Education* 591.

[121] Hall, Townes O'Brien and Tang (n 1)

[122] Jackson (n 7); Giroux and Penna (n 84).

three terms are potentially misleading and do not accurately describe what Jackson is referring to.

Jackson uses 'power' to discuss the outcomes associated with the authoritative role of the classroom teacher in their interaction with students and students' behaviour in response.[123] Jackson's description of power overlaps with concepts of pedagogy insofar as it describes the teaching method an individual educator might adopt. However, his analysis is much broader. It encompasses every interaction between teachers and students regardless of whether they are recognised forms of pedagogy or not. For the purposes of this thesis, Jackson's nomenclature of 'power' is avoided. However, his grouping of interactions between individual law teachers and students is used to analyse one limb of the hidden curriculum. Instead, 'law teacher' is used in both discussion and coding.

Jackson adopted 'crowds' to describe the outcomes associated with the overarching curriculum structures within which teachers and students interact, including the selection of subjects, their content and the order in which they are taught.[124] In many respects, 'crowds' is a poor or misleading label for the influences that Jackson encompasses within it. Superficially, it might appear to mean the role of communal pressure on the individual student. However, what would appear to be meant is 'crowd *control*', more specifically, how the structure of the explicit curriculum implicitly controls the choices and actions of crowds.[125] Jackson's focus was on the effects of both the content of, and the silences in, the explicit curriculum and the implicit messages they created about the value of particular types of knowledge. In this thesis

[123] Jackson (n 7).
[124] Ibid 10.
[125] Ibid.

'law school' is used instead of 'crowds' to capture those aspects of the hidden curriculum not attributed to law teachers or evaluation. This approach, and the potential challenges it creates, is discussed in much greater detail in chapters 2 and 4.

'Praise' captured the behaviours and values associated with evaluation. Jackson's use of 'praise' is also potentially misleading. He uses it as shorthand to generally refer to evaluation and assessment, not solely to positive affirmation or feedback. His discussion of evaluation extends beyond formal assessment to the myriad of ways students are engaged in judging themselves and one another influenced by the priorities assigned to knowledge, conduct, and attitudes.[126] Perhaps inconsistently with his catchphrase, he rejects praise as the primary explanation of student learning. For example, Jackson identifies a spectrum of student behaviours ranging from active compliance to total disengagement in response to evaluation.[127] He also acknowledges the existence of cheating (academic misconduct) as being yet another behaviour prompted by evaluation and an 'effort to avoid censure or to win unwarranted praise.'[128]

Jackson's model of evaluation also extends to evaluation by peers of one another in educational settings. Jackson argues that, although not directly within the teacher's control, evaluation by peers in a classroom is part of the hidden curriculum and produces hidden outcomes.

[126] Ibid 21. For Dreeben, Jackson's 'crowds' and the adoption of social behaviours resulted from the point of application of, and adaptation to, Jackson's other categories; Dreeben, 'The Contribution of Schooling to the Learning of Norms' (n 108). Dreeben adopted a different taxonomy, referring instead to 'independence' and 'achievement'.
[127] Jackson (n 7).
[128] Ibid 28.

> Learning how to live in a classroom involves … learning how to witness, and occasionally participate in, the evaluation of others … [S]tudents also have to accustom themselves to viewing the strengths and weaknesses of their fellow students.[129]

Jackson does not define evaluation by students of one another. However, what Jackson incorporates in his discussion is evaluation akin to informal judgment or a sizing up. It also extends to competition with other students insofar as students evaluate their own performance against peers. For Jackson, the evaluation or judgment of peers prompts different responses in individual students, similar to the concept of peer influence or peer pressure.

This thesis avoids the use of 'praise', using instead 'evaluation' to refer to the expanded frame of reference adopted by Jackson himself, that is, to refer to informal and formal evaluation and assessment.

Jackson's model shares several elements in common with Foucault, although never acknowledged by Jackson. For example, the classroom teacher in Jackson's construction does use familiar tools of examination, punishment (though reprimand) and reward.[130] They perform the role of Foucault's teacher-judge to determine the limits of acceptable or normal behaviour in the classroom.[131] They evaluate, assess and stream students according to ability or deviation from the norm.[132] The explicit curriculum (Jackson's 'crowds') bears similarities with Foucault's construction of the controls on time that replicate forms of power. However, as observed elsewhere,

[129] Ibid 24.
[130] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, tr Alan Sheridan (Penguin Books, 2019) 186.
[131] Ibid 304; Gerald Turkel, 'Michael Foucault: Law, Power, and Knowledge' (1990) 17 *Journal of Law and Society* 170, 186.
[132] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Pantheon Books, 1980) 39; Stephen Ball, *Foucault, Power, and Education* (Routledge, 2012) 100.

Foucault's observations on power in education, while relevant, are spread widely across his work.[133] There is also generally a lack of empirical application of Foucault's construction of power to the classroom environment.[134] While mindful of Foucault's relevance to the classroom and educational relationships, the focus of this thesis is not on constructing a Foucauldian model of legal education. Instead, this thesis adopts Jackson's observational, phenomenological groupings as a taxonomy through which to analyse students' reactions.

Jackson sorts phenomena under the three headings, but they are not independent. Each aspect can work to reinforce another. For example, a student's compliance with a teacher's instructions is likely to result in a positive evaluation. A positive evaluation will have a reciprocal effect, increasing the likelihood of the student repeating the compliant behaviour. Similarly, a student's mastery of explicit learning outcomes is also likely to result in positive evaluation. Reciprocally, a positive evaluation will reinforce the perception that the knowledge or behaviour prioritised by the learning outcomes is inherently 'right' or valuable.

D *The relevance of learning theory: Behaviourism and constructivism*

Underpinning these analyses of implicit or hidden messages is the concept of learning and knowledge as something social and transactional. Students are not passive recipients and interpreters of their educational experiences but are instead active participants who engage with and respond to those experiences. At the same time, the

[133] Roger Deacon, 'Michel Foucault on education: a preliminary theoretical overview' (2006) 26 *South African Journal of Education* 177.
[134] Deacon (n 133). One notable exception is Gore's observational studies of power and pedagogy in teaching and teacher training; see Jennifer Gore, 'On the Continuity of Power Relations in Pedagogy' (1995) 5 *International Studies in Sociology of Education* 165; Jennifer Gore, 'Disciplining Bodies: On the Continuity of Power Relations in Pedagogy' in Thomas Popkewitz and Marie Brennan (eds), *Foucault's Challenge: Discourse, Knowledge, and Power in Education* (Teachers College, 1997) 170.

source of their experience is not entirely restricted to classroom teachers. Jackson also highlights that students' responses to teachers, the explicit curriculum, and evaluation are diverse and often driven by personal characteristics[135] and influences outside the classroom.[136]

This concept is not new in educational theory. Jackson's model is based on existing learning theories, although he rarely explicitly incorporates them, focussing instead on how pedagogy could be used to improve student engagement.[137] Philosophers and theorists, including some familiar to legal theorists like John Locke and Aristotle,[138] had argued that we learn principally through working with others. In that context, 'others' might be teachers, but they might also be parents, family, friends or peers. Over the following centuries, a theory of knowledge and how we come to know was the subject of ongoing philosophical debate. Without the methods or technologies to peer inside the human brain at work, it is not surprising that epistemology stayed at a theoretical level. However, as noted before, the late 19th and early 20th centuries saw a resurgence of interest in how formal education—either in schools or professional settings—might promote a collective social identity or foster specific attributes. From the late 19th century, the emergent discipline of psychology began to examine how the

[135] For example, Jackson refers to surveys that suggest a correlation between academic success and enthusiasm for school, although questions their overall reliability; Jackson (n 7) ch 2 III.
[136] Ibid.
[137] See Jackson (n 7) ch 3.
[138] Aristotle and Locke's principal works on learning were *De Anima* (Aristotle, (n 6)) and *Some Thoughts on Education* respectively; John Locke, *Some Thoughts on Education* (Dover Publications, 2007). However, both Aristotle and Locke wrote on knowledge more generally which is either reflected in, or influenced, their writing on education and learning; see for example John Sisko, 'On Separating the Intellect from the Body: Aristotle's De Anima III.4, 429a20-b5' (1999) 81 *Archiv für Geschichte der Philosophie* 249; John M Rist, 'Notes on Aristotle De Anima 3.5' (1966) 61(1) *Classical Philology* 8; Caleb Murray Cohoe, 'Nous in Aristotle's De Anima' (2014) 9(9) *Philosophy Compass* 594-604; John Locke, *An Essay on Human Understanding* (Hayes & Zell Publishers, 1860); John Adamson, 'The Educational Writings of John Locke' in John Adamson (ed), *Some Thoughts Concerning Education* (Dover Publications, 2007) 12; Bird T. Baldwin, 'John Locke's Contributions to Education' (1913) 21(2) *The Sewanee Review* 177; Peter Gibbon, 'John Locke: An Education Progressive Ahead of His Time?', *Education Week* (Blog, 4 August 2015) <https://www.edweek.org/ew/articles/2015/08/05/john-locke-an-education-progressive-ahead-of.html>.

individual's relationship with their environment affected learning. Over 60 years, two broad schools of educational psychology—both claiming roots within empiricism and scientific method—began to emerge. One, commonly referred to as behaviourism, focused on how external stimulus prompted a response in the individual.[139] The other, commonly referred to as constructivism, emphasised the mediating effects of a range of influences like the individual's prior experience, context and long-term impact on an individual's response.[140] Both influenced and were influenced by broader debates on the purpose of formal education.[141]

The relevance of learning theory to this thesis is twofold. First, it fills the theoretical gaps in Jackson's taxonomy. Jackson makes repeated references to the relevance of external influences in affecting students' responses to teachers, the explicit curriculum and evaluation. However, he never explains how or why they might have the effect for which he contends.

Secondly, it provides both a deductive and inductive tool to be applied to interview data. It provides a deductive tool insofar as, for example, behaviourism argues that in analysing interview data, one should expect that stimulus and reward might drive student behaviours. Alternatively, constructivism would suggest that one should

[139] Among the most widely cited and influential behaviourists in educational psychology is BF Skinner who argued that all behaviours were a response to external stimulus. Between 1954 and 1965, Skinner published a series of articles in which he explicitly set out to apply his behavioural analysis to instructional design; The articles were subsequently collected into a single volume, originally published in 1968; Burrhus Skinner, *Technology of Teaching* (BF Skinner Foundation, 2001). Skinner's research will be discussed in more detail in Chapter 2.

[140] Among the earliest and influential writers on the interaction between experience and education was one of James' own students, John Dewey. For Dewey, a pedagogy that places emphasis on the one-way transmission of facts from teacher to student ignores students' personal history, experience and relationships; John Dewey, *Experience and Education* (MacMillan Publishing, 1963); John Dewey, *The Child and the Curriculum* (Cosimo Inc, 2010). Dewey's research, and that of other 'constructivist' will be discussed in more detail in Chapter 2.

[141] See Robert Levin, 'The Debate over Schooling: Influences of Dewey and Thorndike' (1991) 68(2) *Childhood Education* 71; David Berliner, 'The 100-year journey of educational psychology: From interest, to disdain, to respect for practice' in Thomas Fagan and Gary Vandenbos (eds), *Exploring applied psychology: Origins and critical analyses.* (American Psychological Association, 1993) 37.

expect specific external agents (e.g., family, peers or employers) might interrupt that binary relationship. It also provides an inductive tool that might assist in understanding the relevance of particular agents identified in interviews and how they might cause particular outcomes.

E *Quantitative or qualitative?*

As noted above, learning theory attempts to explore and explain the unseen connections within a student's mind as they are exposed to stimuli or experiences. Those responses are unique to individual students. No two minds or sets of experiences are identical. Consequently, the individuality of student experiences compels a choice between qualitative and quantitative methods. As these two approaches have developed, the distinction has evolved from mere differences in method to differences in epistemology.

Quantitative studies generally adopt, as their starting point, that there is an objective or normative fact. Collecting sample data in large volumes means the fact can be reliably tested and either proved or disproved free of any researcher bias.[142] Quantitative data collection has become closely associated with the belief that the researcher must be independent of the research being conducted to be reliable and robust. Put another way, quantitative empirical research is based on the belief that for data to be reliable, it must be based on independently observable facts gathered by an impartial and independent researcher.[143] This research approach dictates that data is

[142] Alan Bryman, *Social Research Methods* (Oxford University Press, 5th ed, 2016); Bagele Chilisa, *Indigenous Research Methodologies* (SAGE Publications, 2011); Webley (n 73).
[143] Bryman (n 142); Webley (n 73).

collected through self-directed survey instruments and carefully recorded observational data that allow the researcher to stand apart from the research subjects.

Qualitative studies tend to be more closely associated with 'grounded theory'; that is, the data itself leads to research outcomes.[144] Relevant to this thesis, qualitative studies have become closely associated with research in which there is an attempt to identify how respondents make meaning from a set of circumstances.[145]

As outlined earlier, the thesis relies on learning theories and the hidden curriculum that focus on how students construct their own understanding. Those theories assume the accumulation of knowledge is active, transactional and transformative on the learner. The learner hears and responds to the information provided to them based on their own experiences and personal makeup. Some potential outcomes and causes can be predicted based on existing literature about Australian legal education. However, developing a survey instrument that attempts to capture every potential cause and outcome is challenging. Existing research acknowledges the diversity of potential influences. There would appear to be no consistent body of empirical research on the links between those influences and outcomes. Students' construction of their understanding is also individualised. Selecting a subset of elements for a large scale, quantitative survey based on the researcher's own determination of what is essential paradoxically reintroduces the bias that quantitative research attempts to exclude.

In those circumstances, adopting a quantitative method is inconsistent with the underlying theoretical approach on which the thesis relies.

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[144] Kathy Charmaz, *Constructing Grounded Theory* (SAGE Publications, 2014); Barney G Glaser and Anselm L Strauss, *Discovery of Grounded Theory: Strategies for Qualitative Research* (Routledge, 1967).

[145] See the discussion of attributional theory and coding below.

F *Deductive or inductive?*

The distinction is sometimes drawn between deductive approaches (i.e., developing a theory and testing it to confirm or deny it) and inductive approaches (i.e., creating a thesis from collected data). However, there is generally no 'bright line' between the methods, and there are no determinative rules to guide the application of one method over another. A research tool fashioned to confirm a theory might throw up unexpected data, prompting the researcher to refine or redevelop their approach. For example, Bryman argues that it might be more correct to say that both approaches are part of a broader development, testing, refinement, and re-testing process.[146]

There is also substantial overlap between research fields grounded in one school or another, with many proposed definitions of various methods subject to ongoing revision and contest. It has been suggested that the continuing self-reflection and examination of qualitative methods could be divided into as many as seven major 'phases' or 'waves' from the 1930s onwards.[147]

Even within these sub-categories of the method, there are then divergences in their application. For example, during the 1960s, Glaser and Strauss proposed a way of collecting and analysing qualitative data that they christened 'grounded theory'. The label is self-explanatory: developing a theory should be 'grounded' in the data. Rather than developing and then attempting to fit theory to data, with the consequent concerns about bias in interpretation, theory should be 'discovered … from data systematically

[146] Bryman (n 142).
[147] Michael Patton, *Qualitative Research & Evaluation Methods* (SAGE Publications, 3rd ed, 2002) 79.

obtained from social research'.[148] In effect, grounded theory is an inductive theory by another name.

A summary of grounded theory method published in 2016 claimed that there are four different approaches and an emerging fifth approach. [149] There would also appear to have been a schism within adherents to the theory, with those arguing that for research to be authentically 'grounded theory', it had to apply methods developed by Glaser. In contrast, others claimed that it had to use techniques developed by Strauss.

As noted earlier, there is a body of literature on the perceived implicit or hidden outcomes of Australian legal education from which we can predict what law students might say. Educational theory and research also provide guidance from which we might predict law students' responses when asked why or how they arrived at a conclusion. We can begin to build a deductive 'map' of how law students are affected by their experience at law school and from where those influences, ideas or effects come.[150] However, the absence of consistent empirical data means that our map may be incomplete. We need to preserve some space within the research for unexpected outcomes or inductive reasoning.

G *Attributional methods and coding*

In order to understand the causal links between specific agents and outcomes, this thesis adapts and applies an attributional method of coding text. Attributional theory is based on the premise that behaviour results from the interaction between the individual and their environment. In the 1930s, American psychologist Kurt Levin

[148] Glaser and Strauss (n 144). See also Barney G Glaser, *Basics of grounded theory analysis: Emergence vs forcing* (Sociology Press, 1992).
[149] Juliet Corbin, 'Analytic Journey' in Janice Morse et al (eds), *Developing Grounded Theory: The Second Generation* (Taylor & Francis, 2nd ed, 2016) 35.
[150] This is discussed in more detail in Chapter 2.

argued that existing approaches to psychology had acknowledged the concept of intervening, dynamic but unseen forces between external stimuli and individuals' responses.[151] However, attempts to describe it had generally been vague, encompassing ideas like tendencies, drive, libido or intelligence.[152] The connection between stimulus and response could not be considered linear but 'hodological'—there being many different paths to an outcome within a defined space.[153]

Levin's work and other psychologists that followed focused on attempts to map and measure the forces involved principally in terms of motivation and goal attainment in experimental environments.[154] However, in the 1960s, Bernard Weiner argued that the development of 'motivation theory' was problematic. The potential causal links were too numerous,[155] and, consequently, the characteristics of some causes could not be reliably determined.[156] The theory also tended to ignore emotional and historical influences in an individual's motivation. He proposed instead that, since the origins of motivation were primarily internal, a more accurate assessment might be formed by merely asking individuals to attribute the links between outcome and cause.[157]

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[151] Kurt Levin, *The conceptual representation and the measurement of psychological forces* (Duke University Press, 1938).
[152] Ibid 12.
[153] Ibid 210.
[154] See for example Clark Hull who developed a mathematical formula and postulates for 'drive' primarily based on experiments involving food rewards; Clark Hull, *Principles of behavior* (Appleton Century Crofts 1943); Clark Hull, 'Behavior postulates and corollaries--1949' (1950) 57(3) *Psychological Review* 173. Judson Brown, building on the work of Levin and Hull, developed an approach to experimental design that attempted to assign names and values to 'drive' to allow for the variation and recording of different motivations within distinct settings; Judson Brown, *The Motivation of Behaviour* (McGraw Hill, 1961). Still later, John Atkinson sought to include time into the process of identifying motivation and drive by measuring the latency between the application of stimulus and goal-achievement to differentiate the variable strength of motivation; John Atkinson, 'Personality Dynamics' (1960) 11(1) *Annual Review of Psychology* 255; John Atkinson and David Birch, *The dynamics of action* (John Wiley & Sons, 1970); John Atkinson, *A Theory of Achievement Motivation* (John Wiley & Sons, 1971); David Birch, John Atkinson and Kenneth Bongort, 'Cognitive control of action' in Bernard Weiner (ed), *Cognitive views of human motivation* (Academic Press, 1975) 252.
[155] Weiner (n 118).
[156] Bernard Weiner, 'The Legacy of an Attribution Approach to Motivation and Emotion: A No-Crisis Zone' (2018) 4(1) *Motivation Science* 4, 6.
[157] Weiner, *An Attributional Theory of Motivation and Emotion* (n 118).

Weiner constructed a model for tracing attributional links based on identifying key elements of what he referred to as 'causal dimensions'.[158] The model served both a diagnostic and predictive purpose. It allowed for an understanding of how or why an individual behaved in a particular manner. By either reproducing the links or manipulating them, performance might be sustained, improved or extinguished.[159]

Attributional models have been adopted and applied in psychology, often in the diagnosis and cognitive approaches to the treatment of depression. [160] However, it has also been adopted and applied extensively,[161] including in educational contexts.[162]

One approach to collecting attributional data proposed by Weiner was through coding text, speech or interview data to identify causal links. While not proposing a coding methodology, he suggested some broad parameters to guide a method's design. The

[158] Weiner, 'The Legacy of an Attribution Approach to Motivation and Emotion: A No-Crisis Zone' (n 156); Weiner, *An Attributional Theory of Motivation and Emotion* (n 118).

[159] Weiner, *An Attributional Theory of Motivation and Emotion* (n 118); David Cook and Anthony Artino Jr, 'Motivation to learn: an overview of contemporary theories' (2016) 50(10) *Medical Education* 997; Sandra Graham and Xiaochen Chen, 'Attribution Theories', *Oxford Research Encyclopedia of Education* (Electronic Article, 30 June 2020) <https://oxfordre.com/education/view/10.1093/acrefore/9780190264093.001.0001/acrefore-9780190264093-e-892>.

[160] Lyn Abramson, Martin Seligman and John Teasdale, 'Learned Helplessness in Humans: Critique and Reformulation' (1978) 87 *Journal of Abnormal Psychology* 49; Christopher Peterson et al, 'The Attributional Style Questionnaire' (1982) 6(3) *Cognitive Therapy and Research* 287. In an attempt to predict how an individual's depression might develop or be treated, a larger team that included the original proponents of the re-framed model constructed an attributional survey tool called the Attributional Style Questionnaire (ASQ). The ASQ invites respondents to imagine themselves in different hypothetical situations and asks them to select a likely outcome and identify the cause; Adrian Furnham, Valda Sadka and Chris Brewin, 'The development of an occupational attributional style questionnaire' (1992) 13(1) *Journal of Organizational Behavior* 27. The approach has been the subject of critical analysis as a tool for diagnosing depression; James Coyne and Ian Gotlib, 'The Role of Cognition in Depression: A Critical Appraisal' (1983) 94 *Psychological Bulletin* 472; Mick Power and Tim Dalgleish, *Cognition and Emotion: From order to disorder* (Psychology Press, 3rd ed, 2015).

[161] In their review of attribution theory, Graham and Taylor noted that there had been more than 3,000 articles published applying attribution and causal analysis in a diverse field of activities between 1982 and 2014; Sandra Graham and April Taylor, 'Attribution theory and motivation in school' in Kathryn Wentzel and David Miele (eds), *Handbook of motivation at school* (Routledge, 2nd ed, 2016) 23.

[162] For a review of the development of attribution theory in education, see Sandra van der Putten, 'A Trace of Motivational Theory in Education through Attribution Theory, Self-Worth Theories and Self-Determination Theory' (2017) 10(1) *SFU Educational Review*; Carol Dweck, 'Reflections on the Legacy of Attribution Theory' (2018) 4(1) *Motivation Science* 17; Graham and Taylor (n 161).

following discussion describes how those parameters have been adopted and applied by this research.

1 *Selection of domain*

Consistent with his critique of approaches that attempted to reduce motivation or drive to selective elements, Weiner argued that a 'virtually infinite number of causal ascriptions are available in memory'.[163] However, the prevalence of particular ascriptions was higher in similar motivational domains.[164]

Therefore, the design of this research explicitly circumscribed the domain within which participants were asked to assign attributions. Promotional material published to invite students to participate in an interview made the law school and legal education domain explicit. Students were told that the research, and the interview in which they were invited to participate, would focus on 'how law school affects your approach to problem-solving, working with others and life after law school'.[165]

2 *Spontaneous attribution*

Weiner warned that limiting the number of causal ascriptions had the effect of weakening the research's strength.[166] Care also needed to be taken to avoid introducing the idea of causality to avoid an individual ascribing casualty based on the researcher's external cues.[167] Consequently, in interviews, care was taken to avoid any suggestion

[163] Weiner, *An Attributional Theory of Motivation and Emotion* (n 118) 42.
[164] Ibid.
[165] This is the text used in posters and in-class Powerpoint slides promoting the research.
[166] For example, the development of personality tests in the 1970s based on multiple choice questions which forced a choice on a respondents were criticised on the basis that they failed to take into account the potential variability of responses and whether they might be internal to the respondent or externally focused; see Harold Kelley and John Michela, 'Attribution Theory and Research' (1980) 31(1) *Annual Review of Psychology* 457.
[167] For example, if a respondent's observations of their own behaviour are weak, there is a danger of a researcher substituting their own interpretations or cues to construct causal links; see Daryl Bem, 'Self-Perception Theory' in Leonard Berkowitz (ed), *Advances in Experimental Social Psychology* (Academic

by the interviewer of potential outcomes or causes. Participants were allowed to make spontaneous links freely and independently, albeit within the domain's scope. Open questions were used in preference to closed questions presenting a limited choice of options to the greatest extent possible.

Studies of attributional research have also found that limiting the time for response may discourage individuals from making personal attributions and encourage a focus on external causes.[168] In this research, participants were told that interviews would not last more than an hour to plan around their other commitments and emphasise that the interview was neither a marathon nor an interrogation. However, acknowledging the risk of placing arbitrary time limits on responses, no pressure was placed on participants to limit their answers.

3 *Designing the questions*

A semi-structured interview model using a core set of five open-ended questions was adopted based on the parameters discussed above. The questions focused on aspects of the hidden curriculum assumed in research and commentary to be attributable to law school. The aspects on which this research focuses and that guided the questions' design are discussed in more detail in Chapter 2.

1. Why did you choose to study law? Do you still feel the same way about your decision? Why?
2. When you started law school, did you want to be a lawyer? Why/why not? Has your intention changed? Why? /Why not?

Press, 1972) vol 6, 1; Michael Enzle and Donald Schopflocher, 'Instigation of Attribution Processes by Attributional Questions' (1978) 4(4) *Personality and Social Psychology Bulletin* 595.

[168] Michael Enzle, Michael Harvey and Ranald Hansen, 'Time Pressure and Causal Attributions' (1977) 3(4) *Personality and Social Psychology Bulletin* 624.

3. Do you think there are things that make it harder for students to get into law school, or discourage them from continuing? (If yes) Can you give me an example?
4. Do you think the way you relate to others has changed since you started studying law? Why? Why not? Can you give me an example?
5. Do you think how you resolve disputes has changed since you started studying law? Why? Can you give me an example?

Question 1 was intentionally designed as an 'ice breaker' to allow participants to discuss a familiar question, become comfortable with the interview and the interviewer, and orient them to an attributional mindset. However, the follow-up question encompassed in question 1 was valuable for gathering information about experiences and perceptions. Questions 2-5 were designed to focus on aspects of the assumed hidden curriculum. For example, it was hoped that question 2 might open a discussion about experiences that encouraged or discouraged the participant from entering the legal profession. Question 4 was intentionally broad to capture relationships with friends, peers, law teachers or even family, based on research that suggests that students develop an increasingly combative or adversarial approach through law school.

As discussed earlier, both these questions and any follow-up questions asked in interviews consistently used 'why', 'what' or 'how' without offering specific or explicit choices of cause or outcome. Occasionally the interviewer asked 'was it …' using the outcomes and causes that the participant had identified to clarify a response.

4 *Coding*

Although Weiner did not propose a coding method, existing coding methods are available to support attributional analysis. The transcripts of interviews undertaken for this thesis were coded using the Leeds Attributional Coding System (LACS).[169]

The LACS was developed in the 1980s by a group of family counsellors to provide a systematic method of coding 'public attributions' (i.e., those made in interviews, writing or other text).[170] It was designed to explore the various elements within causal belief. Although applied initially to clinical settings, it has been applied in several different physical health, mental health and occupational and educational settings.[171] It is grounded in attributional theory. It adopts the cause/outcome framework proposed by Weiner and used in other attributional studies. However, the LACS method also extends the method to include the agent (i.e., the source of the cause) and the target (i.e., on whom the cause acted).

The advantage of the LACS method is that it allows for a systematic way of organising and analysing interview data to identify, in this case, learning outcomes (whether explicit or hidden), to what or who they attribute the cause of that outcome, and whom they perceive the cause affected. The number of codes across all interviews can be counted to provide a simple frequency analysis and identify patterns or themes. Items coded in the same way across multiple interviews can also be recalled and grouped for closer textual analysis.

Attributional statements were identified in each participant's interview. For this thesis, the LACS definition of attribution was adopted:

[169] Munton et al (n 106).
[170] Peter Stratton et al, *Leeds attributional coding system (LACS) manual* (Leeds Family Therapy and Research Centre, 1988).
[171] For a review of the range of settings and examples see Munton et al (n 106).

> Any statement in which an outcome is indicated as having happened or being present, because of some identified event or condition. [172]

Each attribution was coded to identify what participants perceived as the outcome and its cause. Each cause was coded individually to identify whom the participant perceived as the agent and the target. Statements that were not attributional were not coded.

In the coding process, there was no attempt made to differentiate in the coding between outcomes that were consistent with the explicit curriculum and those that might be implicit or hidden. As noted above, the principal purpose of the coding process was to identify attributions and the agents associated with them. However, as noted above, the benefit of coding is to be able to group similar items together to allow for a closer textual analysis. Consequently, outcomes were assessed once coding was completed to identify what the outcome was perceived to be and whether it was explicit or hidden. This second stage analysis was adopted for two reasons. First, it was consistent with the deductive and inductive method adopted in the thesis. Adopting a prescriptive list of hidden outcomes to establish a strict deductive method was considered dangerous insofar as it potentially a rigid lens through which to view outcomes, consequently overriding any previously unrevealed hidden outcomes or forcing them into pre-existing categories. Secondly, as coding attempts to engage with assigning codes to more complex or nuanced outcomes, it becomes increasingly difficult to consistently apply across interviews and between coders since a clear and consistent definition needs to be developed and applied. Take, for example, the following attribution:

[172] Ibid 136.

> But I would also say that law school does make you think because of the whole IRAC thing. The thing is, if you keep doing this for four years, it just becomes like a real habit thing again. You just take it with you everywhere now.
>
> Male, 21, LLB, Canberra Law School

The participant refers to an outcome; the adoption of an IRAC method to problem-solving. However, does one code this as rational decision-making, doctrinal decision-making or emotionless decision-making? There is considerable difficulty in adopting a consistent code to describe the outcome. The statement needs to be considered in the context of the interview as a whole. This closer consideration was undertaken in the second stage once all outcomes were able to be gathered together.

At the beginning of the coding process, and based on an overview of the literature, a small number of codes for agents were pre-determined. However, as coding progressed, participants began to identify additional agents and targets which did not fit the pre-determined list. Consistent with the deductive-inductive approach adopted, additional codes were added. For example, different codes were assigned to 'law school' and 'teacher' based on participants' responses. Some participants identified the agent as law school generally, while others identified specific law teachers. Separate codes were also assigned to 'friends-law' and 'peers-law' as agents and targets based again on participants' responses. Some identified influences derived from close associates but identified others as coming from law students who were not friends, students that participants disliked, or unnamed law students with whom they had interacted.

The codebook, including the definitions of codes, is Appendix A.

(a) Example of the coding process

The following provides a simple example of the coding process.

> I think knowing when to accept a difference of opinion. I don't know if that's a law school thing or just a growing up thing.
>
> Female, 24, Undergraduate, ANU

The statement constitutes an **attribution** as defined by the LACS method. The participant perceives there to have been a change in her relationship to other people (‘knowing when to accept a difference of opinion’), that is, an **outcome**.

The participant perceives two **causes**, although she expresses doubt over which has a more significant effect (‘law school’ and ‘growing up thing’). Consequently, both causes are coded separately. Consistent with the emphasis on spontaneous attributions, the participant is not pressed to decide or reject one cause.

Each cause is coded for the **agent**. An agent is a person, group, thing or entity identified in the attribution as responsible for the cause. The participant perceives two causes so each is coded separately for the agent. Consequently, one (‘law school’) is coded for ‘agent/law school’ and one (‘growing up thing’) for ‘agent/participant’. A code for ‘participant’ as an agent was applied across all interviews where the participant perceived that the origin of the cause was something personal. For example, that may be a personal characteristic, attribute or value that the participant did not attribute to another cause or agent.

The attribution is also coded to identify the **target.** A target is the person, group, thing or entity identified in the outcome on which the cause acted. In the example it is coded

as ‘target/participant’ because she refers to the outcome as being her understanding of when to accept a difference of opinion.

(b) Some elements of attributional coding are not used in this thesis

The LACS method allows for coding both cause and outcome for what Weiner called causal dimensions, including how long the participant perceived the cause would last or whether they could control the outcome. The extended coding for causal dimension requires the coder to interpret the attribution in context, allowing for some comparison, for example, between the influential power of different causes and outcomes. However, this research focuses on participants’ perceptions of the outcome, its cause, and influences external to law school. It does not attempt to assign measures of influence to determine an influence's depth or breadth.

(c) Summary of the data collection process

The LACS creators found that, generally, interview participants identified one to two attributions per minute.[173] Interviews for this thesis lasted, on average, 43 minutes. The interview length depended on the participant, although none lasted for more than one hour. From 65 interviews, 2082 codable attributions were identified, with an average of 28 attributions for each interview. This is slightly less than expected, although the average number of attributions is affected by the small number of unrecorded interviews where the interviewer’s notes were coded.

The range of attributions was significant (30). One possible issue is that as experience with the coding process increased, so did the number of attributions identified. However, early transcriptions were reviewed again once all coding was completed to ensure consistency. There was no correlation between the order in which transcriptions

[173] Ibid 35.

were coded, and an increase in attributions identified, suggesting that the coder's experience did not affect the data. The number of attributions appears to depend on the participant. Some participants were able to make attributions easily, whereas others did not demonstrate the same ease.

A random sample was also coded by a second coder unconnected with the project to assess interrater reliability of the methodology and robustness of results. Second coding produced a Cohen kappa statistic of 0.59 representing 'moderate agreement' (falling just below 0.61 or 'substantial agreement').[174] Noting that coding for this thesis relies on coder interpretation of language in context rather than a binary assessment, and that coding is not being relied on for determinative or strict diagnostic conclusions, the result indicates an acceptable level of reliability.

The coding process provided a substantial body of data to which subsequent codes could be applied.

5 *Weaknesses in the method*

This thesis acknowledges that there has been some criticism of allowing spontaneous attributions or 'free association' model. The reliance on observational data can introduce elements of researcher bias in which the research selects which attributional

[174] Cohen's kappa is used to determine intercoder reliability since it is considered more reliable than simple percentage agreement. The advantage of the Cohen kappa is that is calculation includes a weighting to discount the number of agreed coding outcomes that might be attributable simply to chance; see for example Alan Cantor, 'Sample-size calculations for Cohen's kappa' (1996) 1 *Psychological Methods* 150.

elements are essential.[175] However, it has been suggested that the concern is principally one of semantics.[176]

This thesis identifies specific domains from the existing literature and potential transmission methods of a hidden curriculum based on educational theory.[177] Consequently, there is a risk that those elements have been prioritised over others in coding. However, the deductive/inductive focus discussed earlier has been retained to avoid omitting other significant information to the greatest extent possible. As this thesis will reveal in later chapters, consistent patterns in participants' answers suggest some conformance with existing theories and some divergent elements.

There is also some evidence to suggest that a participant's responses may change depending on whether they are asked to make attributions on their own through, for example, a survey instrument, compared to when they believe they are being watched or judged.[178] In order to manage this risk, participants in interviews conducted for this thesis were consistently reminded that they were de-identified in all recorded data.[179] The interviewer's tone and manner were consistent throughout interviews and between participants to the greatest extent possible. However, participants' perceptions of the interviewer are not controllable.

The objective of attributional theory and coding is to identify individual causal links. It carries an inherent risk that the individuality of responses may also make

[175] Lee Ross, 'The Intuitive Psychologist And His Shortcomings: Distortions in the Attribution Process' in Leonard Berkowitz (ed), *Advances in Experimental Social Psychology* (Academic Press, 1977) vol 10, 173; Edward Jones et al, *Attribution: Perceiving the Causes of Behavior* (General Learning Press, 1972).
[176] Kelley and Michela (n 166).
[177] This is discussed in further detail in Chapter 2.
[178] See for example Ryan Carlson et al, 'Motivated misremembering of selfish decisions' (2020) 11(1) *Nature Communications* 2100.
[179] This is discussed in further detail below.

generalising results difficult where there are significant differences in responses.[180] As noted above, the careful selection of domains and theoretical foundation means a greater degree of consistency in approaching interviews and interview data. Adopting a consistent coding method, or codebook, applied to all interviews ensures that the coding approach is consistent. As this thesis will explain in later chapters, participants' answers are consistent. There are some distinctions between participants. However, that is to be expected, given this thesis adopts the perspective that knowledge is individually constructed.

The LACS has faced criticism insofar as it has provided a basis for 'systemic' or 'manualised' approaches to particularly family therapy that overlooks cognitive techniques in psychology.[181] However, it has also been cited as having benefits. It is straightforward in its application. It is also valuable in providing evidence of outcomes, primarily whether particular influences produce expected effects.[182]

The purpose of coding is to identify common themes or patterns within research data.[183] The developed and applied codes are 'researcher-generated' to 'symbolize (sic) or translate data'.[184] Consequently, there is an inherent bias in generating and applying codes based on the researcher's role, objective, and identity. The 'constructs, concepts, language, models and theories that structured the study' will influence

[180] Kelley and Michela (n 166).
[181] See for example Stephen Allison et al, 'Extended Dialogue About Significant Developments: Manualising Systemic Family Therapy: The Leeds Manual' (2002) 23(3) *Australian and New Zealand Journal of Family Therapy* 153; Glenn Larner, 'Family therapy and the politics of evidence' (2004) 26(1) *Journal of Family Therapy* 17; Bronwen Davies, 'Critique of Manualized Therapies: Systemic Family Therapy Manual for Adolescent Self-Harm' (2019) 32(4) *Systemic Practice and Action Research* 403.
[182] Allison et al (n 181).
[183] Johnny Saldana, *The Coding Manual for Qualitative Researchers* (Sage Publications Ltd, 3rd ed, 2016) 3.
[184] W. Paul Vogt et al, *Selecting the Right Analyses for Your Data: Quantitative, Qualitative, and Mixed Methods* (Guildford Press, 2014) 13.

decisions about how and what to code as will the researcher's 'subjectivities, personalities predispositions, [and] quirks'. There is a potential weakness in reducing participants' voices to a common set of ideas or 'an essence'.[185]

While this is a risk and potential weakness in any coding method, synthesising volumes of research data into common themes of patterns do contribute to them becoming 'more trustworthy evidence for our findings … demonstrat[ing] habits, salience and importance.'[186] To the extent that the coding method is transparent, potential biases can be identified and addressed.

H *Selecting the cohort*

Students at the ANU and the University of Canberra were invited to participate in an interview through a series of social media advertisements, posters, a website[187] and mentions in lectures by academic staff in the law schools at both universities.[188]

No reward or incentive for participation was offered. All the students who agreed to be interviewed did so entirely voluntarily. The rationale for adopting that approach, and some of the potential weaknesses it presents to the research, are discussed further below.

As noted earlier, completing the LLB or the JD meets the academic requirements for admission as a lawyer. Both the ANU and the University of Canberra offer the JD alongside the LLB program. Insofar as the research's object was to identify the effect

[185] Saldana (n 183).
[186] Ibid 5.
[187] Andrew Henderson, 'Researching the effect of law school's implicit curriculum on law students' perceptions of life after law school', *Can we talk about law school?* (Web Page, 2019) <https://implicitcurriculumresearch.wordpress.com>.
[188] Human Ethics Committee approvals were sought and obtained at both the ANU (Protocol 2019/593) and University of Canberra (HREC – 2218).

of a hidden curriculum in law school on law students, extending the research to encompass JD students was a logical step. It was also influenced by the ethical framework that applies to research into teaching and learning, which is discussed further in relation to inviting participants below.

One of the primary motivations behind the choice of law schools that needs to be acknowledged is that the ANU and the University of Canberra are the only two Australian law schools with a physical presence near the author's home. The author has also worked with academic staff at both law schools and used existing professional networks to promote the research.

However, there are also some distinct differences between the two law schools that, at the time the interviews were planned, suggested there could be different influences on students at each law school and opportunities to compare the two.

1 *Origins, history and ethos*

The ANU is a member of 'the Group of Eight', a self-identified group of 'Australia's leading universities' that includes some of Australia's oldest universities.[189] The University of Canberra began as the Canberra College of Advanced Education in 1967, becoming a university in 1990 as part of a series of reforms to tertiary education.[190]

The ANU LLB program first appeared in 1960 when the Faculty of Law at the Canberra University College with the School of General Studies at the ANU amalgamated. The ANU has produced many eminent jurists over the past 60 years,

[189] 'About the Go8', *The Group of Eight* (Web Page) <https://go8.edu.au/about/the-go8>.
[190] John Sharpham, 'The Context for New Directions' in John Sharpham and Grant Harman (eds), *Australia's Future Universities* (University of New England Press, 1997) 1.

including members of the judiciary at all levels, leading members of the independent bar and profession, and internationally renowned legal researchers.[191]

The Canberra Law School opened in 1993 as part of the 'third wave' of law schools following reforms to tertiary education in the 1990s.[192] It is not an independent school, being part of the Faculty of Business, Government and Law.

The ANU Law School is currently ranked significantly higher than the University of Canberra in international and national university rankings. The ANU Law School is ranked fifty-fourth internationally and second in Australia by the 2022 Times Higher Education World University Rankings. The University of Canberra is ranked sixteenth in the world as a 'Young University' by Times Higher Education and second in Australia.[193] The 2021 QS University Rankings list the ANU Law School seventeenth internationally and fourth in Australia while the University of Canberra was unranked in law.[194]

The ANU Law School is a comparatively more prestigious law school based on international rankings. However, the Quality Indicators for Learning and Teaching (QILT) student experience survey outcomes suggest that law students at both law schools have the same positive experience. Across 2018 and 2019, 81.5% of undergraduate law students at the ANU indicated that they had a positive experience

[191] 'Our History', *ANU College of Law* (Web Page) <https://law.anu.edu.au/about-us/our-history>.
[192] David Barker, 'An Avalanche of Law Schools: 1989 to 2013' (2013) 6 *Journal of the Australasian Law Teachers Association* 1, 12.
[193] Times Higher Education, 'World University Rankings 2022', *World University Rankings* (Web Page) <https://www.timeshighereducation.com/world-university-rankings>.
[194] QS Top Universities, 'QS World University Rankings by Subject 2021', *QS World University Rankings* (Web Page, 2021) <https://www.topuniversities.com/university-rankings/university-subject-rankings/2021/law-legal-studies>.

overall compared to 81.2% of University of Canberra students.[195] The national average in the same period for all Australian law schools was 81.5%.

Both law schools also performed well in the same survey in terms of skills development (87.9% positive at ANU; 90.3% positive at UC) and experience of teaching (84.1% positive at ANU; 88% positive at UC)—both well above the national averages.[196] However, only 57.5% of ANU law students and 53.7% of UC law students positively rated their engagement with their respective law schools. QILT includes the extent to which respondents felt they 'belonged' to measure self-reported engagement.[197]

Relevant to this thesis, the ANU College of Law is a separate school on the ANU campus. It emphasises a balance between liberal university education and a vocational focus in preparing graduates for legal practice. For example, the ANU College of Law included a statement from its Faculty Handbook in its submission to the Pearce Committee in the 1980s, emphasising that legal education should engage with the relationship between law and society. Graduates should be able to understand the role of law in society.[198] More recently, the College describes its LLB program as:

> providing [students] with a competitive edge on graduation, and a solid foundation for postgraduate study. Through the degree, [students will] gain in-depth knowledge about the role and function of law, and develop advanced understanding about how law influences and impacts almost every aspect of our world … Alongside the fundamental concepts of

[195] 'Compared', *Quality Indicators in Learning and Teaching* (Web Page) <https://www.qilt.edu.au/qilt-surveys/student-experience>. The sample size at both law schools is similar: 308 ANU respondents and 282 University of Canberra respondents.
[196] Ibid.
[197] Ibid.
[198] Pearce, Campbell and Harding (n 15) vol 1 [1.110].

> law and legal systems, the ANU LLBHons (sic) will encourage [students] to consider how the law does and doesn't work, and what can be done to improve and enhance it.[199]

In comparison to the ANU's program description, the Canberra Law School appears to emphasise preparation for legal practice:

> Our highly practical approach is a marked strength, and continues to set our law degree apart from the rest. With small class sizes, a purpose-built eMoot Court and highly qualified and experienced staff, [students will] be encouraged to develop [their] advocacy abilities and legal skills while understanding their connection to legal history and law in context … The course will ground [students'] education in the latest legal innovations, develop your communication and interpersonal skills and allow [students] to become agile, ethical and effective legal professional[s].[200]

The inclusion of law schools within larger faculties, especially business studies, has raised questions and concerns about the extent to which they can withstand pressures to adopt a greater vocational focus in their curriculum.[201]

The number of students enrolled in both LLB and JD programs at the ANU is greater than the Canberra Law School, and the difference in the number of students enrolled in the LLB programs at the two schools has increased significantly since 2014.

Students enrolled in LLB, LLB (Hons) and JD by year[202]

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[199] 'Bachelor of Laws (Honours)', *ANU College of Law* (Web Page) 'Program Description' <https://lawschool.anu.edu.au/study/study-programs/bachelor-laws-honours-llbhons>.
[200] 'Bachelor of Laws', *University of Canberra* (Web Page) <https://www.canberra.edu.au/coursesandunits/uc-courses/course?course_cd=SCB101>.
[201] Thornton, *Privatising the Public University: The Case of Law* (n 16) 18.
[202] Data provided to the author by the Department of Education, Skills and Employment, 6 November 2020. The data refers to 'non-commencing' students i.e., students with an existing enrolment in the reporting year. The data excludes students enrolled in LLM programs.

University	Program	Year					
		2014	*2015*	*2016*	*2017*	*2018*	*2019*
ANU	LLB	597	1038	1404	1603	1547	1435
	JD	113	133	151	214	237	208
Canberra Law School	LLB	451	443	398	377	401	310
	JD	64	67	65	58	39	43

The number of women enrolled in the LLB programs at both schools has consistently been greater than men since 2014.

Students enrolled in LLB and LLB (Hons) programs by gender

University	Gender	Year					
		2014	*2015*	*2016*	*2017*	*2018*	*2019*
ANU	Female	325	620	832	962	924	878
	Male	272	418	572	641	623	557
Canberra Law School	Female	261	268	240	234	255	195
	Male	190	175	158	143	146	115

The number of women enrolled in the JD program at the ANU, but not the Canberra Law School, has also been consistently greater than men.

Students enrolled in JD programs by gender

University	Gender	Year					
		2014	*2015*	*2016*	*2017*	*2018*	*2019*
ANU	Female	66	69	83	130	141	130
	Male	47	64	68	84	96	78
Canberra Law School	Female	32	37	34	33	19	24
	Male	32	30	31	25	20	19

2 *Inviting participants*

There are social sensitivities in talking to students about their teaching and learning experiences, especially when the findings may be published. Law students may be concerned that their participation, or their decision not to participate, may affect their relationship with friends, peers, tutors, law teachers or even potential employers.

In an Australian context, teaching and learning research is governed by both university ethics frameworks, national ethics frameworks[203] and a specific set of national guidelines governing teaching and learning research ('the SoTL Manual').[204] In particular, the SoTL Manual guides researchers dealing with the types of concerns law students might express about participation and its effect on their relationships with others.

All law students enrolled in the LLB and JD programs at the two universities were invited to participate. As discussed earlier, inviting students in the JD program to participate was a logical extension given the proposed research. As the interviews progressed, it also became apparent that there was valuable comparative data being collected from undergraduate LLB students and postgraduate JD students.

Students were neither invited individually nor directly to avoid the perception that some students have been individually approached or that some students have been approached to the exclusion of others, thereby preventing any perception of coercion.

As noted above, there was no reward or incentive offered to students to participate based on the types of concerns outlined in the SoTL Manual in working with students. While the SoTL Manual does not discourage offering financial incentives, it

[203] National Health and Medical Research Council, Australian Research Council and Universities Australia, *National Statement on Ethical Conduct in Human Research* (National Health and Medical Research Council, 2007).
[204] Australasian Human Research Ethics Consultancy Services, *Scholarship of Teaching and Learning Human Research Ethics Resource Manual* (Commonwealth Office of Learning and Teaching, 2016).

encourages researchers to consider the extent to which it might encourage students to participate who may have otherwise been unwilling to take the risk.[205]

The risk of students being prompted to disclose distressing information, or being critical of peers or academics, in the planned questions was low. However, it was likely that students might choose to share information that would increase that risk. Consequently, the level of the potential risk to a student outweighed the risk of providing any form of direct reward for participation that might encourage a student to agree to be interviewed who would have otherwise not considered participating. The analysis of the research data will show that assessment was not entirely fanciful. Once a level of trust was established, many students did begin to share their personal reflections on peers, academic staff, and employers—both positive and negative.

Any information that could identify students specifically was also removed from any research material. Students could elect whether their interview was recorded and whether some essential information was associated with their interview (age, gender, university, program, year of commencement). Students were also told that their consent to include the quote would be explicitly sought from them where they may be quoted in any published research. As a result, all the quotes that appear in this research, and any identifying information associated with them, appear with the consent of the student.

Beyond externally prescribed requirements for working with students, managing their concerns, and demonstrating a framework in place to protect their identity was also a key element in developing students' trust. As Robert Granfield found with his work with law students at Harvard, building that level of trust is critical to gaining an honest

[205] Ibid [3.11].

insight into their experiences.[206] For many students, the author was almost entirely a stranger. Agreeing to speak to a stranger for an hour about law school experiences must have been a slightly daunting prospect for some students. The author took the opportunity to reinforce the protections in place with each student before the interview started. In that context, many of the ethical concerns highlighted by the SoTL manual significantly benefitted the content of interviews.

3 *Characteristics of participants*

Seventy-five students enrolled in the LLB and JD programs at the ANU and University of Canberra responded to the invitation to participate. However, only 65 participated in an interview. Consequently, the interviews with participants represent a very small sample (3%) of all students enrolled in LLB and JD programs at the two universities in 2019 (n=1996).

Twenty-nine participants (45%) were enrolled at ANU while 36 (55%) were enrolled at the Canberra Law School. Consequently, Canberra Law School students were overrepresented among participants.

The table below provides a more detailed breakdown of the gender,[207] program and age group of participants by number and as a percentage of all respondents.

[206] Robert Granfield, *Making Elite Lawyers* (Routledge, 1992).
[207] Participants were invited to elect the gender with which they identified. No participants self-identified as other than male or female.

Details of participants: Gender, program, and age

Attribute		**University**				**Total**	
		ANU		**UC**			**%**
Male		7	11%	18	28%	25	38%
Female		22	34%	18	28%	40	62%
LLB		19	29%	31	47%	50	77%
JD		10	15%	5	8%	15	23%
Age group	**18-21**	4	6%	6	9%	10	15%
	22-25	16	25%	14	22%	30	46%
	26-29	2	3%	3	5%	5	8%
	30-33	0	0%	5	8%	5	8%
	34-37	3	5%	4	6%	7	11%
	38-40	2	3%	0	0%	2	3%
	41+	2	3%	4	6%	6	9%
Year(s) at law school	**1**	3	5%	4	6%	7	11%
	2	5	8%	8	12%	13	20%
	3	4	6%	7	11%	11	17%
	4	5	8%	11	17%	16	25%
	5	7	11%	5	8%	12	18%
	6 or more	4	6%	2	3%	6	9%

The following table provides information on when participants commenced their studies.

Details of participants: Year of commencement

	08	**09**	**10**	**11**	**12**	**13**	**14**	**15**	**16**	**17**	**18**	**19**	**Total**
ANU	0	0	0	1	0	0	3	7	5	4	5	4	29
UC	1	0	0	0	0	1	0	5	11	7	8	3	36

One important observation about the characteristics of participants was no correlation between students who might be described as first, second, penultimate or final year students and their ages. Among participants, years spent at law school ranged from

one year through to 12 years[208] with an average of three and a half years. The largest proportion of participants were 24 years old, but their law school enrolment ranged from one year to seven years.

Although the participants represented only a small sample of all students at both law schools, across both law schools and programs, 61% of all enrolled students in 2019 were female, compared to 62% of participants.

Students enrolled in JD programs were overrepresented among participants. Only 12% of all students at both law schools are enrolled in JD programs compared to 23% of participants.

V SUMMARY

The LLB and JD satisfy the academic requirements for admission to legal practice in Australia. Since 1992 there has been a national syllabus for Australian legal education and, since 2013, a national curriculum. However, adopting a nationally consistent framework has failed to resolve competing objectives in legal education. The absence of clarity of objectives, alongside reforms to the Australian tertiary education sector, have also begun to attract academic attention in the context of how successfully legal education is meeting its objectives and whether it is producing outcomes entirely opposed to those objectives. One avenue of inquiry has been whether there is an implicit or 'hidden' curriculum within Australian legal education that may be producing those outcomes.

The focus of much of the existing analysis and research has been law school-centred, assuming a top-down or dominant role for legal education in the production of

[208] The participant had changed degrees and continued to study part time.

outcomes for law students. However, there is very little empirical evidence establishing those causal links or interrogating whether other influences might affect law students' experiences.

To explore this gap, this thesis seeks to gather evidence of the extent to which Australian legal education influences law students in the ways suggested or assumed. It does so by working directly with law students themselves, based on pedagogical and sociological theories of learning that argue that knowledge is individually created through students' exposure to and exchange with educational settings and other experiences.

An attributional method and coding system have been applied to establish causal links between law students' experiences and perceptions to analyse the data collected through interviews with law students systematically.

The ethical guidelines associated with research with students and the temporal limits of higher degree research programs meant that the number of participants represented only a small sample of all students enrolled at the ANU and Canberra Law School. Some student characteristics are also overrepresented. Consequently, care needs to be taken in interpreting interview data. Nevertheless, the research presented in this thesis would appear to be the first attempt to conduct research of this type. It is hoped that it may also provide a precedent for more comprehensive research to be conducted in the future.

The following chapter examines existing approaches to how we learn in order to identify potential transmission paths. It then examines what is explicit in Australian legal education, and what is thought to be implicit, to explain the hypotheses on which the approach to interview and data interpretation was based.

CHAPTER 2 – LEGAL EDUCATION'S 'HIDDEN CURRICULUM'

I INTRODUCTION

The purpose of this chapter is to establish in more detail the theoretical lens through which law students' responses in interviews can be analysed and to predicatively 'map' what one might expect to see in those responses based on both existing research and commentary and learning theory.

The chapter begins to construct by deduction what might be hidden in Australian law schools. The simplest way to begin to examine what might be hidden in Australian law schools is to identify outcomes that are part of the explicit curriculum. As noted in chapter 1 and discussed in more detail below, Australian law schools must comply with a series of external regulations that are published and form the explicit curriculum's core. Learning outcomes based on the explicit curriculum cannot be part of a hidden curriculum.

The chapter then explains two theories of learning—behaviourism and constructivism—before applying them to legal education. The purpose is twofold. First, some existing commentary would appear to implicitly assume stimulus-response or behaviourism to be the dominant pedagogy in Australian law schools. The binary relationship of stimulus-response may explain some of the hidden outcomes assumed to flow from legal education. That binary model is, however, incomplete. By looking at the roles of agents and causes other than law school, one can better understand the diversity in students' responses. Secondly, by applying both theories to existing commentary on legal education, one can begin to predict the outcomes that might expect to see in students' responses in interviews.

II WHAT IS EXPLICIT?

Australian law schools must meet the requirements of the *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ('the *TEQSA Act*'),[1] and the associated *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) ('the Threshold Standards').[2] The Threshold Standards provide that for a course to be accredited, 'the learning outcomes for the qualification are consistent with the level classification for that qualification in the Australian Qualifications Framework' (AQF).[3] The AQF 'defines the relative complexity and depth of achievement and the autonomy required of graduates to demonstrate that achievement'[4] in ascending order of complexity (from Level 1 to Level 10) by reference to purpose, knowledge, skills, application and volume of learning.

This external regulatory structure establishes a high-level set of learning outcomes applicable to all tertiary studies. To add detail specific to law degrees, the Australian Government's Office for Learning and Teaching drafted Teaching and Learning Outcomes for LLB programs (TLOs) in 2010. The TLOs are endorsed by the Council of Australian Law Deans (CALD), the Law Admissions Consultative Committee (LACC), and all Australian law schools.[5]

The TLOs provide a more detailed set of requirements for LLB courses. As the TLOs themselves explain, they constitute 'in the language of the AQF … what a Bachelor of

[1] *Tertiary Education Quality and Standards Agency Act 2011* (Cth) Pt 3 Div 1 ('*TEQSA Act*').
[2] *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) ('*Threshold Standards*').
[3] Ibid.
[4] Australian Qualifications Framework Council, *Australian Qualifications Framework* (Australian Qualifications Framework Council, 2nd ed, 2013) 11.
[5] Sally Kift, Mark Israel and Rachel Field, *Learning and Teaching Academic Standards Project - Bachelor of Laws - Learning and Teaching Academic Standards Statement* (Department of Education, Employment and Workplace Relations, 2010). That includes the two universities the subject of this research—the Australian National University and the University of Canberra.

Laws graduate is expected "to know, understand and be able to do as a result of learning"'.[6]

The TLOs encompass six broad areas that address knowledge, skills and attributes that a graduate is expected to demonstrate. They are set out in Table 1 below since we will refer back to them later in the chapter.

Teaching and Learning Outcomes for the LLB and their descriptors.

TLO 1: Knowledge • fundamental areas of legal knowledge, the Australian legal system, and underlying principles and concepts, including international and comparative contexts, • the broader contexts within which legal issues arise, and • the principles and values of justice and of ethical practice in lawyers' roles.
TLO 2: Ethics and professional responsibility • an understanding of approaches to ethical decision-making, • an ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts, • an ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community, and • a developing ability to exercise professional judgement.
TLO 3: Thinking skills • identify and articulate legal issues, • apply legal reasoning and research to generate appropriate responses to legal issues, • engage in critical analysis and make a reasoned choice amongst alternatives, and • think creatively in approaching legal issues and generating appropriate responses.
TLO 4: Research skills The intellectual and practical skills needed to identify, research, evaluate and synthesise relevant factual, legal and policy issues.
TLO 5: Communication and collaboration

[6] Ibid 1.

• communicate in ways that are effective, appropriate and persuasive for legal and non-legal audiences, and • collaborate effectively.
TLO 6: Self-management • learn and work independently, and • reflect on and assess their own capabilities and performance, and make use of feedback as appropriate, to support personal and professional development.

The TLOs do not explicitly address the substantive areas of law that an LLB program must cover. In the commentary to the TLOs, the authors instead note that TLO 1:

> encompass[es] the current 'prescribed academic areas of knowledge' known as the 'Priestley 11' and to be flexible enough to allow for subsequent developments as negotiated between CALD and the law admitting authorities.[7]

The Priestley 11 refers to the 11 prescribed areas of knowledge recommended by the LACC, also known as 'the Priestley Committee'.[8] Rather than being a curriculum, the Priestley 11 has more in common with a syllabus, listing topics to be covered in a law degree. The LACC recently published a revised Priestley 11 intended to commence on 1 January 2021 but now 'indefinitely postponed'.[9] The revised version explicitly refers to the Priestley 11 as 'fundamental areas of legal knowledge' in TLO 1.[10]

[7] Ibid 12.

[8] Law Admissions Consultative Committee, *Background Paper on Admission Requirements* (Law Council of Australia, 2010); Law Admissions Consultative Committee, 'Prescribed academic areas of knowledge', (December 2016). The Australian Council of Chief Justices appoints the LACC. It includes representatives of admitting authorities, the CALD, the Australasian Professional Legal Education Council and the Law Council of Australia. It is not a committee of the Council of Chief Justices but instead makes recommendations to the Council.

[9] Law Admissions Consultative Committee, 'Law Admissions Consultative Committee (LACC)', *Legal Services Council* (Web Page, 1 February 2021) <https://www.legalservicescouncil.org.au/Pages/about-us/law-admissions-consultative-committee.aspx>.

[10] Law Admissions Consultative Committee, 'Prescribed areas of knowledge', (October 2019). The use of 'fundamental areas of legal knowledge' in the revised Priestley 11 is intentional, being the phrase used in TLO1(a). The revised Priestley 11 has also become less prescriptive in its listing of sub-topics and includes an expectation that students will be exposed to 'theoretical concepts', context and the

The Priestley 11 has been subject to criticism on the basis that it either places insufficient focus on what lawyers do, or that it excludes critical perspectives.[11] For this research, the value or merit of the Priestley 11 is not relevant. However, it provides part of an explicit statement of what a law student is expected to learn.

The CALD *Australian Law School Standards* provide that law schools are expected to translate the TLOs and the Priestley 11 into their own curriculum design and outcomes and to disseminate that information to students.[12] The *Standards* do not provide how that translation should occur. Although there would appear to be no expectation as to the form that dissemination should take in the *Standards*,[13] the two universities the subject of this research publish unit outlines for each unit offered to students.

Arguably, these unit outlines constitute part of the explicit curriculum, at least at the individual university level. However, they are not considered in this research. First, the focus of the thesis is on the law schools as a whole, rather than individual unit offerings. Consequently, drilling down to the expectations of individual units is not consistent with the broader focus of this thesis. Secondly, the way in which respondents were recruited to participate in interviews did not restrict the cohort to a specific unit or units.[14] Unit outlines are only applicable to the unit to which they are

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relationship between the law and Aboriginal and Torres Strait Islander Peoples within subject areas. However, the relationship between the law and Aboriginal and Torres Strait Islander Peoples is limited to property law and constitutional law.

[11] See for example Margaret Thornton, 'Dreaming of Diversity in Legal Education' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 549; R. Michael Cassidy, 'Reforming the Law School Curriculum from the Top Down' (2015) 64(3) *Journal of Legal Education* 428; Kris Franklin, 'Do We Need Subject Matter-Specific Pedagogies' (2016) 65 *Journal of Legal Education* 839-863; Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37(1) *Monash University Law Review* 43; John Lande, 'Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice' [2013] (2013)(1) *Journal of Dispute Resolution* 1; Jeremiah A. Ho, 'Function, Form, and Strawberries: Subverting Langdell' (2015) 64 *Journal of Legal Education* 656.

[12] Council of Australian Law Deans, 'Australian Law School Standards' (2020) 18.

[13] The explanatory notes to the *Standards* suggest a 'curriculum map or spreadsheet'; ibid.

[14] See ch 1 IV H.

addressed. Consequently, it is difficult to argue that they should be incorporated in the explicit curriculum as it has been approached in this thesis since they are not applicable to all students.

III WHAT IS HIDDEN?

To understand how law students might perceive an implicit or hidden curriculum in law school, one needs to understand the theoretical basis of the concept.

Concepts of knowledge and learning remained primarily the domain of philosophers until the late 19th century. The publication of Williams James' *Principles of Psychology* in 1890 established a foundation for psychological studies of education and learning in the United States.[15] William James' research, and that of his immediate successors, focused on identifying physiological and neurological explanations for memory and learning that were observable and, to the greatest extent possible, measurable.[16] However, within that research were the origins of two broad, divergent approaches to understanding experience, learning and memory. One focused primarily on the response to external stimulus (sometimes referred to as stimulus-response).[17]

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[15] See David Hothersall, *History of Psychology* (McGraw-Hill Education, 4th ed, 2004); David Berliner, 'The 100-year journey of educational psychology: From interest, to disdain, to respect for practice' in Thomas Fagan and Gary Vandenbos (eds), *Exploring applied psychology: Origins and critical analyses.* (American Psychological Association, 1993) 37. See also William James, *Principles of Psychology* (Henry Holt and Company, 1890) vol 1, ch IV.

[16] For example, James proposed that the formation of habit was the result of the 'plasticity' of 'brain matter'. But, because changes in the brain could not be seen, 'an abstract and general scheme of processes' could be developed by 'interpreting hidden molecular events after the analogy of visible massive ones'; James (n 16) 107. See also for an overview of the work of James' students, Mary Whiton Calkin, Granville Hall and Edward Thorndike; Laurel Furumoto, 'Mary Whiton Calkins (1863–1930)' (1980) 5(1) *Psychology of Women Quarterly* 55; Laurel Furumoto, 'From "Paired Associates" to a Psychology of Self: The Intellectual Odysey of Mary Whiton Calkins' in Gregory Kimble, Michael Wertheimer and Charlotte White (eds), *Portraits of Pioneers in Psychology* (Taylor & Francis, 2014) 57; Fisher Sara Carolyn, 'The Psychological and Educational Work of Granville Stanley Hall' (1925) 36(1) *The American Journal of Psychology* 1; Edward L. Thorndike, 'The contribution of psychology to education' (1910) 1(1) *Journal of Educational Psychology* 5; Hothersall (n 15) 351-60.

[17] See for example James' discussion of the example of a child touching a lighted candle and the role of sensory stimulus on memory; James (n 16) 25. Even though James is credited with the foundations of educational psychology, the idea of stimulus-response models (sometimes referred to as a structuralist approach) and the use of scientific, experimental methods had been proposed a little less than 30 years

The other attempted to understand how an individual's pre-existing experience might affect their response.[18]

The discussion that follows does not provide an exhaustive analysis of the development of those theories. A detailed history of their application over time is also outside the aims and objectives of this thesis. The overview presented here is substantially simplified and focuses on educational psychology in the United States, having had the most substantial effect on formal education. The divergence in approach is not directly relevant to this thesis. However, some elements are touched on where they help explain the different approaches—both of which this thesis draws on to examine the 'what' and 'how' of a hidden curriculum.

A *Behaviourism: Stimulus-response*

William James' research had considered the extent to which other external influences might affect stimulus and response.[19] As his research developed, he began to examine the role of individual consciousness and introspection in making meaning more closely.[20] However, by the early 20th century, some psychologists had begun to express dissatisfaction with the 'unscientific' nature of consciousness as an object of study.[21]

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before by German psychologist Wilhelm Wundt; see for example Edward Titchener, 'Wilhelm Wundt' (1921) 32(2) *The American Journal of Psychology* 161, 163-4; Solomon Diamond, 'Wundt Before Leipzig' in Robert Rieber and David Robinson (eds), *Wilhelm Wundt in History: The Making of a Scientific Psychology* (Springer, 2001) 1, 29-32. One of Wundt's students, Englishman Edward Titchner, emigrated to the United States and promoted Wundt's careful methodological approach, writing at about the same time as James; see Edward Bradford Titchener, *Experimental psychology: A manual of laboratory practice* (MacMillan Co, 1901).

[18] Among the first to question the focus on stimulus-response was one of James 'own students, John Dewey; John Dewey, 'The reflex arc concept in psychology' (1896) 3(4) *Psychological Review* 357; Hothersall (n 15) 371.

[19] Although primarily concerned with the 'plasticity' of the brain, James' earliest work had suggested a broader setting for stimulus and response, even in discussions of habit; James (n 15) 225.

[20] Later in his career, James wrote extensively on the interplay between consciousness and the environment as a way of making meaning, especially in the area of religion; William James, *The Varieties of Religious Experience: A Study in Human Nature* (Penguin Books, 1982).

[21] Franz Samelson, 'The struggle for scientific authority: The reception of Watson's behaviorism 1913-1920' (1981) 17 *Journal of the History of the Behavioral Sciences* 399.

In one of the first critiques of consciousness, for example, Watson argued that psychological study had failed to identify itself as a 'natural science'.[22] Its focus should be the 'prediction and control of behaviour'[23] supported by behavioural data.[24]

Despite an initial lack of enthusiasm for what would come to be referred to as 'behaviourism', the focus on the accumulation of data to provide universally applicable predictive models of behaviour would consequently become a dominant approach in American psychology.[25] While the primary subjects of behavioural studies were animals,[26] it slowly extended its research and analogies to human subjects and education.[27]

Among the most widely cited and influential behaviourists in educational psychology is BF Skinner.[28] Skinner's research focused primarily on conditioning responses in animal subjects (or 'operant conditioning'). He argued that all behaviours were a

[22] John Watson, 'Psychology as the behaviorist views it' (1913) 20(2) *Psychological Review* 158, 163; Samelson (n 21).
[23] Watson (n 22) 163; Samelson (n 21).
[24] Ibid; Furumoto, 'From "Paired Associates" to a Psychology of Self: The Intellectual Odysey of Mary Whiton Calkins' (n 16).
[25] Richard Herrnstein and Edwin Boring, *A Sourcebook in the History of Psychology* (Harvard University Press, 1966); Herbert S. Langfeld, 'Jubilee of the Psychological Review: Fifty volumes of the Psychological Review' (1994) 101(2) *Psychological Review* 200; Hothersall (n 15) 359.
[26] Thorndike, for example, conducted his research by putting chickens in mazes, and cats and dogs in puzzle boxes; see Edward Thorndike, *Animal Intelligence: Experimental Studies* (Transaction Publishers, 1970). Although not a behaviourist, Thorndike's research methods were adapted by behaviourists working with rats and pigeons; John Watson, 'Kinæsthetic and organic sensations: Their role in the reactions of the white rat to the maze' (1907) 8(2) *The Psychological Review: Monograph Supplements* i; Burrhus Skinner, 'A case history in scientific method' (1956) 11(5) *American Psychologist* 221.
[27] Thorndike undertook research with his own child (see Hothersall (n 15)) while Watson is infamous for the 'Little Albert' experiment in which he conditioned a child to fear rats; John Watson and Rosalie Rayner, 'Conditioned emotional reactions' (1920) 3 *Journal of Experimental Psychology* 1.
[28] In 1975, a PhD student in communications at MIT asked college students to identify the names of scientists as part of the study of what makes their work 'visible'. The most 'visible' was BF Skinner who was correctly identified by 81% of respondents; see Rae Goodell, *The Visible Scientists* (Stanford University, 1975); Sandra Blakeslee, 'M.I.T. Researcher Studies "Visible" Scientists and Impact They Have on Public Issues', *New York Times* (online, 29 April 1975) <https://www.nytimes.com/1975/04/29/archives/mit-researcher-studies-visible-scientists-and-impact-they-have-on.html>.

response to external stimuli.[29] Through repeated experiments with rats and pigeons, Skinner demonstrated that a subject could be trained to perform behaviours through positive reinforcement (primarily food rewards).[30] Over time, the frequency of the reinforcement could be reduced, but the behaviour would remain. Between 1954 and 1965, Skinner published a series of articles in which he explicitly set out to apply his behavioural analysis to education.[31] It was not a direct application. Skinner acknowledged that the behaviours expected of students were more complex, requiring a graduated series of stimulus-response activities building to more complex behaviours. He argued that teaching had 'failed' because, based on his research into operant conditioning, the connection between performance and reinforcement, and the frequency of reinforcement, were haphazard.[32] Schools were also reliant on 'aversive' reinforcement (punishment) that simply encouraged avoidance behaviour.[33]

Central to Skinner's model and behaviourism is the role of stimulus. The subject is exposed to stimulus designed, applied and controlled by an external agent, whether that is the researcher or, in the case of Skinner's model of education, a teacher or teaching machine.[34] The role of an authoritative external agent, namely the classroom teacher, is also central to Jackson's description of the classroom teacher's role in transmitting a hidden curriculum.[35]

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[29] James Johnson et al, *Introduction to the Foundations of American Education* (Pearson, 14th ed, 2005) 324.
[30] See Charles Ferster and Burrhus Skinner, *Schedules of Reinforcement* (Appleton-Century-Crofts, 1957).
[31] The articles were subsequently collected into a single volume, originally published in 1968; Burrhus Skinner, *Technology of Teaching* (BF Skinner Foundation, 2001).
[32] Burrhus Skinner, 'Why Teachers Fail', *The Saturday Review* (London, 16 October 1965) 80 89.
[33] Ibid 82.
[34] See particularly Burrhus Skinner, 'The Technology of Teaching' (1965) 162 *Proceedings of the Royal Society* 427. Skinner discusses the development of programmable technology that could be used in classrooms to allow students to work through questions, being told whether they were right or wrong as they attempted the answers.
[35] Phillip W Jackson, *Life in Classrooms* (Holt, Reinhart and Winston, 1968) 30.

For Jackson, the classroom teacher serves an essential role in teaching appropriate social conduct in many different ways beyond discrete stimulus-response exchanges. For example, they are distinct from family or friends and therefore, their relationship with students is relatively impersonal. Their role as the centre of attention in the classroom establishes their authority. The teacher directs what students cannot do and what they must do, including reading, homework and assignments. Consequently, students become familiar with obeying the directions of someone other than a family member.[36] Jackson argues that this relationship prepares students for work; their teacher is their first 'boss'.[37]

Skinner's work on stimulus-response, particularly the role of positive reinforcement, has also become closely associated with approaches to individual motivation. In Skinner's model, the individual's response is the consequence of externally provided rewards. In his experiments, that reinforcement was provided in the form of food. In applying the model to education, he saw reinforcement being praise or affirmation.[38]

For Jackson, evaluation of behaviour and the consequent reward (or its withholding) is important, although not central to transmitting the hidden curriculum. Jackson's description of evaluation and reward is more detailed than Skinner's. While he includes formal evaluation, assessment and feedback, Jackson emphasises that the conditions in which evaluation takes place are more complex, and are not generally observable in Skinner's rats or pigeons:

> Evaluations derive from more than one *source*, the *conditions of their communication* may vary in several different ways, they may have one or more of several *referents*, and they

[36] Ibid 30-2.
[37] Ibid 31.
[38] Skinner, 'Why Teachers Fail' (n 32).

> may range in *quality* from intensely positive to intensely negative. (Emphasis in the original)[39]

The principal origin of evaluation in education settings is, of course, the teacher, although it may also be invited from other students (e.g., 'Can anyone help [student]?'). The conditions may be public (e.g., 'That's a good answer') or private (e.g., written feedback or in one-on-one discussions). In terms of referents, the evaluation may be directed to a student's academic performance, the extent to which they are meeting expectations, or their attributes and character.

A further category of evaluation identified by Jackson but never acknowledged by Skinner is the assessment by peers of one another, which Jackson identifies as key to forming friendships and social groups.[40] It may also be done secretly, in the form of gossip or *sotto voce* comments not directed at the student, of which the student is nevertheless aware.[41]

1 *Commentary on Australian legal education: Stimulus-response*

The small body of Australian commentary on a hidden curriculum in Australian legal education is often opaque in its discussion of theories of learning or the pedagogy perceived to drive the hidden outcomes it identifies. Despite there being no comprehensive study of prevailing pedagogies in Australian law schools, it appears to be implicit in Australian literature that a behaviourist pedagogy is principally responsible for producing hidden outcomes. For example, Townes O'Brien and Littrich's discussion of the hidden curriculum at the University of Wollongong focused on the design of assessment—the archetypal example of stimulus (the assessment) and

[39] Jackson (n 35) 21.
[40] Ibid 23.
[41] Ibid 23-4.

response (answers to assessment)—as the driving force behind hidden outcomes.[42] They argued that the design of assessment, especially differences in marking and grading structures across courses, encouraged students to perceive some courses to be of less value than others.[43] There is no discussion of divergence in student responses or other agents.

In a later work, Townes O'Brien focuses specifically on the hidden outcome of an adversarial approach to problem-solving and the devaluing of cooperative or alternative forms of dispute resolution.[44] There is closer attention paid to the role of pedagogy in the promotion of adversarialism and competition between students. Townes O'Brien discusses aspects of stimulus being the overwhelming use of appellate materials and encouraging students to distil and focus on the right or 'winning' answer as a driver for adversarial problem-solving. She also discusses, albeit separately, aspects of response and reward in the form of law school's focus on assessment. Making the assumption of a behaviourist pedagogy more explicit, she asserts that 'assessment regimes are the most potent drivers of the hidden curriculum.'[45]

Hall, Townes O'Brien and Tang provide a much larger picture of the hidden outcomes perceived to be encouraged by law school.[46] They acknowledge that students are not 'baby ducks' vulnerable to imprinting,[47] but assert that law school comes at a 'particularly important time' in the development of students' identity.[48] Their

[42] Molly Townes O'Brien and John Littrich, 'Using Assessment Practice to Evaluate the Legal Skills Curriculum' (2008) 5(1) *Journal of University Teaching & Learning Practice* 62.
[43] Ibid 74.
[44] Townes O'Brien (n 11).
[45] Ibid 49.
[46] Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 21.
[47] Ibid 38.
[48] Ibid 39.

discussion of changes in students' thinking, images of the elite lawyer and a focus on adversarial problem-solving places law school at the core of those changes. Where there is closer scrutiny of the causal links between law school and law students in promoting individualism, they also emphasise assessment and reward as the principal cause:

> Law school can also encourage students to approach the world alone. Floyd argues that law students are influenced early on in their degree by messages that doing well in law school *means getting high results, winning prizes, and securing prestigious summer jobs* (or clerkships). However, in most law schools these successes can only be achieved by students acting alone. (emphasis added)[49]

The authors repeat their assertions about the 'causative role of law school' in promoting rational problem-solving and adversarialism in a later article, but without the acknowledgement that other agents may also play a role.[50]

In yet a later article, O'Brien, Tang and Hall use both survey data and interviews with law students at the ANU to tentatively suggest that law school's focus on rational problem-solving may correlate to poor mental health outcomes for some students.[51] Again, law school plays a central role in the authors' analysis although they acknowledge that new law students' predispositions to holistic or narrative thinking may affect how they respond to law school's emphasis on rational problem solving. Interestingly, the data collected from interviews suggests a much richer array of agents

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[49] Ibid 43 citing Daisy Hurst Floyd, 'Lost Opportunity: Legal Education and the Development of Professional Identity' (2007) 30 *Hamline Law Review* 555, 569.

[50] Molly Townes O'Brien, Stephen Tang and Kath Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing May Begin in Year One' (2011) 2 *The International Journal of the First Year in Higher Education* 49.

[51] Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law StudentWellbeing, Thinking Styles and the Law Curriculum' (2011) 21(2) *Legal Education Review* 150.

and causes including social background, school experiences and relationships with peers. The students to whom the authors speak express divergent views on their experiences of law school and the outcomes they perceive. Nevertheless, the authors return to an implicit focus on a more binary relationship between law school as the agent of outcomes affecting feelings of success, failure or self-worth.[52]

2 *Weaknesses in the model*

The final article by O'Brien, Hall and Tang begins to reveal the weakness in constructing a simple causal relationship between law school as an agent and hidden outcomes—law school may not be the sole agent in creating outcomes. Skinner's stimulus-response model, supplemented by Jackson's model of evaluation, may partially explain how students receive or construct hidden outcomes. In the context of legal education, it provides potential explanations of how students' experiences in law school could produce unintended or implicit outcomes beyond the explicit curriculum. For example, as Townes O'Brien and Littrich argue, evaluating and rewarding specific types of behaviours implicitly tells students that the things that are not assessed are of little or no comparative value.[53]

However, as noted above, in Skinner's model the relationship between stimulus and response is binary. Rewarded behaviour is reinforced and consistently reproduced. Individual students' characteristics are irrelevant. From the perspective of an attributional method, if Skinner's model holds, we should expect to see a consistent result in coding students' perceptions. Instances in which students attributed an outcome to a law teacher or the explicit curriculum, 'law school' or 'law teacher'

[52] Ibid 181.
[53] Townes O'Brien and Littrich (n 42).

would consistently be coded as the sole agent. There would be little variation in the outcomes between participants.

The difficulty in accepting this hypothesis is identified in part by Jackson and is demonstrated in O'Brien, Hall and Tang's empirical work with law students. Students' responses are not universal or uniform. The outcomes are more complex than the reproduction of behaviours in response to external stimuli. For example, in their response to teachers, some students may comply with directions. Others may adapt their behaviour beyond compliance to create a good impression. In extreme cases, they may adapt their behaviour to become overly compliant—something that Jackson refers to 'apple polishing'. Alternatively, students may become outwardly compliant but hide words or actions they think will displease or anger. Others may simply reject compliance entirely with the consequent adverse effect on evaluation and reward.[54]

Jackson does not explore why there is a diverse response in students. In terms of Skinner's model, as discussed earlier, the rise of behaviourism was in response to frustration with the vague role of 'consciousness' and the idea that other processes and influences were acting on the formation of habits that were not directly observable. The rejection of other influences external to the immediate stimulus and response meant that Skinner excluded them from his model.

Another problem with adopting this hypothesis is the connection between evaluation in law school and the perceived reward of employment after law school. Research in American law schools has consistently identified this connection since the 1970s.[55] In

[54] Jackson (n 35).
[55] See Steve Nickles, 'Examining and Grading in American Law Schools' (1976) 30 *Arkansas Law Review* 411. This research is discussed in further detail below.

an Australian context, research,[56] commentary[57] and social media,[58] indicate that Australian law students continue to draw a connection between performance at law school and the prospects of gaining employment. Skinner's model emphasises the relationship between the student/subject and the teacher/researcher as providing the primary causal link. The circumstances and conditions of the reward provide the outcome. However, employment as a reward is almost entirely outside law school's control.

Descriptions of stimulus-response may provide a partial explanation of the causes and outcomes of legal education. However, the diversity of student responses and the disconnection between some forms of response and reward suggest that there may be other influences that affect law students' perceptions.

B *Construction, social learning and crowds*

As we saw earlier, William James' research into the formation of habit and the publication of *Principles of Psychology* contained the roots of two broad approaches to understanding learning. One adopted a focus on external influences. The other attempted to assess the effects of an individuals' internal experiences on the process.

The concept that learning is an interaction between a student's experience and new information has an even longer history than that of a hidden curriculum, finding its

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[56] See for example Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A report commissioned by the Australian Universities Teaching Committee* (Department of Education, Science and Training, 2003) 270-5.

[57] Judy Allen and Paula Baron, 'Buttercup Goes to Law School: Student Wellbeing in Stressed Law Schools' (2004) 29 *Alternative Law Journal* 285; Helen Brown, 'The Cult of Individualism in Law School' (2000) 25(6) *Alternative Law Journal* 279; Miranda Stewart, 'Conflict and Connection at Sydney University Law School: Twelve Women Speak of Our Legal Education Feminist Symposium' (1991) 18 *Melbourne University Law Review* 828, 841.

[58] See for example Reddit r/auslaw that has been forced to devote a weekly forum to law students asking questions about, among other things, their prospects of employment based on university choice, employment experience and their current academic results; 'Reddit', *r/auslaw* (Web Forum, 2020) <https://www.reddit.com/r/auslaw/>.

roots in the work of Aristotle and Locke.[59] Aristotle's idea of children as '*tabula rasa*',[60] or Locke's concept of 'wax to be moulded'[61] were observations on the state of infants' knowledge of the world around them. Both appeared to reject a conceptualisation of infants having some form of innate awareness or that physical development somehow preceded understanding.[62] The development of an individual's knowledge is instead the interplay between internalised memory and external stimulus. They argued that independent learning was not entirely impossible, but it looked a lot like merely memorising information. It did not teach how that information might be practically, usefully or flexibly applied.[63] The student internalises each experience,

[59] Aristotle and Locke's principal works on learning were *De Anima* and *Some Thoughts on Education* respectively; Aristotle, *De Anima*, tr CDC Reeve (Hackett Publishing Company, 2017); John Locke, *Some Thoughts on Education* (Dover Publications, 2007). However, both Aristotle and Locke wrote on knowledge more generally which is either reflected in, or influenced, their writing on education and learning; see for example John Sisko, 'On Separating the Intellect from the Body: Aristotle's De Anima III.4, 429a20-b5' (1999) 81 *Archiv für Geschichte der Philosophie* 249; John M Rist, 'Notes on Aristotle De Anima 3.5' (1966) 61(1) *Classical Philology* 8; Caleb Murray Cohoe, 'Nous in Aristotle's De Anima' (2014) 9(9) *Philosophy Compass* 594-604; John Locke, *An Essay on Human Understanding* (Hayes & Zell Publishers, 1860); John Adamson, 'The Educational Writings of John Locke' in John Adamson (ed), *Some Thoughts Concerning Education* (Dover Publications, 2007) 12; Bird T. Baldwin, 'John Locke's Contributions to Education' (1913) 21(2) *The Sewanee Review* 177; Peter Gibbon, 'John Locke: An Education Progressive Ahead of His Time?', *Education Week* (Blog, 4 August 2015) <https://www.edweek.org/ew/articles/2015/08/05/john-locke-an-education-progressive-ahead-of.html>.

[60] Aristotle (n 59) 99.

[61] Locke, *An Essay on Human Understanding* (n 59) 75.

[62] The use of 'appeared' is intentional. Shields warns readers of Aristotle that '[t]here is no passage of ancient philosophy that has provoked such a multitude of interpretations'; see Christopher Shields, *The Oxford Handbook of Aristotle* (Oxford University Publishing, 2012). An alternative interpretation is that the active intellect is in fact an embodiment of a divine entity and the body is simply a vessel for potential life that an active soul enters and animates; see Aristotle (n 59). These more esoteric ideas of the interaction between the individual and (a) God, and that part of the soul might therefore be immortal, have entertained philosophers and theologists well into the Renaissance; see Thomas De Koninck, 'Aristotle on God as Thought Thinking Itself' (1994) 47(3) *The Review of Metaphysics* 471; Werner Jaeger, *Aristotle: Fundamentals of the History of his Development* (Oxford University Press, 1934) 49. But they are not important to this thesis. What is important is that the student as a blank state was never the whole story and that the development of the intellect is, according to Aristotle, the interplay between internalised memory and external stimulus. Locke was far more explicit in his rejection of the idea of a form of innate knowledge; see Roger Woolhouse, 'Locke's Theory of Knowledge' in Vere Chappell (ed), *The Cambridge Companion to Locke* (Cambridge University Press, 1994) 146, 149; Locke, *An Essay on Human Understanding* (n 59) 48. Here Locke differs from Aristotle, with whom he is sometimes lumped, including erroneously attributing authorship of Aristotle's 'tabula rasa' to Locke; see Nick Goddard, 'Human Personality Development' in Pádraig Wright, Julian Stern and Michael Phelan (eds), *Core Psychiatry* (Elsevier Ltd, 3rd ed, 2011) 55; William Uzgalis, 'John Locke' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2019) https://plato.stanford.edu/archives/spr2019/entries/locke/.

[63] See Aristotle's discussion of the active and passive intellect and its role in building knowledge; Aristotle (n 59) 223-5; Mark Johnston, 'Hylomorphism' (2006) 103(12) *The Journal of Philosophy* 652;

either fitting it within their existing knowledge or using it to (re)construct new knowledge.[64]

Among the earliest and influential writers on the interaction between experience and education was one of Williams James' students, John Dewey.[65] Dewey argued that learning was a constructive process rather than an external or top-down imposition of knowledge.[66] It is also a social process. Talking, working or interacting with others means that there is a 'social environment'. That environment determines behaviour.[67] According to Dewey, education draws in an extensive range of influences through interactions with family, friends, work colleagues, and even customers.[68]

For Dewey, a pedagogy that emphasises the one-way transmission of facts from teacher to student ignores students' personal history, experience and relationships. It assumes the classroom, and a student's experience in it, are central to learning.[69] As discussed in chapter 1, research often takes law school as the primary lens through which law students' experiences are constructed. However, according to Dewey, other agents, including family, friends, peers, and work experience, may affect how they approach law school and what they draw (or do not draw) from it. It suggests that the explicit and hidden outcomes assumed to flow from law school may be mediated,

Sisko (n 59); WD Ross, *Aristotle* (Methuen, 1949); Rist (n 59). Locke, *Some Thoughts on Education* (n 59) 203.

[64] See Carol Wren and Thomas Wren, 'The Capacity to Learn' in Randall Curren (ed), *A Companion to the Philosophy of Education* (Blackwell Publishing, 2006) 246.

[65] Other students of James also embarked on similar research, but appear to have attracted less attention, despite actively arguing against what would eventually become 'behaviourism'. See for example Mary Whiton Calkins and Granville Hall (n 16).

[66] John Dewey, *Experience and Education* (MacMillan Publishing, 1963). ; Laurel N. Tanner, *Dewey's Laboratory School: Lessons for Today* (Teachers College Press, 1997) iv.

[67] John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (Collier-MacMillan, 1916).

[68] Ibid.

[69] John Dewey, *The Child and the Curriculum* (Cosimo Inc, 2010).

amplified or weakened by agents outside the classroom. Put another way, a hidden curriculum may be created by a larger 'community', not by legal education itself.

Dewey also saw a traditional pedagogy as something divorced from 'the real world', and actively avoided it in implementing his pedagogy.[70] Again, as discussed in chapter 1, there is an increasing emphasis in legal education and among law students on the development of vocational skills that may, in turn, reflect a desire to understand how their experiences in law school classrooms related to 'the real world'. 'Real-world' experience is considered necessary to find employment—a law degree alone is not enough. However, that perception may not come from law school alone but also from friends, peers and potential employers.

At the same time as Dewey was developing a theoretical foundation for learning, on the other side of the Atlantic, a Russian psychologist, Lev Vygotsky, was conducting empirical research that, coincidentally and entirely independently of Dewey, provided evidence of learning as a process of social construction. Vygotsky began his research as early as 1917[71] , but it did not become more widely known until the 1960s.[72]

Through empirical research focused on language development, Vygotsky provided empirical support for the proposition that learning, thinking and memory are formed through social interactions. The process of learning, according to Vygotsky, is neither

[70] In 1898 John Dewey established 'the Laboratory School' at the University of Chicago as a basis for empirical studies in psychology and pedagogy. 'Authentic' learning—experiences based on real life activities and experiences—formed the basis of the Laboratory School's curriculum; see Kenneth T. Henson, 'Foundations for Learner-Centered Education: A Knowledge Base' (2003) 124(1) *Education* 5; Tanner (n 66).

[71] Michael Cole and Sylvia Scribner, 'Introduction' in Michael Cole et al (eds), *Mind In Society* (Harvard University Press, 1978) 9, 9. It has also been suggested that the limited exposure of Vygotsky outside Russia was largely due to the absence of translated material and that any Russian collections of his research were often incomplete; see Rene van der Veer, 'Some Major Themes in Vygotsky's Theoretical Work: An Introduction' in Robert Reiber and Geoffrey Woolock (eds), *The collected works of L. S. Vygotsky: Vol. 3. Problems of the theory and history of psychology* (Plenum Press, 1997) 1, 1-2.

[72] Michael Cole et al, 'Preface' in Michael Cole et al (eds), *Mind In Society* (Harvard University Press, 1978) 1, 1.

entirely independent of external influence nor imposed entirely externally.[73] Instead, it is a social activity. Each student constructs meaning individually 'under adult guidance or in collaboration with more capable peers.'[74] The individualised nature of learning would suggest that assumptions of universal or uniform effects of law school or legal education may not be entirely correct. Individual students' experiences are essential in identifying how those effects may be shared or unique.

Dewey and Vygotsky became closely associated with an approach to learning termed 'constructivism', a term intended to denote a theory of learning in which the learner constructed knowledge from their experiences.[75] Although constructivism has been popular in educational circles,[76] *how* it can be, or has been, implemented in classrooms has been actively criticised on several bases. Most of these criticisms are not directly relevant to this thesis.[77] However, one critique adds to our mapping of how and what

[73] Lev Vygotsky, *Mind in Society*, tr Alexander Luria (Harvard University Press, 1978) 106. Vygotsky's principal concern here were with theories of child development that proposed intellectual development was the product of physiological development. That is, children progressed through recognised stages of development that led their capacity to reason; see for example Herbert Ginsburg and Sylvia Opper, *Piaget's Theory of Intellectual Development* (Prentice Hall Inc., 1979); Patricia Kimberley Webb, 'Piaget: Implications for Teaching' (1980) 19(2) *Theory Into Practice* 93.

[74] Vygotsky (n 73) 115.

[75] Over time, pedagogists have constructed a taxonomy of approaches within constructivism; see for example, Paul Ernest, 'Varieties of Constructivism: Their Metaphors, Epistemologies and Pedagogical Implications' (1994) 2 *Hiroshima Journal of Mathematics Education* 1; Charlotte Hua Liu and Robert Matthews, 'Vygotsky's philosophy: Constructivism and its criticisms examined' (2005) 6 *International Education Journal* 386; DC Phillips, 'The good, the bad, and the ugly: the many faces of constructivism' (1995) 24(7) *Educational Researcher* 5; Peter Doolittle, 'Complex Constructivism: A Theoretical Model of Complexity and Cognition' (2014) 26 *International Journal of Teaching and Learning in Higher Education* 485. The distinctions between them are not directly relevant to this thesis, and may in fact be distinctions without differences (see Hua Liu and Matthews). What is relevant is the indivisibility of the student from social influences posited by social constructivists like Dewey and Vygotsky.

[76] See Robert Levin, 'The Debate over Schooling: Influences of Dewey and Thorndike' (1991) 68(2) *Childhood Education* 71; Berliner (n 15).

[77] One criticism is that constructivism has been interpreted as requiring decontextualised instruction; see for example John Anderson, Lynne Reder and Herbert Simon, 'Situated Learning and Education' (1996) 25(4) *Educational Researcher* 5. Alternatively, it has been interpreted as rejecting pre-existing bodies of knowledge in favour of activity-based, independent discovery of the same concepts by students with minimal supervision, placing high demands on student abilities and leaving weaker students behind; see for example Paul Kirschner, John Sweller and Richard Clark, 'Why Minimal Guidance During Instruction Does Not Work: An Analysis of the Failure of Constructivist, Discovery, Problem-Based, Experiential, and Inquiry-Based Teaching' (2006) 41 *Educational Psychologist*, 75; John Sweller, 'Cognitive load during problem solving: Effects on learning' (1988) 12 *Cognitive Science* 257; Richard Clark, 'When teaching kills learning: Research on mathemathantics' in Heinz Mandl et al

law students may learn from a hidden curriculum. Constructivism requires the student to be an active participant in learning.[78] Put another way, a student cannot learn something without being actively or directly exposed to it. In that context, constructivism *and* behaviourism could arguably be subject to the same criticism. Both emphasise the student as the subject and object of theory and research. As we saw earlier, one of the principal criticisms of behaviourism was that in its application of a stimulus-response model, it ignored more complex influences that might affect the reception of the stimulus and the nature of the response. Constructivism does not entirely reject the stimulus-response model, but argues that other mediating factors are in play.[79]

During the 1960s and 1970s, American psychologist Albert Bandura began to question the role of direct stimulus in learning and habit formulation. Bandura argued that '[i]n actuality virtually all learning phenomena resulting from direct experiences can occur on a vicarious basis through observation of other people's behavior (sic) and its consequences for them'.[80]

Bandura accepted the concept of direct experience.[81] However, individuals could also learn from watching (rather than directly experiencing) what others did and the consequences of those actions. They could use those observations to manage their

(eds), *Learning and instruction: European research in an international context* (Pergamon, 1989) vol 2, 1.

[78] The criticism draws on what has been referred to as 'neo-Vygotskian' approaches to instruction that propose an apprenticeship model; see for example Allan Collins, John Seely Brown and Susan Newman, 'Cognitive apprenticeship: Teaching the craft of reading, writing and mathematics' (1988) 8(1) *Thinking: The Journal of Philosophy for Children* 2; Barbara Rogoff, *Apprenticeship in thinking: Cognitive development in social context* (Oxford University Press, 1990). For an overview of research critiquing the effectiveness of activities without abstract information see Anderson, Reder and Simon (n 77) 8-9. Unsurprisingly, this criticism is not universally accepted; see Hua Liu and Matthews (n 75).

[79] It has also been suggested that the stimulus-response model was abandoned as it became simply too difficult to diagrammatically represent increasingly extended or complex chains of stimuli and response; see Doolittle (n 75) 485.

[80] Albert Bandura, *Social Learning Theory* (General Learning Press, 1977) 2.

[81] Ibid 3.

behaviour or react to new situations. Bandura used the example of a homeowner not needing to see their house burn down before buying fire insurance or a pedestrian knowing they have to wait for traffic to pass without having the direct experience of being hit by a car.[82]

The consequence of Bandura's argument for vicarious learning extended students' construction of knowledge to include observation of *modelled* behaviour by adults, teachers, peers, colleagues, friends or even strangers. The learner did not need to be directly engaged with the model for the modelled behaviour to be effective. Bandura coined the phrase 'social learning'[83] to distinguish learner-centred approaches like social constructivism from learning through socially modelled actions, behaviour or language.

Bandura also sought to explain why students' observation of one model might be more or less influential than another. He identified a series of intervening, mutually supporting processes that affected whether a student watched, remembered, was capable of repeating and was motivated to repeat modelled behaviour independently.[84] For the model to be persuasive, the student/observer had to be familiar with them or recognise them as someone whose knowledge they valued. The behaviour also needed to be reinforced by a straightforward or easy form of recall, supported by feedback that allowed them to reproduce it accurately and consequences that the student perceived to be positive or conforming to their values.

[82] Ibid 68.
[83] Ibid.
[84] Ibid 24.

Take, for example, a law student's observations of a lecturer explaining the benefits of altruism in the profession. One can see how some of these processes might work, and how other influences might mediate that explanation:

- Is 'service to the community' something on which the student already places value?
- Does the student know the lecturer, have a relationship with them, and/or perceive them as someone of authority? Are there other models on whom the student places greater value?
- Was the explanation associated with powerful or memorable imagery or a concise, clear explanation?
- Is the student already engaged with community-type work *or* are opportunities to be involved in it advertised or made available to them in a way that they can access successfully?
- Does the explanation offer advantages or incentives on which the student may already place value, whether they are extrinsic or intrinsic and/or moderate possible negative consequences?

The explanation here provides an example of how internal and external influences might act on an outcome. It also reveals how difficult it is to entirely change a student's mind on a particular attitude or attribute in light of other more valued, authoritative models. Bandura suggests that to 'lift' the desired modelled behaviour requires repeated, cumulative models supported by substantial negative or positive consequences. In order to alter existing behaviour with which the observer associates

positive outcomes (e.g., status), the strength of the modelling and the intervening processes must be significantly increased.[85]

Other influences outside the immediacy of response and stimulus, and the role of individualised responses to stimulus, potentially explain the diversity in student responses. Other influences outside the control of school might mediate or subvert an outcome, placing it beyond both the explicit and a hidden curriculum.

C *Law teachers, the explicit curriculum and evaluation in law school: What might we expect to see in interviews?*

Using these learning models, we can begin to deconstruct the outcomes that research suggests flow from legal education and develop some predictions of what participants in this research might be expected to say.

As discussed earlier in chapter 1 and above, there is a very small body of Australian literature on the perceived hidden outcomes to flow from legal education. In the context of Jackson's taxonomy, there are some aspects where there would appear to be no Australian commentary or examination at all. There is a much larger body of literature in the United States, including empirical research, some of which has been imported and adapted into an Australian setting. It would be short-sighted to ignore some of the conclusions that American writers have drawn from their analysis of legal education, especially where some of the underlying practices and pedagogy is similar. Consequently, in developing predictions, both Australian and American research is used with explicit acknowledgement of the jurisdiction from which it is drawn.

[85] Ibid 55.

1 *The role of the law teacher*

In the context of legal education, approaches in which a law teacher manages, controls and directs the environment in the same way as Skinner's researcher or Jackson's classroom teacher—lectures, seminars or tutorials—are common. However, there is limited Australian empirical evidence of the effects of these approaches that mirrors Jackson's construct, making it challenging to map what the outcomes may be.

The closest analogy is law students' experience in American law schools with the Socratic method, which mirrors Jackson's discussion of the central, authoritative role of the law teacher.[86] While the Socratic method is considered the 'signature pedagogy' of American law schools,[87] there is minimal evidence of its use in Australia. However, it has been suggested that teacher-centred pedagogies are dominant in Australian law schools.[88]

What also makes commentary on the Socratic method analogous to aspects of Australian legal education is that, in practice, its application encompasses a much broader range of participatory teaching. Like Jackson's classroom teacher, the law teacher (or professor) is the centre of attention, posing questions and controlling the flow of information and discussion. Advocates and critics have all argued that this expanded concept of a teacher-centred, Socratic-based pedagogy can incorporate more

[86] See for example, Duncan Kennedy, 'How the Law School Fails: A Polemic' (1970) 1 *Yale Review of Law and Social Action* 71; Andrew Watson, 'The Quest for Professional Competence: Psychological Aspects of Legal Education Symposium: The Teaching Process in Legal Education' (1968) 37 *University of Cincinnati Law Review* 91.

[87] William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (John Wiley & Sons, 2007) 50; Mindie Lazarus-Black, 'Teaching International Lawyers How to Think, Speak and Act Like US Lawyers' in Meera Deo, Mindie Lazarus-Black and Elizabeth Mertz (eds), *Power, legal education, and law school cultures* (Routledge, 2020) 37.

[88] Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537; Penny Carruthers, Natalie Skead and Kate Galloway, 'Teaching Skills & Outcomes in Australian Property Law Units: A Survey of Current Approaches' (2012) 12 *Queensland University of Technology Law and Justice* 66.

participatory and less interrogatory approaches. Perhaps the most inclusive definition of this extended Socratic pedagogy is anything that requires active participation by students in which the law teacher retains a central role[89]—practices that are not unfamiliar or uncommon in Australian law schools.[90] For example: posing questions to encourage discussion between teacher and student *and* between students;[91] asking questions to challenge and extend students' thinking;[92] a guided discussion as an adjunct to Langdell's casebook method;[93] asking students to describe a case or state the rule derived from it;[94] allowing students to report on their research and findings and subject them to critical review;[95] or as a means of leading into a student-led debate.[96]

If we adopt this broader construction of Socratic pedagogy, commentary on its purpose and effect in American law schools can begin to reveal implicit or hidden learning outcomes. In doing so, the discussion that follows adopts the phenomenological lens discussed in chapter 1. In the context of Skinner's stimulus and Jackson's construction of the role of the classroom teacher, the emphasis is placed on the role of the teacher-

[89] Jenny Morgan, 'The Socratic Method: Silencing Cooperation' (1989) 1 *Legal Education Review* 151, 152; Louis Del Duca, 'Educating Our Students for What? The Goals and Objectives of Law Schools in Their Primary Role of Educating Students-How Do We Actually Achieve Our Goals and Objectives?' (2010) 29 *Penn State International Law Review* 95, 100.
[90] Keyes and Johnstone (n 88); Carruthers, Skead and Galloway (n 88).
[91] Philip Areeda, 'The Socratic Method' (1996) 109 *Harvard Law Review* 911; Alan Stone, 'Legal Education on the Couch' (1971) 85 *Harvard Law Review* 392; Del Duca (n 89).
[92] Anthony D'Amato, 'The Decline and Fall of Law Teaching in the Age of Student Consumerism' (1987) 37 *Journal of Legal Education* 461.
[93] Interestingly, and perhaps reflective of the extended understanding of Socratic pedagogy, there is a division of opinion on whether Langdell's casebook method is synonymous with Socratic method, a necessary partner to it or distinct from it; see Ruta Stropus, 'Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century' (1996) 27 *Loyola University of Chicago Law Journal* 449; Karl Llewellyn, 'The Current Crisis in Legal Education' (1948) 1 *Journal of Legal Education* 211; Stone (n 91); Del Duca (n 89).
[94] Llewellyn (n 93).
[95] Stone (n 91).
[96] Orin Kerr, 'The Decline of the Socratic Method at Harvard' (1999) 78 *Nebraska Law Review* 113. Kerr splits examples of Socratic teaching into 'traditionalist' and 'non-traditionalist' streams.

as-agent and the extent to which their conduct or behaviour is perceived to produce particular outcomes.

Some outcomes fall within the explicit curriculum. Despite the divergent approaches, advocates of an expanded Socratic pedagogy tend to adopt a consistent argument as to its purpose: to actively encourage students to explore legal arguments' strengths and weaknesses.[97] In the context of an explicit curriculum, some commentary argues that the Socratic method has benefits beyond individual classroom experiences, including developing analytical thinking,[98] critical thinking,[99] creativity in problem-solving,[100] and verbal skills.[101] Coincidentally, all of these benefits appear in the explicit curriculum for Australian law schools in TLO 3 and, to some extent, in TLO 5.

Although often unsupported by empirical evidence, even critics of a Socratic pedagogy acknowledge that some students adapt and demonstrate behaviours consistent with the explicit curriculum, for example, a capacity for critical and analytical thought, preparing them to 'think like a lawyer'.[102] To the extent that a law teacher models or exemplifies positive professional attributes or behaviours, their authoritative position may encourage law students to emulate them.[103] Ultimately, they may demonstrate

[97] Del Duca (n 89); Llewellyn (n 93)
[98] Carl Schneider, 'On American Legal Education' (2001) 2 *Asian-Pacific Law & Policy Journal* 76; Cynthia Hawkins-Leon, 'The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues' (1998) [1998](1) *Brigham Young University Education and Law Journal* 1; Stone (n 91).
[99] Stone (n 91).
[100] Schneider (n 98).
[101] Stone (n 91); Hawkins-Leon (n 98); Stropus (n 93); Del Duca (n 89).
[102] Watson (n 86).
[103] Stone (n 91); Hannah Arterian, 'The Hidden Curriculum' (2009) 40 *University of Toledo Law Review* 279. This is also explicitly acknowledged as an obligation on law teachers by the Association of American Law Schools; Association of American Law Schools, 'Law Professors in the Discharge of Ethical and Professional Responsibilities', *AALS Statement of Good Practices* (Web Page, 12 July 2017) <https://www.aals.org/about/handbook/good-practices/ethics/>.

elements of the type of 'professional responsibility' and 'self-management' reflected in TLO 2 and TLO 6:

> A successful student develops a sense of excitement and pleasure in his own learning process, and as he further improves, he becomes more closely identified with his future role as a lawyer. He perceives himself in his vocational posture and becomes interested in and a part of the activities of the professional bar. He will be able to see this role objectively, accurately perceiving his shortcomings as well as his strengths. He will seek to develop his status both among professionals and in relation to society.[104]

Although not applicable specifically to law students, there is some empirical evidence to support these observations. Positive perceptions of faculty may significantly affect students' perceptions of support, belonging and motivation. Those effects were likely to be more pronounced if students perceived they had established a closer, personal relationship with faculty members. [105] However, none of this research is directed to law students, and there is no similar research conducted with Australian law students.

Critics of a Socratic pedagogy argue that teacher-centred environments reflect a hierarchical structure based on the teacher's central, authoritative role as the expert.[106] Abuse or misapplication of the power accorded to them in that context produce outcomes unintended by, or inconsistent with, the explicit curriculum. Several descriptors have been applied to the types of behaviour or conduct perceived in law teachers that cause adverse reactions in law students, for example, 'hostile',[107]

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[104] Watson (n 86) 127.
[105] Barbara Hong, Peter Shull and Leigh Haefner, 'Impact of Perceptions of Faculty on Student Outcomes of Self-Efficacy, Locus of Control, Persistence, and Commitment' (2011) 13 *Journal of College Student Retention: Research, Theory & Practice* 289.
[106] Toni Pickard, 'Experience as Teacher: Discovering the Politics of Law Teaching' (1983) 33 *The University of Toronto Law Journal* 279; Robert Nagel, 'Invisible Teachers: A Comment on Perceptions in the Classroom' (1982) 32 *Journal of Legal Education* 357, 357; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (NYU Press, 2004) 3.
[107] Kennedy (n 86) 71; Stone (n 91) 413.

'abrasive',[108] 'indifferent',[109] 'inaccessible'[110] or applying differential treatment in their approach to particular students.[111] How law teachers might communicate this to students can be overt or subtle:

> Each of us interprets the emotions of his interlocutor by far more than the content of his language. Tones of voice, physical mannerisms, facial expression, cast of eye—all these are as important in the classroom as they are anywhere else in life. A professor who lectures can get this across as effectively as a professor who proceeds by question and answer.[112]

Women's accounts of teachers' conduct in Australian and American law schools, although not universal, reinforce these types of observations and are more often supported by direct empirical evidence.[113] Their experiences suggest that conduct can be even more overt, in the form of explicitly derogatory or misogynistic comments.[114] It may be more subtle in the sense of not being apparent, or not applied, to their male

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[108] Stone (n 91) 413.
[109] Kennedy (n 86) 72.
[110] Ibid 49; Law School Reform, *Breaking the Frozen Sea: The case for reforming legal education at the Australian National University* (ANU Law Students Society, 2010).
[111] Kennedy (n 86). Although not directly applicable to law students, research with American undergraduate students elicited similar descriptors of faculty with whom students were inclined to have little or no contact; see Hong, Shull and Haefner (n 105).
[112] Kennedy (n 86).
[113] See for example Stewart (n 57); Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) 89-105. For an overview of collected empirical and anecdotal studies of women's experiences in American law school classrooms, see Taunya Lovell Banks, 'Gender Bias in the Classroom Women in Legal Education--Pedagogy, Law, Theory, and Practice' (1988) 38 *Journal of Legal Education* 137. Weiss and Melling conducted interviews with 20 women at Yale law school; Catherine Weiss and Louise Melling, 'The Legal Education of Twenty Women' (1987) 40 *Stanford Law Review* 1299. Taber conducted a survey of 516 male and female students at Stanford Law School, testing hypotheses of women's experiences at law school; Janet Taber, 'Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates' (1987) 40 *Stanford Law Review* 1209. Bashi and Iskander undertook interviews and observational studies with both faculty and women at Yale Law School, supplemented by observational data; Sari Bashi and Marayana Iskander, 'Why Legal Education Is Failing Women' (2006) 18 *Yale Journal of Law and Feminism* 389. Neufeld undertook research at Harvard using a similar methodology to Bashi and Iskander; Adam Neufeld, 'Costs of an Outdated Pedagogy? Study on Gender at Harvard Law School' (2005) 13 *American University Journal of Gender, Social Policy & the Law* 511.
[114] Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 113); Weiss and Melling (n 113).

peers: ‘a kind of wilful deafness toward what women-students (sic) say, accompanied by an absence of eye contact, a physical turning away’.[115] Alternatively, male law teachers are less likely to invite women to participate.[116]

Just as Jackson argues that students’ responses to teachers vary, the outcomes for law students are similarly diverse. For example, in the same way that law students might emulate positive conduct, they may be susceptible to internalising the indifferent or even aggressive behaviour of academic staff as appropriate professional conduct.[117] Alternatively, they may create a public, law school persona as a form of ‘camouflage’[118] while maintaining a discrete, private identity,[119] similar to Jackson’s outwardly compliant student. They may also choose to become passive, silent or ‘invisible’[120], a reaction often identified in women’s’ accounts of their experience in law school classrooms.[121] Unlike Jackson’s classroom, law students also have one further option— ‘flight’—withdrawing from a course, or leaving law school altogether.[122]

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[115] Weiss and Melling (n 113); Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 113). See also similar accounts of the experience of women in higher generally in Mary Frank Fox, 'Women and Higher Education: Sex Differentials in the Status of Students and Scholars' in Jo Freeman (ed), *Women: A Feminist Perspective* (Mayfield Publishing Company, 1984) 238.
[116] Bashi and Iskander (n 113).
[117] Pickard (n 106) 283; Arterian (n 103).
[118] Watson (n 87); see also Granfield’s discussion of law students from lower socio-economic backgrounds and ‘faking it’; Robert Granfield, *Making Elite Lawyers* (Routledge, 1992) ch 7.
[119] Kennedy (n 86) 78.
[120] Nagel (n 106).
[121] See for example Stewart (n 57); Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 113); Banks (n 113). See also the discussion of pedagogy silencing women in law school and higher education generally, and the supporting empirical research, in Morgan (n 89). See also Granfield (n 118) 100-1.
[122] Watson (n 87) argues that law students demonstrate a ‘fight or flight’ response when challenged in law school. Watson’s sample is small and does not explore options between the two. However, comparative empirical research involving law and medical students in American universities suggests that law students contemplate leaving more often than their peers in medical school; Marilyn Heins, Shirley Nickols Fahey and Roger Henderson, 'Law Students and Medical Students: A Comparison of Perceived Stress' (1983) 33 *Journal of Legal Education* 511.

For law students generally, the causal link in much of this literature between law teachers' conduct and students' reactions is not always clear. It is sometimes implicit,[123] assumed,[124] or aggregated with other facets of law school.[125] They may also be based on individual observations,[126] although given the focus of this thesis on student experience, they are still valuable.

In women's accounts of their experience in law classrooms, those causal links between the teachers and students' reactions are often more clearly identified, especially in interview data.[127] However, they are also often subsumed within discussions that, while important, adopt law school and the curriculum as the primary lens, examining the emphasis on male perspectives on the law and legal problem-solving.[128] They are also not universal.[129] As discussed earlier, some students adapt, and not all law teachers are aggressive, abusive or misogynistic. Nevertheless, evidence suggests that law teachers' conduct plays an essential role in law students' perceptions. The diversity of responses also reflects the same diversity that Jackson outlines.

Applying the commentary and research on the role of law teachers is challenging. Much of it is based on the reactions of American law students. However, some of the extended or non-traditional Socratic pedagogy classroom structures are similar to Australian law schools. We might expect some participants to perceive law teachers as agents to which they attribute outcomes consistent with the explicit curriculum,

[123] See for example Kennedy (n 86).
[124] See for example Stone (n 91); Pickard (n 106).
[125] Watson (n 87).
[126] See for example Adrienne Stone's critique of Kennedy's (n 86) work in Adrienne Stone, 'Women, Law School and Commitment to the Public Interest' in Jeremy Cooper and Louise Trubek (eds), *Educating for Justice: Social Values and Legal Education* (Routledge, 2018) 56.
[127] See for example Banks (n 113); Weiss and Melling (n 113); Taber (n 113); Granfield (n 118).
[128] See for example Granfield (n 118); Banks (n 113). This is discussed further below.
[129] See for example the discussion of some women adapting to their studies; Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 113); Granfield (n 118); Stewart (n 57).

especially those associated with thinking skills. At the same time, we might expect some participants to perceive law teachers as agents in hidden outcomes that are inconsistent with the explicit curriculum. Based on existing research and commentary, those outcomes might include withdrawing from classroom interactions, either by remaining silent, not contributing or even choosing not to attend some classes at all. In some instances, we might expect participants to express a loss of self-confidence or doubt whether they 'fit in', which they attribute to interactions with law teachers. Based on research on women in law classrooms, we might expect that in addition to withdrawal or self-doubt, some women might also perceive they are excluded or marginalised by predominantly masculine structures, especially in their exchanges with male law teachers.

Research and commentary also give us some insight, again acknowledging the significant volume of American research, into how participants might perceive the causes of those hidden outcomes. For example, we might expect participants to attribute conduct to law teachers that is hostile, abrasive, belittling or deferential to particular students or perspectives. We might also expect some participants to refer to more subtle conduct, such as refusing to call on participants or other students.

2 *The role of the explicit curriculum*

There is some overlap between the roles of Jackson's classroom teacher and the curriculum. However, Jackson's model encompasses externally imposed structures that apply to both the teacher and student. For example, the explicit curriculum determines the subjects to be studied and (usually) the order in which they will be studied. By including some subjects and excluding others, Jackson argues that the

hidden curriculum teaches students about the comparative importance of subjects.[130] Dictating the order in which subjects should be studied also communicates an implicit or hidden message about subjects' relative complexity.[131]

Arguably, the exclusion and inclusion of subjects can also be applied to individual courses. The explicit curriculum determines the content covered within courses and the order in which it will be covered. The law school or the law teacher may also have a role. Again, the hidden outcome is that students are taught what is considered necessary within an area of the law.

In the context of Australian legal education, the cascading set of explicit learning outcomes imposed by the AQF, TLOs and the Priestley 11 establishes a pre-determined set of knowledge and skills that a law graduate is expected 'to know, understand and be able to do as a result of learning'.[132] Arguably, the implicit or hidden message communicated is that the knowledge and skills outside the explicit curriculum are considered less important. For example, family law was explicitly excluded in the original drafting of the Priestley 11. Despite calls for its inclusion, it remains absent, implicitly communicating that it is somehow of lesser importance than, for example, corporations law.[133] It has also been argued that the organisation of required courses into 'Contract' or 'Torts'—a structure that is then adopted by law schools[134]—

[130] Jackson (n 35).
[131] See for example a recent blog post by a professor at the City University of New York who argues that American legal education has reached a *détente* between doctrinal and experiential study that assigns case method a higher priority in first year; 'a truce in which law schools have decided that experiential work can happen in the third year so long as the case method reigns supreme in the first.'; Eduardo Capulong, 'Experiential Education and the First-Year Curriculum', *Best Practices for Legal Education* (Blog Post, 10 Februrary 2021) <https://bestpracticeslegaled.com/2021/02/10/experiential-education-and-the-first-year-curriculum/>.
[132] Kift, Israel and Field (n 5) 1.
[133] Thornton, 'Dreaming of Diversity in Legal Education' (n 11).
[134] See for example Australian National University, 'Bachelor of Laws (Hons)', *Programs and Courses* (Web Page, 2020) <https://programsandcourses.anu.edu.au/program/allb#inherent-requirements>; University of Canberra, 'Bachelor of Laws - SCB101', (Web Page, 2020) <https://www.canberra.edu.au/coursesandunits/course?course_cd=SCB101>.

implicitly reinforces a doctrinal emphasis in core areas and excludes critical analysis.[135]

Even when specific subjects are included, the structure of the explicit curriculum may create hidden outcomes. For example, the Priestley 11 mandates students study 'Civil Dispute Resolution.'[136] In the detailed list of 13 subjects to be covered in a civil dispute resolution course, only one addresses non-litigious methods of resolving disputes, for example, mediation or conciliation. Consequently, it is heavily weighted toward litigation. The relative weighting has attracted criticism on the basis that the explicit curriculum, at least for civil disputes, places greater value on litigious or adversarial methods of resolving disputes and less value on other forms of dispute.[137]

Jackson restricts his focus to the implementation of a pre-determined explicit curriculum. He does not examine the upstream influences that might affect the explicit curriculum's design to compel the inclusion or exclusion of particular content. However, as discussed in chapter 1, many external pressures operating on the explicit curriculum in legal education in Australia are perceived to have narrowed student, and to some extent, law school choice.

The content of the explicit curriculum has been contested since the 1850s. The tension between legal education as liberal university education or vocational study is partly reflected in the broad-to-narrow spectrum of focus represented by the AQF, the TLOs

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[135] Leslie Bender, 'Hidden Messages in the Required First-Year Law School Curriculum' (1992) 40 *Cleveland State Law Review* 387, 392. This is considered in more detail in relation to evaluation below. A similar, although unsupported, criticism of the Priestley 11 has been made; Kate Galloway and Peter Jones, 'Guarding Our Identities: The Dilemma of Transformation in the Legal Academy' (2014) 14 *QUT Law Review* 15.

[136] Law Admissions Consultative Committee, 'Prescribed academic areas of knowledge' (n 8).

[137] Townes O'Brien (n 11); Lande (n 11); Productivity Commission, *Access to Justice Arrangements* (Report No 72, 5 September 2014) vol 1, 547; Australian Law Reform Commission, *Review of the adversarial system of litigation: Rethinking legal education and training* (Issues Paper No 21, 1997) [5.14].

and the Priestley 11. The development of the explicit curriculum also reflects the involvement of a broad range of stakeholders who influence the curriculum's content; from Ministers at one end,[138] to a committee representing the interests of universities, the judiciary, the legal profession and admitting authorities at the other.[139]

While the role of the profession's influence on the curriculum has been persistent,[140] it has been argued that the pressure on the profession to become more commercial or profit-oriented has had consequent effects on its expectations of law school. The profession expects law schools to provide more commercially oriented subjects and a greater focus on skills in the explicit curriculum.[141] However, there is very little empirical research on what an effective lawyer is, or what skills make an effective lawyer.[142] Attempts have been made at lists,[143] but research suggests that skills more traditionally considered 'lawyering', like advocacy and negotiation, are rated much lower by legal employers than research and writing skills.[144]

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[138] Australian Qualifications Framework Council (n 4).
[139] Law Admissions Consultative Committee, *Background Paper on Admission Requirements* (n 8).
[140] Keyes and Johnstone refer to the relationship as being one of law schools' persistent subservience to legal practice; Keyes and Johnstone (n 88).
[141] Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012) 70-1.
[142] William Henderson, 'A Blueprint for Change' (2012) 40 *Pepperdine Law Review* 461, 498.
[143] The McCrate Report on legal education included skills like communication and negotiation as well as 'the organisation and management of legal work'; Section on Legal Education and Admissions to the Bar, 'Legal Education and Professional Development - An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap' (Report, American Bar Association, 1992) 139-40 <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>. The Australian Law Reform Commission did not adopt the McCrate list but made reference to 'broad professional skills' and included advocacy, drafting and negotiation; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 17 February 2000) [2.78].
[144] The Pearce Committee undertook a large scale survey of employers in 1987; Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A discipline assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) vol 4. A much smaller scale study of employers in Sydney conducted in 2005 produced very similar results; Elisabeth Peden and Joellen Riley, 'Law Graduates' Skills - A Pilot Study into Employers' Perspectives' (2005) 15 *Legal Education Review* 87.

Changes to tertiary education[145] have also allowed the profession to become more directly associated with aspects of law school life as law schools look outside for financial resources. [146] The relationship between schools and sponsoring firms might be reflected in the association of firms' names with rooms, academic positions, academic prizes and extra-curricular competitions.[147] It may also extend to association and participation in career advice fairs. While this may appear to have little direct influence over the curriculum, it has been suggested that it may create the perception among firms that it is an influence that they might leverage.[148] Alternatively, it could be argued that it is a simple form of advertising to law students. The association a firm chooses to take may reinforce particular messages about the firm, its focus, and its prestige.

The same reforms, and the increase in the number of law schools, have introduced an additional influence on the design of law schools' curriculum. For example, Thornton's empirical research with law school teachers and law deans explored the role and effect of competition between law schools for students through attempted diversification or niche marketing of their curriculum.[149] At the same time, the effect of the explicit curriculum and the generally uniform requirements for admission to practice create barriers to law schools dramatically differentiating the content of their offering.[150] One option is for law schools to appear 'distinctive' in some form to attract

[145] See the discussion at ch 1 II A.
[146] Andrew Goldsmith and David Bamford, 'The Value of Practice in Legal Education' in Fiona Cownie (ed), *Stakeholders in the Law School* (Hart Publishing, 2010) 127.
[147] Thornton, *Privatising the Public University: The Case of Law* (n 141) 51.
[148] Ibid 52.
[149] Ibid 35.
[150] Margaret Thornton and Lucinda Shannon, "Selling the Dream': Law School Branding and the Illusion of Choice' (2013) 23(1/2) *Legal Education Review* 249, 253; Thornton, *Privatising the Public University: The Case of Law* (n 141) 37-8.

potential students.[151] For example, some Australian law schools, including the ANU, offer specialisation in aspects of the law.[152] Others, including the Canberra Law School, have adopted a focus on its graduates' employability, advertising a 'highly practical approach … to allow [students] to become an agile, ethical and effective legal professional[s]'. [153]

Alternatively, Marginson paints a more depressing picture of the effect of competition in a crowded market that may affect the curriculum more directly.[154] Unlike American law students, Australian law students have access to a deferred payment scheme for their tuition costs[155] or pay the cost up-front. Repayment and the rate of repayment is contingent on income levels.[156] Changes to the scheme in 2005 allowed fee-paying students to gain access to a similar loan, allowing greater mobility and accessibility for students between universities. Marginson predicted that the combined effect of university ranking, changes in the accessibility of research funding, and increased

[151] Michael Ariens, 'Law School Branding and the Future of Legal Education' (2002) 34 *St Mary's Law Journal* 301, 348-9.

[152] Bond University offers six specialisations; 'Law Specialisations (Undergraduate)', *Bond University* (Web Page) <https://bond.edu.au/subjects/current-law-specialisations-undergraduate>. The University of Technology Sydney offers a major in Legal Futures and Technology; University of Technology Sydney, 'MAJ09443 Legal Futures and Technology', *Handbook* (Web Page) <https://www.handbook.uts.edu.au/directory/maj09443.html>. The ANU has announced the creation of four specialisations; Australian National University, 'Bachelor of Laws (Honours)', *Programs and Courses* (Web Page) <https://programsandcourses.anu.edu.au/program/allb#specialisations>.

[153] 'Bachelor of Laws', *University of Canberra* (Web Page) <https://www.canberra.edu.au/coursesandunits/uc-courses/course?course_cd=SCB101>.

[154] Simon Marginson, 'Dynamics of National and Global Competition in Higher Education' (2006) 52(1) *Higher Education* 1.

[155] There are several schemes applicable depending on date of enrolment and the type of fee payable including the Higher Education Contribution Scheme (HECS), Higher Education Contribution Scheme – Higher Education Loan Program (HECS-HELP) or the Higher Education Loan Program for full fee paying students (FEE-HELP).

[156] For an overview of the structure of the Higher Education Contribution Scheme (HECS), its successor the Higher Education Contribution Scheme - Higher Education Loan Program (HECS-HELP) and the equivalent scheme for fee-paying students (FEE-HELP) see Kim Jackson, 'The Higher Education Contribution Scheme' (Briefing Paper, Australian Parliamentary Library, 12 August 2003) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/hecs>; Carol Ey, 'Higher Education Loan Program (HELP) and other student loans: a quick guide' (Briefing Note, Australian Parliamentary Library, 2 May 2017) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/HELP>.

competition in light of reforms to fee arrangements might force universities into a 'race to the bottom' to attract more students, which may affect the breadth and depth of curriculum offerings.[157] However, whether enrolment numbers support the prediction is questionable.[158]

Australian law students are entitled to choose from a range of elective subjects to satisfy the LLB or JD program requirements.[159] However, the compounded effect of required courses, an increased emphasis on vocational skills and limits on law school differentiation has narrowed the choice available to law students to subjects directed to legal practice and what is considered valuable by the legal profession.[160]

It is difficult to identify research on the extent to which the Australian law school curriculum has a causal influence on law students' perceptions. In her comprehensive work with law school deans and teachers, Thornton argues that although some new students may be motivated by social justice issues, the narrow choice of subjects means little opportunity to pursue them. From a hidden curriculum perspective, the lack of choice compels or encourages a decline or change in altruistic motivation.[161] The increasing reach of predominantly commercial law firms into law schools, especially

[157] Marginson (n 154) 16-7. The University of Canberra falls into Marginson's category of 'Unitech', being formerly a technical college converted to a university in the wake of the 1987 reforms. Marginson placed Unitech in the bottom two categories of university in terms of stratification of tertiary education.
[158] Enrolment numbers have continued to increase; see ch 1 II.
[159] For the requirements for the ANU LLB (Hons) program and the Canberra Law School LLB see; Australian National University (n 134); University of Canberra (n 134). For the requirements of the JD programs see Australian National University, 'Juris Doctor', *Programs and Courses* (Web Page, 2020) <https://programsandcourses.anu.edu.au/program/MJD>; University of Canberra, 'Master Degree Course in Juris Doctor - SCM001', (Web Page, 2020) <https://www.canberra.edu.au/coursesandunits/course?course_cd=SCM001>. Those requirements may differ if a student chooses to study a double degree program, usually involving a narrower selection of choices.
[160] Thornton, *Privatising the Public University: The Case of Law* (n 141) 100.
[161] Ibid 77, 78, 84.

at careers fairs, may have also exacerbated a perception that the choice of careers within the law is much narrower than in reality.[162]

One pressure on the explicit curriculum to narrow offerings that Jackson does not consider is the pressure from students themselves to change the curriculum. For example, Thornton interviews several law teachers who refer to students' desire that law schools provide electives and teach content relevant to what students perceive employers want.[163] Of particular relevance to this thesis, a group of ANU students conducted their own empirical research with their peers in 2010.[164] Some responses confirmed the expectation of students that their studies would be 'relevant':

> For example, one third year LLB student argued that 'the value in having a law degree is in having legal skills' and thought that these were sacrificed at the expense of critical 'social justice' electives.[165]

Others expressed a desire for more 'practical' learning opportunities, including 'how to BE a lawyer' (emphasis in the original) or more focus on oral communication. Responses were not, however, consistent. The research also found that some respondents did not see law school as vocational training but instead saw it as a personal challenge, a generalist degree or an opportunity to engage with critical perspectives on the law.[166]

The causal connection most commonly drawn for students' push for more commercial, vocational or practical opportunities is the reintroduction of fees for tertiary education.

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[162] Melanie Poole, 'The Making of Professional Vandals: How Law Schools Degrade the Self' (Honours Thesis, Australian National University, 2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029993>.
[163] Thornton, *Privatising the Public University: The Case of Law* (n 141).
[164] Law School Reform (n 110) 16.
[165] Ibid 10.
[166] Ibid 7-8.

As noted above, university students are expected to repay the cost of their studies. It has been argued that Australian law students' positioning as consumers has changed the relationship between students, law schools, and the curriculum.[167] While legal education has always been connected with admission to practice, the reintroduction of fees means that students are now (literally) investing in the expectation of receiving a financial return in the form of employment. In her interviews, Thornton finds evidence of the commodification of legal education among law students as reflected in their exchanges with law teachers over content, delivery, and assessment modes.[168] More generally, research with Victorian high school students suggests that the likelihood of employment plays an essential role in their choice of university.[169]

Embedded within the push from students is a perception of what employers value. Arguably, by meeting employers' expectations, students increase the likelihood of being employed. What is not clear is how those perceptions are created, especially where there is evidence of a difference between what students perceive employers want and what employers expect. Although students perceive employers to want graduates with practical or 'lawyering' type skills, research with employers suggests that they place greater value on skills already embedded in the explicit curriculum, like writing and research.[170]

One source for students' perceptions of the skills they need may be the depiction of lawyers in popular media, for example, in television shows like *Suits* or *Rake*. Empirical evidence, where it exists, is inconclusive. A small study of first-year

[167] Andrew Boon and Avis Whyte, 'Will there be Blood? Students as Stakeholders in the Legal Academy' in Fiona Cownie (ed), *Stakeholders in the Law School* (Hart Publishing, 2010) 187.
[168] Thornton, *Privatising the Public University: The Case of Law* (n 141) 44-9, 91, 104.
[169] Linda Brennan, 'How prospective students choose universities: a buyer behaviour perspective' (PhD Thesis, Melbourne University, 2001) <http://hdl.handle.net/11343/39537>.
[170] See n 144.

American law students suggests that popular media may influence expectations of legal practice.[171] It found that students did not have unrealistic expectations of what lawyers do. However, there is also contradictory, anecdotal evidence that law students are unprepared for the experience of working in environments substantially removed from popular depictions.[172] There would appear to be no research with Australian law students to indicate whether popular media plays any role in their perceptions.

Another potential source is media that speaks directly to law students: law firm employment advertisements. However, the limited empirical research available suggests that employment advertisements tend to depict an image of practice that law students might find attractive, rather than what is required to be *effective* in practice:

> characterised by smart attire, pleasure seeking and hedonistic behaviour, framed within a largely corporately owned leisure context.[173]

However, there would appear to be no research with Australian law students on the effect of law firm recruitment advertising.

Other potential sources of information include 'most obviously, the knowledge derived from the work placement, the vacation visit, the open day, work shadowing and voluntary work'.[174] Every year, Australian law students engage in the process of applying for summer or vacation clerkships:

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[171] Victoria Salzmann and Philip Dunwoody, 'Prime-Time Lies: Do Portrayals of Lawyers Influence How People Think about the Legal Profession' (2005) 58 *Southern Methodist Law Review* 411.
[172] Steven Berenson, 'Preparing Clinical Law Students for Advocacy in Poor People's Courts' (2013) 43 *New Mexico Law Review* 363.
[173] Richard Collier, 'Be Smart, Be Successful, Be Yourself - Representations of the Training Contract and Trainee Solicitor in Advertising by Large Law Firms' (2005) 12 *International Journal of the Legal Profession* 51, 76-7.
[174] Ibid 54.

> Each year enormous effort is made by law students to make the interviews for these clerkships.(sic) The law firms are thought to recruit from the pool of clerks they have employed in the later years of the law degree. Not only are students choosing what they study with this in mind, but they are also gaining knowledge of a type of legal practice that is very different to most legal work.[175] (emphasis added)

Clerkships, and the association with law firms or individual lawyers, may influence what students perceive as valuable in obtaining long-term employment. However, it is difficult to identify research on the extent to which it does.

Lastly, law students' *current* employment commitments may encourage or compel students to make demands on the law school's curriculum. In their interviews with Thornton, Australian law teachers referred to increasing demands from students for changes to content, delivery, and assessment due to students' work commitments. That is, law students saw the law school as needing to change to facilitate their employment.[176] Thornton suggests that the pressure comes from students supporting themselves through university while at the same time 'minimis[ing] their ballooning education debts'.[177] Employment data indicates that since 2015, the proportion of full-time university students employed full-time has steadily increased while the proportion of students studying full-time while working part-time has remained stable.[178] This would tend to support the observations made by law teachers interviewed by Thornton of increased student demands for flexibility.

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[175] Goldsmith and Bamford (n 146) 178.
[176] Thornton, *Privatising the Public University: The Case of Law* (n 141) 44, 95.
[177] Ibid 44. Caution has been expressed over drawing a direct connection between student debt and post-university financial disadvantage; Gary Marks, 'The Social effects of the Australian Higher Education Contribution Scheme (HECS)' (2009) 57(1) *Higher Education* 71; Claire Houssard, Anne Sastro and Suzana Hardy, 'The impact of HECS debt on socioeconomic inequality and transition to adulthood outcomes' (Research Paper, Melbourne Institute, 2010).
[178] In August 2015, the Australian Bureau of Statistics reported that 12% (a little more than one in ten) of all students enrolled in full-time tertiary study were also employed full-time. By August 2020, that

It is difficult to identify research on the extent to which working while studying may affect students. There is some evidence to suggest that the financial capacity to pay fees up-front and therefore not needing to find employment may be associated with better academic performance in the first year. However, that may be closely associated with socio-economic differences in students' backgrounds.[179] At the same time, research with working students has found inconsistent outcomes in terms of time commitments and academic success.[180]

In summary, existing research and commentary would suggest there are top-down, hidden outcomes for law students that flow from the explicit curriculum's structure. Law school and, consequently, student choice are perceived as being increasingly narrow. Pressure from the legal profession and the effect of reforms to tertiary education have generally compelled law schools to focus on commercially-valued knowledge and skills to attract students. As a result, students are implicitly taught that the more limited selection of subjects and skills offered are considered valuable and necessary for employment. From an attributional perspective, we might expect to see some participants adopt that belief. They would identify commercially oriented subjects or practical skills as important and attribute that outcome to the selection of

had increased to 19% (almost one in five), despite the effect of COVID-19. Over the same period, the proportion of students employed part-time (15 hours per week or less) rose from 39% in August 2015 to 44% in August 2018 before falling again to 39% in August 2020. However, part-time employment may have more precarious in the period February 2020 to August 2020; see Australian Bureau of Statistics, 'Table 03. Labour force status for 15-24 year olds by age, educational attendance (full-time) and sex and by state, territory and educational attendance (full-time)' (Labour Force, Australia, Detailed, Quarterly No 6291.0.55.003, Australian Bureau of Statistics, October 2020).

[179] Elisa Birch and Paul Miller, 'The impact of HECS debt on Australian students' tertiary academic performance' (2006) 33(1) *Education Research and Perspectives* 1.

[180] For a review of the literature and the variables that may affect performance see Casey Ee Kiang Choo, Zi Xiang Kan and Eunae Cho, 'A Review of the Literature on the School-Work-Life Interface' (2019) (April) *Journal of Career Development*; Jennifer Logan, Traci Hughes and Brian Logan, 'Overworked? An Observation of the Relationship Between Student Employment and Academic Performance' (2016) 18(3) *Journal of College Student Retention: Research, Theory & Practice* 250.

subjects offered. Other participants may express dissatisfaction with the narrow choice and the inability to pursue subjects in which they are more interested.

However, based on research with Australian law schools, one might expect participants to express dissatisfaction because the explicit curriculum does not meet their expectations of what they perceive as essential for employment. Participants may identify a range of causes and associated agents. Research would suggest that participants might attribute the agent of their disappointment to experiences with employers, media, the cost of their education or their own motivations for studying law. In this context, the outcome is *not* an aspect of the hidden curriculum; it is beyond the law school's control.

3 *Evaluation*

For both Jackson and behaviourists, evaluation of behaviour leading to reward is an essential driving force behind learning outcomes. Behaviourist theories of learning rely on the timely provision of a reward (e.g., marks or positive feedback) to encourage and reinforce desired behaviour. Jackson's model invites us to look closer at the behaviour being evaluated and rewarded.

There is some overlap between the roles of evaluation, law teachers and the explicit curriculum. For example, the context in which a law teacher gives feedback on evaluation can affect students. The explicit curriculum dictates what will be evaluated. However, evaluation itself also drives some implicit or hidden outcomes.

Evaluation and assessment are essential to Australian legal education, although assessment methods are not prescribed. For example, the *Threshold Standards* for Australian universities provide that there must be clear links between learning

outcomes and assessment and that the assessment is 'capable of confirming that all specified learning outcomes are achieved'.[181] CALD's *Standards for Australian Law Schools*, against which Australian law schools may be evaluated, provide that each law school is entitled to determine its assessment methods and criteria, but they must be published.[182] Students are also entitled to 'timely feedback' on formative assessment.[183] ANU had adopted a policy on assessment that referred to timely feedback that allowed students to gauge their progress and improve their performance.[184] However, that policy would appear to have been superseded by a university-wide assessment policy in similar terms.[185] A similar university-wide policy applies to the Canberra Law School.[186]

It is difficult to find aggregated information on the types of assessment or feedback in Australian law schools. The Pearce Committee's survey of law schools focused on examining the prevalence of examinations and encouraged law schools to consider alternatives.[187] McInnis and Marginson's review of changes to Australian legal education after Pearce adopted a similar focus.[188] The only cross-institutional study relates to evaluation and assessment methods in property law.[189] Perhaps consistent with the criticism that empirical research in Australian law schools adopts a 'cottage

[181] *Threshold Standards* (n 2) 1.4.3.
[182] Council of Australian Law Deans (n 12) 22.
[183] *Threshold Standards* (n 2).
[184] Law School Reform (n 110) 36.
[185] Australian National University, 'Policy: Student assessment (coursework)', *Policy Library* (Web Page, 23 December 2019) [34] <https://policies.anu.edu.au/ppl/document/ANUP_004603>. 'Improve performance' is not included in the ANU policy which instead refers to 'assist with … learning'.
[186] University of Canberra, 'Assessment Policy', *University Policy Library* (Web Page, 14 October 2015) [3.22], [3.23] <https://www.canberra.edu.au/Policies/PolicyProcedure/Index/488>. The policy refers specifically to feedback indicating 'what standard of performance the student has achieved; and what the student needs to do to improve that standard of performance'.
[187] Pearce, Campbell and Harding (n 144) vol 1.
[188] Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Printing Service, 1994) 170-1.
[189] Carruthers, Skead and Galloway (n 88).

industry' focus,[190] there are studies on particular types of assessment (usually novel or unique) and their effectiveness in meeting the explicit curriculum's requirements.[191] Consequently, it is difficult to identify causal links between different approaches to assessment or feedback and law students' perceptions more generally.

There is evidence that students see some forms of assessment as useless because they are perceived to bear no connection to what makes a 'good lawyer'.[192] The research conducted by ANU students elicited similar responses, especially with the use of exams to measure student achievement.[193] However, this would appear to have a more transparent connection to ideas about the relevance of study to vocational outcomes.[194]

To the extent that evaluation is teacher-centred, we may be able to draw some analogies with students' experiences and Socratic pedagogies, as discussed earlier. It is reasonable to assume that students' reactions to supportive, indifferent, abrasive or hostile evaluative feedback would be similar to the same behaviour exhibited by teachers objectively unconnected with assessment. There is also some evidence that the absence of cooperative opportunities in assessment forces a sense of isolation and individual competition, which runs counter to the explicit curriculum's focus on collaboration in TLO 5.[195]

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[190] Ben Golder et al, 'Legal education *as* an imperative' in Ben Golder et al (eds), *Imperatives for Legal Education Research: Then, Now and Tomorrow* (Routledge, 2020) 3, 4.
[191] See the collected review of empirical research on assessment in Appendix 2 of Alex Steel, 'Empirical legal education research in Australia: 2000–2016 ' in Ben Golder et al (eds), *Imperatives for Legal Education Research Then, Now and Tomorrow* (Routledge, 2020) 74. For research after 2016, see for example Alex Steel et al, 'Use of E-exams in High Stakes Law School Examinations: Student and Staff Reactions' (2019) 29(1) *Legal Education Review* 1; Cathy Sherry, Leon Terrill and Julian Laurens, '(Re)Introducing a Closed Book Exam in Law' (2018) 28(1) *Legal Education Review* 1; Nicky McWilliam, Tracey Yeung and Annabelle Green, 'Law Students' Experiences in an Experiential Law and Research Program in Australia' (2018) 28(1) *Legal Education Review* 1.
[192] Discussed earlier in the context of the explicit curriculum. See also Stewart (n 57).
[193] Law School Reform (n 110) 71. Interestingly, the dissatisfaction with exams and their disconnection to the material was echoed by some of the law teachers interviewed by Thornton (n 141) 74.
[194] This is discussed further in Reward and competition below.
[195] Law School Reform (n 110) 61.

While the nature and content of feedback are important, the *absence* of feedback in evaluative settings may also affect law students. Skinner and Jackson assumed that unrewarded behaviour was unlikely to be reproduced. However, first-year law students' experiences, in particular, suggest that student perceptions of inadequate or non-existent discussions of expectations before an assessment, or feedback following assessment, produces outcomes affecting their beliefs in their abilities and whether they 'fit in'.[196] Several psychological, developmental and personality-related factors have been advanced to suggest why first-year students in particular struggle with expectations of law school.[197] They are beyond the scope of this thesis. One link to law school that does appear through the literature relevant to this thesis is students' perception that there is little or no information on what is evaluated and valued.[198] That perception is often reported in response to low grades, leading some to suggest a self-identified mismatch between American students' expectations of themselves and the expectations of law school.[199]

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[196] See for example the discussion of developmental stages in adolescents, Myers-Briggs personality types and self-actualisation in Nancy Soonpaa, 'Stress In Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students' (2004) 36 *Connecticut Law Review* 353. Soonpaa argues that the same factors are also present in later year students as well. See also an examination of the role of 'self-efficacy' in first year students generally; Charlotte Pennington et al, 'Transitioning in higher education: an exploration of psychological and contextual factors affecting student satisfaction' (2018) 42(5) *Journal of Further and Higher Education* 596.

[197] Soonpaa (n 196); Pennington et al (n 196).

[198] One of the earliest empirical studies of this perception appears in Ronald Pipkin, 'Legal Education: The Consumers' Perspective' (1976) 1(4) *Law & Social Inquiry* 1161. In the context of the earlier discussion of teacher-centred pedagogy, it is worth noting that abandonment of Socratic method ranked significantly lower than 'more feedback' in student suggestions of how to improve their experience. A more recent, larger scale survey of American law students again ranked 'feedback' (including the absence of and lack of positive feedback) as being a greater 'stressor' than Socratic method, reinforcing Pipkin's research; Suzanne Segerstrom, 'Perceptions of Stress and Control in the First Semester of Law School' (1996) 32 *Willamette Law Review* 593.

[199] One American law school counsellor has referred to this as 'Valedictorian Syndrome'—students who excelled at high school find that they are underperforming at law school; Peter Kutulakis, 'Stress and Competence: From Law Student to Professional' (1992) 21 *Capital University Law Review* 835. More recent research is contradictory. For example, survey-based research on stress and depression among American law students suggests that prior academic performance has no significant effect on self-reported distress, although first year students self-report distress more often than later year students; see Andrew Benjamin et al, 'The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers' (1986) 1986 *American Bar Foundation Research Journal* 225. On the other hand, qualitative interviews with law students suggest that mismatched expectations based on prior

There is very little comparative research with Australian law students, but it suggests that the relationship between evaluation, academic success and perceptions of 'fitting in' may be more complex. It may also be affected by students' characteristics. For example, a large scale, multi-year survey of Australian university students generally found that academically successful students at high school were likely to perform well in their first semester at university. Successful first-year students were more likely to cite intrinsic or personal motivations for study as reasons for their success, arguably reflecting a closer personal alignment with their chosen discipline. Poor performing students were more likely to cite parental advice or financial security as reasons for pursuing their studies and lower interest levels. [200]

A study of first-year LLB students found a similar result between high and low performing students, motivation and interest. In the context of what contributed to their success or failure, poorly performing students were more likely to report that they were unlikely to succeed without 'a good teacher'. High performing students were almost evenly split on the importance of teacher support and more likely see themselves as personally responsible for their studies. The same research concluded that high performing students had more 'realistic expectations' (equated with time committed to studying) of law school. [201]

What the research does not explore is the stimulus-response or causal connection. The research did not examine the extent to which poor performance drove a decline in interest and motivation. Conversely, there was no examination of whether high

academic performance are a perceived stressor; Gerald Hess, 'Heads and Hearts: The Teaching and Learning Environment in Law School' (2002) 52(1/2) *Journal of Legal Education* 75.

[200] Kerri-Lee Krause et al, *The First Year Experience in Australian Universities: Findings from a Decade of National Studies* (Centre for the Study of Higher Education, 2005).

[201] Wendy Larcombe, Pip Nicholson and Ian Malkin, 'Performance in Law School: What Matters in the Beginning' (2008) 18 *Legal Education Review* 95.

achievement promotes motivation and perseverance. Research conducted by ANU students in 2010 provides some causal evidence.[202] There are several references to the absence or incomplete discussion of expectations and performance and students' belief that they do not fit in. Consistent with the results of the more extensive, multi-year study of poorly performing students, the cause identified by students was law teachers.[203]

Adding to this complexity is evidence suggesting that students' perceptions of their abilities and whether they are fixed or can be improved affect how they respond to feedback. That is, identical feedback given to two students can be understood and interpreted in two entirely different ways depending on the students' mindset, leading one to exhibit a motivation to improve and the other to assume that the expectations are unachievable.[204]

From an attributional perspective, the diversity of causes and responses to evaluation suggests that interview participants would be unlikely to identify a consistent coding pattern. Some participants may perceive law school or law teachers as agents. However, we might also expect some participants to attribute perceptions of evaluation attributable to agents beyond law school's control, including legal employers. Some may attribute their perceptions to an inherent, personal characteristic that does not match their perceptions of what law school expects (e.g., 'I have never been good at public speaking').

[202] Law School Reform (n 110).
[203] Ibid 49-50.
[204] Ying-yi Hong et al, 'Implicit Theories, Attributions, and Coping: A Meaning System Approach' (1999) 77 *Journal of Personality & Social Psychology* 588.

(a) But what is being rewarded?

For Jackson, evaluation is directly connected to the reproduction of desirable behaviour. However, Jackson's model of evaluation directs attention to *what* is being evaluated. Superficially, the answer may be simple; achievement against the explicit curriculum. However, it has been argued that the approaches to reasoning, research and problem-solving prioritised by the explicit curriculum also produce unintended, implicit or hidden outcomes.

Legal reasoning has made a claim to exceptionalism for almost 400 years. In 1628, Sir Edward Coke wrote:

> Reason is the life of the Law, nay the common law itself is nothing else but reason, which is to be understood of an Artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason ... no man out of his own private reason ought to be wiser than the law, which is the perfection of reason.[205]

For Coke, the law's essence was as a form of higher reasoning. Over the following four centuries, the law's perceived impartiality has become closely associated with consistency, transparency, and predictability.[206] It has been suggested that the crystallisation of accepted conduct into text meant that the law both lent itself to,[207] or

[205] Edward Coke, *The First Part of the Institutes of the Laws of England: Or, A Commentary Upon Littleton : Not the Name of the Author Only, But of the Law Itself* (J & W Clarke, 19th ed, 1832) vol 1, 97b. See also Michael Lobban, 'The common law mind in the age of Sir Edward Coke' (2001) [2001](33) *Amicus Curiae* 18.

[206] Catherine Elgin, 'Impartiality and Legal Reasoning' in Amalia Amaya and Maksymilian Del Mar (eds), *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Hart Publishing, 2020) 47. It has also been suggested that adhering to an idea of transparency and impartiality in the law may shield judicial officers from attacks on their independence or the suggestion of bias; Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions' (2009) 94 *Minnesota Law Review* 1997, 2003; Judith Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' (1987) 61 *Southern California Law Review* 1877.

[207] Senthorun Raj, 'Teaching feeling: bringing emotion into the law school' (2020) 52 *The Law Teacher* DOI: 10.1080/03069400.2020.1781456, 3.

encouraged,[208] a quasi-scientific or mechanical approach to its study; identification of the appropriate rule and applying it to produce a solution.[209]

Arguably, the importance of identifying and applying rules to produce a solution is explicit in the Australian curriculum. For example, the commentary to TLO 3 ('Thinking skills') refers to graduates' ability to 'discriminate between legal and non-legal issues' as a means of identifying the former. Assessment and evaluation would follow, meaning that students would be evaluated, at least in the context of this TLO, on their capacity to identify legal issues and their solutions.[210]

The explicit curriculum does attempt to place legal problem-solving in a broader context. For example, the commentary to TLO 1 ('Knowledge') refers to understanding social justice; gender-related issues; Indigenous perspectives; cultural and linguistic diversity; the commercial or business environment; globalisation; public policy; moral contexts; and issues of sustainability.'[211] It refers to justice, although it is expressed in terms of injustice, demonstrating a failure to adhere to the rule of law.[212]

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[208] Elgin (n 206).

[209] Although Langdell's casebook method is accused of reducing the study of law to a scientific discipline (see JH Landman, 'Problem Method of Studying Law' (1952) 5 *Journal of Legal Education* 500, 502; Hawkins-Leon (n 98)) it has also been argued that the accusation is a misinterpretation of the approach. See the extensive defence of Langdell's intended approach in Bruce Kimbal, *The Inception of Modern Professional Education: CC Langdell 1826-1906* (University of North Carolina Press, 2009) ch 4. Kimbal points out that Langdell wrote very little about his teaching method other than emphasising the use of inductive, scientific reasoning. Accounts of the practise collected by Kimbal suggest that the approach was an energetic and active one in which Langdell himself asked a diverse range of questions of his students in order to derive principles, rather than rules, from a study of precedent. Although Langdell never makes reference to Socratic method, the process of questioning students was part of Langdell's approach and appears to have become associated with a Socratic pedagogy by some writers (see n 93). The decline in the use of a Socratic-type pedagogy to derive principles was first acknowledged by the Association of American Law Schools in 1942; Association of American Law Schools, *Reports of Committees* (Committee on Teaching and Examination Methods, 1942) cited in Hawkins-Leon (n 98). The Report suggested that the practise had deteriorated to such an extent that students merely absorbed cases as authoritative pronouncements, rather than attempting to derive principles from them.

[210] It should be acknowledged that the commentary notes that not all legal issues require a 'legalistic or adversarial' response; Kift, Israel and Field (n 5) 18.

[211] Ibid.

[212] Ibid 14.

Research and commentary in Australia and the United States argue that the law's focus on rationality produces some consequential hidden outcomes.

(i) Adversarialism

The basic texts used in Priestley 11 courses draw primarily on the reported decisions of appellate courts. The 'winning' argument, judicially restated in reasons, is determined the preferred, right or correct interpretation and application of the law.[213] Commentary posits that, insofar as the law is seen to be derived from conflict and competition between opposing points of view, it implicitly communicates that adversarial solutions are the preferred means of problem-solving.[214] Consequently, it encourages students to assume an adversarial personality.[215]

There would appear to be limited empirical evidence in Australian legal education about the emphasis on conflict and its effect on students generally. A survey of students enrolled in Alternative Dispute Resolution at La Trobe found that at the beginning of the course, students were more likely to agree with the statement 'Australian lawyers practise in an adversarial system, hence negotiations and dealings

[213] For a discussion of adversarialism in defining the law in American law schools see Susan Sturm and Lani Guinier, 'The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity' (2007) 60 *Vanderbilt Law Review* 515. Similar suggestions have been made about pedagogy in Australian law schools; see Townes O'Brien (n 11); Townes O'Brien, Tang and Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing May Begin in Year One' (n 50). The concept of judicial reasons representing the 'correct' or 'right' answer to a 'controversy' is also one that has been reinforced by members of the High Court of Australia; see for example Isaac Isaacs, 'The Late Mr Justice Higgins' (1928) 41 *CLR*; Frank Kitto, 'Why Write Judgments?' (1992) 66 *Australian Law Journal* 787; Stephen Gageler, 'Why write judgments?' (2014) 36 *Sydney Law Review* 189. For an acknowledgement and defence of the 'contest' of the common law see; Murray Gleeson, 'The Judicial Method: Essentials and Inessentials' (District and County Court Judges' Conference, Sydney, 25 June 2009). At the same time, the origins and utility of adversary systems as an oppositional, binary process designed to find 'fact' or 'truth' has been examined and critiqued in detail; see for example Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World Teaching of Legal Ethics' (1996) 38 *William and Mary Law Review* 5.

[214] Townes O'Brien (n 11).

[215] The adoption of adversarial characteristics is also sometimes closely associated with competition between students. The role of competition with peers is discussed in more detail in 'Reward' below.

between lawyers must be adversarial in nature',[216] suggesting that adversarialism has some effect on students' perceptions. Qualitative research with law students at ANU identified that some found that they had become 'tenacious, adversarial, elitist — to fight first, ask questions later'.[217] The same research also found that this approach 'leaked' into students' personal lives, affecting their conversations with family and friends.[218]

Feminist scholars have more closely examined the emphasis on conflict as an essential element of the law. Carol Gilligan's discussion of the preference for cooperation and connection over conflict[219] in women's experience has been echoed in feminist analysis of traditional legal reasoning.[220] Adversarialism is perceived to be opposed to traits characterised as more feminine, including cooperation and caring.[221] It has been suggested that the adversarial focus presents women with opposed images of their roles as 'woman' and as 'lawyer'.[222] Consequently, in reflections on their law school experience, women talk about a spectrum of responses; acceptance, adaptation, acquiescence, 'playing the part' or rejection of adversarial orthodoxy.[223]

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[216] Tom Fisher, Judy Gutman and Erika Martens, 'Why Teach ADR to Law Students? Part 2: An Empirical Survey' (2007) 17 *Legal Education Review* 5. The survey was repeated at the end of the course and found that fewer students agreed with the sentence, suggesting a change in attitude or perception.

[217] Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law StudentWellbeing, Thinking Styles and the Law Curriculum' [150] (2011) 21(2) *Legal Education Review*, 177.

[218] Ibid.

[219] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1993) ch 2.

[220] Gilligan's model of women's approach to conflict is not without critics. It has been argued that it is not necessarily representative of the historical experiences of women, lacks methodological rigour and is focused primarily on the experiences of white women; see for example the variety of critiques offered at an inter-disciplinary forum on Gilligan's work collected in (1986) 11 *Signs* 304-33. The reference here is not to adopt Gilligan's model, but to point out that a universal response to conflict shared by men and women has been actively questioned.

[221] See for example Thornton's (n 113) interviews with law students (93-5) and particularly barristers (195).

[222] Weiss and Melling (n 113) 1314.

[223] See for example ibid; Thornton (n 113).

If the commentary is accurate, one would expect some participants to express a preference for conflict over cooperation in legal problem-solving. However, the causes might be more diverse than simply reward for reproducing rational answers, including perceptions of law school's focus on appellate decisions, law school rewarding an adversarial approach, or law school being a predominantly masculine setting. Law school and law teachers are likely to be perceived as the agent, regardless of the cause.

(ii) Emotionless problem-solving

It has also been argued that the appeal to reason and rationality in legal problem-solving excludes emotion or considers it irrelevant.[224] Various explanations have been offered to explain why law school excludes emotion, at least in doctrinal courses. For example, the adoption of a quasi-scientific approach to its study devalues emotion;[225] law school prepares students for a profession that values rationality;[226] emotion is too vague to be included in goal-focused learning outcomes;[227] the western academy traditionally focuses on thought over emotion;[228] or law teachers themselves are emotionless.[229] For feminist scholars, the assumption of rationality as a masculine trait reflects and perpetuates the characterisation of emotion as feminine and, therefore,

[224] See for example the discussion of opposition to the emerging study of law and emotion in Abrams and Keren (n 206).
[225] This explanation tends to emphasise on Langdell's use of inductive scientific method and his advocacy for legal education as 'rigorous and pragmatic'; Kimbal (n 209).
[226] See for example Paul Savoy, 'Toward a New Politics of Legal Education' (1970) 79 *Yale Law Journal* 444; David Culp, 'Law School: A Mortuary for Poets and Moral Reason' (1994) 16 *Campbell Law Review* 61. Bliss discusses the 'bifurcation' of law student personalities through exposure to legal reasoning, separating a rational/professional identity from the personal/moral identity; John Bliss, 'Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in a Period of Market Crisis' (2017) 42(3) *Law & Social Inquiry* 855.
[227] Mantz Yorke and Peter Knight, 'Self-theories: some implications for teaching and learning in higher education' (2004) 29(1) *Studies in Higher Education* 25.
[228] Carole Leathwood and Valerie Hey, 'Gender/ed discourses and emotional sub-texts: Theorising emotion in UK higher education' (2009) 14(4) *Teaching in Higher Education* 429.
[229] Angela Harris and Marjorie Shultz, 'A(nother) Critique of Pure Reason" Toward Civic Virtue in Legal Education' (1993) 45 *Stanford Law Review* 1773. Shultz and Harris do provide some support in references to a history of western liberal university education for their observations on the academy. The accusation that law teachers are emotionless is, however, difficult to accept, and one with which Leatherwood and Hey (n 228) take particular exception.

alien to the law's dispassionate and impartial operation.[230] Women's accounts of their experiences in classrooms also suggest they feel constrained in displaying emotion because of the risk of appearing vulnerable to other students.[231]

Empirical research in American law school classrooms offers another potential explanation. In the same way that a focus on appellate decisions encourages an emphasis on conflict, Mertz argues that their use as decontextualised examples encourages students to adopt a clinical perspective on the parties involved.[232] Using observational data from law school classrooms, Mertz draws an analogy between research demonstrating medical students' changing reactions to cadavers and law students' use of legal text:

> The clear message is that a legal reading is primarily focused on 'what the law says you can or cannot do,' rather than on 'what's fair.' Just as medical training requires a hardening and distancing of students' sensibilities from empathic reactions to death and human bodies, legal training demands a bracketing of emotion and morality in dealing with human conflict and the language of 'conflict stories.'[233]

However, the extent to which any of these things encourage similar changes in law students is often unclear.

Leaving to one side why legal education is perceived to exclude emotion, its implicit rejection may simply result from it not being a feature of the explicit curriculum. Although the Australian legal education curriculum refers to policy or contextual issues as relevant to 'thinking skills', it refers only briefly to the emotional pressures

[230] See for example Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 113).
[231] Weiss and Melling (n 113).
[232] Elizabeth Mertz, 'Teaching Lawyers the Language of Law: Legal and Anthropological Translations' (2000) 34 *John Marshall Law Review* 91.
[233] Ibid 102.

on clients, with an explicit link drawn to family law.[234] There is a more extensive discussion of emotion in the context of 'self-management' (TLO 6) and relationships with others. However, it is cast in terms of employers' expectations and the capacity to work with others.[235] The commentary suggests that it may also incorporate personal resilience, but this is primarily inward-looking, rather than outwardly focused.[236]

Consistent with Jackson's construct, the silence in the explicit curriculum on the role of emotion in legal problem-solving means that it is unlikely to be assessed. There is no reward offered for demonstrating or applying emotion. Implicitly, students are told that emotion has little or no value. If a behaviourist model is accurate, one might expect participants to mirror that outcome. However, given the diversity of ideas about why the law is emotionless, it is difficult to predict how participants might attribute that outcome to a cause. Regardless of the diversity in the cause, we would predict that law school and law teachers are most likely to be identified as agents.

(iii) Reward and competition

Assessment and evaluation in law school are most commonly linked with reward or recognition in the form of marks or grades. For Skinner, positive reinforcement of desired student behaviour should sustain or even improve overall academic performance.[237] However, it is argued that the explicit curriculum's focus on extrinsic reward plays a role in producing unintended or unforeseen outcomes for law students, for example, competition and individualism. The connection between demonstrable

[234] Kift, Israel and Field (n 5)
[235] Ibid 23.
[236] Ibid.
[237] Skinner, 'Why Teachers Fail' (n 32); Skinner, 'The Technology of Teaching' (n 34). Skinner extended his theory into employment, arguing that the exchange of wages or goods for labour, employer praise, positive performance ratings or performance bonuses were all simple examples of operant conditioning that would sustain and improve employee motivation; Barrhus Skinner, *Science and Human Behaviour* (BF Skinner Foundation, 2014) 385-7.

academic success and finding employment at the end of law school may reinforce or even aggravate students' focus on external recognition and reward.

Whether extrinsic reward drives competition or reflects societal structures depends on whether one adopts a phenomenological or macro-sociological lens. For example, Giroux and Penna argue that competition is an immutable characteristic of American educational settings and therefore embedded within a hidden curriculum.[238] For Dreeben, the embedded nature of competition in classrooms separates them as a site for social reproduction from the family.[239] Therefore, by analogy, competition is an inescapable element of law school.

Some early commentary on the politics of law school adopts a similar approach, suggesting that any attempt to introduce forms of collectivism among laws students is impossible in a much larger environment of power[240] and disempowerment.[241] Law students who attempt to reject competition are unlikely to succeed academically, having adopted a perspective alien to their peers and the faculty who are products of a meritocracy.[242] Alternatively, new law students have come from competitive high school environments. They have competed to enter law school and carry the expectation that law school will be similarly competitive.[243] Women's accounts of

[238] Henry Giroux and Anthony Penna, 'Social Education in the Classroom: The Dynamics of the Hidden Curriculum' (1979) 7(1) *Theory & Research in Social Education* 21, 33. See also Elizabeth Cagan, 'Individualism, Collectivism, and Radical Educational Reform' (1978) 48 *Harvard Educational Review* 227.
[239] Robert Dreeben, 'The Contribution of Schooling to the Learning of Norms' (1967) 37(2) *Harvard Educational Review* 211, 227.
[240] Pickard (n 106).
[241] Savoy (n 226). Savoy discusses the incongruity of teaching rights discourse to students from disenfranchised backgrounds.
[242] Stone (n 91) 424. See also Kennedy's discussion of the highly competitive nature of entry to Harvard and what happens to the 'radicals' who reject forms of competition; Kennedy (n 86).
[243] Barry Boyer and Roger Cramton, 'American Legal Education: an Agenda for Research and Reform' (1974) 59 *Cornell Law Review* 221, 262. Cramton and Boyer cite research conducted with American high school students in L Baird, *The Graduates: A Report on the Plans and Characteristics of College Seniors* (Educational Testing Service 1973).

their experiences also explore the idea that competition results from law school being a traditionally white, male-controlled environment that makes them feel they do not belong or must 'prove' themselves.[244]

Much of the macro-sociological discussion of competition in American law schools is the product of a period of significant social change during the 1960s and 1970s.[245] Both supporters and critics of the approach commonly refer to student activists, radicals or those who have adopted a social reformist perspective.[246] More recent commentary on legal education has instead tended to adopt a greater emphasis on the phenomenological perspective. The drivers of competition that have been identified are, however, diverse.

For example, critics of the Socratic method argue that it is a model for competition, inculcating competitive behaviour as the norm in participatory settings without building explicit links to academic success,[247] suggesting that reward may have little effect. However, others are quick to point out students' perceptions that appearing to be enthusiastic may bring other rewards, for example, offers of research assistant roles or positions on the editorial boards of law school journals.[248] One student at Harvard suggests that there is a belief among students that more enthusiastic or high-performing students have a greater entitlement to make demands on law teachers' time in and out

[244] See for example Weiss and Melling (n 70).
[245] Stevens, for example, notes changes in American law students' responses to empirical research on legal education between the 1960s and 1970s and the return of what he refers to as an 'eerie tranquillity' in law schools; Robert Stevens, 'Law Schools and Law Students' (1973) 59 *Virginia Law Review* 551, 555-6.
[246] See for example Watson (n 44); Stone (n 91); Kennedy (n 86); Karl Klare, 'The Law-School Curriculum in the 1980s: What's Left' (1982) 32 *Journal of Legal Education* 336; Stevens (n 245).
[247] Morgan (n 47).
[248] Watson (n 44); Kennedy (n 86); Weiss and Melling (n 70); Steve Nickles, 'Examining and Grading in American Law Schools' (1976) 30 *Arkansas Law Review* 411; Hess (n 199) 78.

of the classroom.[249] In the context of Jackson's work, it may also bring more intangible rewards in the form of verbal praise or positive assessment of informally evaluated personal attributes:

> The teacher's compliment is intended to entice the student (and those who are listening) to engage in certain behaviors (sic) in the future, but not simply in the repeated exposure of the knowledge he has just displayed. It is intended to encourage him to do again what the teacher tells him to do, to work hard, to master the material. And so it is with many of the evaluations that appear to relate exclusively to academic matters. Implicitly, they involve the evaluation of many 'non-academic' aspects of the student's behavior (sic).[250]

This type of evaluation has a particular significance for women in law school. In Bashi and Iskander's study of Yale Law School classrooms, male law teachers were less likely to invite women to participate in the discussion and quicker to reward men for their participation in the form of what they called 'space-grabbing'.[251] A similar study at Harvard found that male students were also more likely to participate in classroom discussion voluntarily.[252] Both studies found that, consequently, women were less likely to have access to other forms of reward, including access to faculty members.[253]

Another perceived driver is competition for grades.[254] Empirical research with American law students suggests that there is a perception that grading encourages competition with peers.[255] However, it tends to assume that competition with peers is a feature of law school. Researchers have tended to adopt students' accounts of

[249] Sharon Dolovich, 'Note: Making Docile Lawyers: An Essay on the Pacification of Law Students' (1998) 111 *Harvard Law Review* 2027, 2036.
[250] Jackson (n 35) 23.
[251] Bashi and Iskander (n 113).
[252] Neufeld (n 113).
[253] Bashi and Iskander (n 113) 414-6; Neufeld (n 113) 535-6.
[254] Stewart (n 113) 841-2.
[255] Stevens (n 245).

competition for grades in earlier studies to craft later survey instruments without identifying the causal link.[256] Alternatively, competition is considered merely a consequence, or even the purpose, of evaluation.[257] The absence of a more direct link has prompted some critical analysis of whether competition in law school is merely a stereotype.[258]

A more recent and parallel line of research in American law schools focused on assessment practices suggests a more explicit link between grades and competition through the use of grade ranking, standardisation and 'the bell curve'. Standardisation of grades would not appear to have been a common practice in American law schools until the end of the 20th century. A survey of 196 law schools in the mid-1970s found that, while students were ranked, there was no evidence of standardisation other than that adopted by individual faculty members.[259] There was no consistent position among students on whether ranking was appropriate or inappropriate.[260] By 1994, a survey of 175 American law schools found that ranking still occurred, but more than half (66%) had formally adopted standardisation.[261] Again, there was no consistent practice in its application between schools or courses within schools.[262] Surprisingly,

[256] See for example research into stress and depression in American law students; Segerstrom (n 198); Phyllis Beck and David Burns, 'Anxiety and Depression in Law Students: Cognitive Intervention' (1979) 30 *Journal of Legal Education* 270.
[257] Nickles (n 248) citing JL Brereton, 'Theories of Examinations' in Joseph Lauwerys and David Scanlon (eds), *World Yearbook of Education 1969: Examinations* (Taylor & Francis, 1969) 32.
[258] Susan Daicoff, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46 *American University Law Review* 1337, 1369.
[259] Nickles (n 248), 425-6.
[260] Ibid 427. Student responses were split across different cohorts. The responses in favour of ranking came predominantely from law review editorial board students who, coincidentally, are generally high-performing and rely on rankings to secure their editorial positions.
[261] Nancy Kaufman, 'A Survey of Law School Grading Practices' (1994) 44 *Journal of Legal Education* 415.
[262] Ibid.

just three years later, 84% of 116 law schools surveyed reported having adopted a formal standardisation practice.[263]

The 1997 survey also asked whether law schools adopted standardisation out of concern for grade inflation or some other reason. Running counter to perceptions of competition, most law school respondents indicated that they had adopted it in the interests of 'fairness and equity' and to avoid unfair marking practices that *disadvantaged* students.[264] The researchers also began to draw attention to students' negative perceptions of standardisation and the promotion of competition between peers despite schools' emphasis on fairness. Although not examined directly, the authors made passing references to opposition from student representative bodies to standardisation, the perception that it fostered competition, and the 'perverse incentive to help your classmates fail'.[265]

It is difficult to find any similar research in an Australian context on the effect of grades and standardisation or bell curves on law students despite some Australian law schools[266]—including the ANU[267] but not the Canberra Law School—adopting standardisation policies. However, there is evidence of Australian students' criticism

[263] Nancy Levit and Robert Downs, 'If it Can't Be Lake Woebegone...A Nationwide Survey of Law School Grading and Grade Normalization Practices' (1997) 65 *University of Missouri-Kansas City Law Review* 819. The authors also note the surprising growth of standardisation within a short time.
[264] Ibid 835.
[265] Ibid 847.
[266] The University Of Sydney, *Sydney law school handbook* (The University of Sydney, 2010) 29; Melbourne Law School, 'Presumptive Grade Distribution in the JD', *Student Achievement and Grading* (Web Page) <https://law.unimelb.edu.au/students/jd/studies/student-achievement-and-grading>; The University of Western Australia, 'Will my Law marks be adjusted, scaled or standardised?', *FAQs* (Web Page) <https://ipoint.uwa.edu.au/app/answers/detail/a_id/1382/~/adjustment-of-marks-within-the-faculty-of-law>.
[267] The ANU College of Law, 'Grading', *ANU College of Law Grading Distribution Policy* (Web Page) <https://law.anu.edu.au/grading>.

of grade distribution and confusion over comparability of grades while attempting to determine how they may have performed compared to peers.[268]

Of direct relevance to this thesis is a report by ANU students published in 2010 on various law school practices, including assessment. The report indicated a high degree of dissatisfaction and disappointment among students with 'banded grading' or 'the bell curve' although primarily directed at a perceived lack of transparency.[269] Conversely, while some students linked grade distribution with competition, they found it motivated them to perform better.[270]

Just as perceived drivers of competition are diverse, so are law students' responses. Some students choose to reject competition. Some may choose to withdraw or remain silent in the face of overt competition, either as a form of passive resistance[271] or to conceal an emotion they consider unacceptable.[272]

Based on the existing literature, it is difficult to predict what one might expect to see from participants. There is an assumption that competition is endemic to law school as an implicit or hidden outcome. However, participants may perceive it as an outcome caused by other aspects of law school (e.g., the bell curve) or a cause to which participants attribute other outcomes (e.g., stress, withdrawal, or a motivator to work

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[268] 'Average Law Grades', *Whirlpool* (Web forum, 16 July 2015) <https://forums.whirlpool.net.au/archive/2429574>; 'USYD vs UNSW Comm/Law - Grade distribution?', *Whirlpool*, 25 December 2015) <https://forums.whirlpool.net.au/archive/2483764>; 'USYD/ANU Vs UNSW Grade distributions', *Whirlpool* (Web forum, 29 October 2016) <https://forums.whirlpool.net.au/archive/2578869>; 'Law grades', *Whirlpool* (Web forum, 5 September 2017) <shorturl.at/enqX1>.

[269] Law School Reform (n 110) 53. It should be noted grading policies have changed since the publication of the report in 2010.

[270] Ibid.

[271] Stewart, for example, refers to the response of some women to the honour board in the Sydney University Law School to ask that their names be removed; Stewart (n 57). Stevens discusses student responses to the introduction of a pass-credit grading system in first year at Yale Law School as promoting greater in-class discussion; Stevens (n 245) 673.

[272] Harris and Shultz (n 229).

hard). Alternatively, participants may perceive it as something that is not attributable to law school as a cause or agent, and therefore not part of a hidden curriculum. Instead, competition is something participants perceive they brought to law school attributable to school, family or an inherent attribute.

However, these potential attributions deal with competition among law school law students within the law school setting. There is an additional form of competition discussed in the research, and beyond law school's control, that may also play a role. Nickles's survey of assessment practices in American law schools in the mid-1970s began to associate the ranking of law students with the likelihood of employment, based on both faculty and students' views.[273] By the late 1980s and early 1990s, discussion of assessment in American law schools would appear to have adopted a common agreement on the connection between evaluation in law school and post-law school careers, supported by empirical research with employers.[274] For some, evaluation served as a form of quality assurance and 'sorting' function for employers. That is, evaluation is merely a process for the profession's benefit.[275] The connection

[273] Nickles (n 248).

[274] See for example Emily Campbell and Allan Tomkins, 'Gender, Race, Grades, and Law Review Membership as Factors in Law Firm Hiring Decisions: An Empirical Study' (1992) 18 *Journal of Contemporary Law* 211; Heather Woodson, 'Evaluation in Hiring' (1996) 65 *University of Missouri at Kansas City Law Review* 931.

[275] See for example Philip Kissam, 'The Decline of Law School Professionalism' (1986) 134 *University of Pennsylvania Law Review* 251; Philip Kissam, 'Law School Examinations' (1989) 42 *Vanderbilt Law Review* 433. In his history of American legal education, Stevens discusses at several points the relationship between law schools and the profession. In his closing chapters he returns to a theme about the purpose of legal education, discussing the profession's expectations of law schools in preparing students for practice; Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, 1983). In 'The Decline of Law School Professionalism', Kissam draws on Stevens to assert that it *is* a purpose of law school whereas a closer reading of Stevens suggests that he merely offers an historical account of the pressures on the legal academy. The process has been sardonically summarised as 'meeting consumer expectations' and 'a bargain basement for screening employees'; Barbara Fines, 'Competition and the curve' (1997) 65 *University of Missouri at Kansas City Law Review* 879, 887.

between evaluation and employment was the principal cause of law student self-comparison with peers and competition.[276]

Australian research has begun to identify alternative causes and outcomes associated with competition for employment unconnected with law school or employers' influence. Student responses to surveys asking why they enrolled in law school have commonly referred to obtaining financially rewarding employment although with varying degrees of importance.[277] The desire for financial success may result from social or family influences and the implicit desire to maintain social position and standing.[278] While those influences may operate in the decision to enrol in law school and persist through the first year, Australian law students continue to draw a connection between performance at law school and the prospects of gaining employment.[279]

[276] See for example Matthews' discussion of ranking, employment and the consequence of students being 'obscenely interested' in how they stand in relation to others; Christopher Matthews, 'Sketches for a New Law School,' (1989) 40 *Hastings Law Journal* 1095. See also Henderson's discussion of the effect of failure on students' perspectives on their future careers; Douglas Henderson, 'Uncivil Procedure: Ranking Law Students Among Their Peers' (1994) 27 *University of Michigan Journal of Law Reform* 399. Fines, in an argument that reflects both elements of 'quality assurance' and competition, suggests that a student's academic ranking is so deeply embedded in the employment process that if a law school were to abandon the practice, it would make their students uncompetitive in the race for employment; Fines (n 275).

[277] Pearce, Campbell and Harding (n 187) Table 3.8; Livingston Armytage and Sumitra Vignaendra, *Career Intentions of Australian Law Students 1995* (Centre for Legal Education, 1995) Table 4.1. The Pearce survey reported that 20% of student responses indicated that financial reasons were important whereas that had fallen to 4% in the Armytage/Vignaendra survey. Castan et al's survey with first year students at Melbourne University ranked 'high income' as being a 'lower band' motivation; Melissa Castan et al, 'Early Optimism - First-Year Law Students' Work Expectations and Aspirations' (2010) 20(1/2) *Legal Education Review* 1. The motivation may not be specific to law students. Research with Victorian high school students suggests that the likelihood of employment at the end of their studies is a motivator in their decision on the university in which to enrol; see Brennan (n 169).

[278] Castan et al (n 277) citing Debra Schleef, '"That's a Good Question!" Exploring Motivations for Law and Business School Choice' (2000) 73 *Sociology of Education* 155. Schleef suggests that several motivations, including family and social status, may be linked to the influence of social norms constructed within the family, drawing on Bourdieu's theory of *habitus*; Pierre Bourdieu, 'Habitus' in Emma Rooksby and Jean Hillier (eds), *Habitus: A Sense of Place* (Taylor & Francis, 2017) 43.

[279] See (n 56), (n 57) and (n 58).

As discussed earlier, it has been argued that the reintroduction of fees introduces an additional or associated influence.[280] The student/consumer has the incentive to achieve a return on their investment in the form of financially secure employment or possibly the well-dressed corporate role presented in the law firm recruitment advertisements.[281] Added to the internal or family influence may also be the effect of consistent references in media to the over-supply of law students.[282]

As discussed earlier, law school has no direct control over its graduates' employment prospects other than in the form of completing the academic requirement for admission. We might expect participants to attribute competition for employment to agents external to law school. In those circumstances, competition would not be part of a hidden curriculum. However, to the extent that law students perceive that their law school results might affect the likelihood of employment, students might attribute their optimism or pessimism about finding a job directly to law school, despite the absence of control.

(b) Judgment by peers

Jackson's model of evaluation encompasses judgment by peers of one another in educational settings. Although not directly within a teacher's or schools' control, judgment by peers in a classroom is part of the hidden curriculum and produces hidden outcomes.[283]

[280] See The role of the explicit curriculum above.
[281] Collier (n 153).
[282] See for example Louise Yaxley, 'Don't study law unless you really want to be a lawyer, Malcom Turnbull says', *ABC News*, 2 February 2018) <https://www.abc.net.au/news/2018-02-02/malcolm-turnbull-says-too-many-kids-do-law/9387508>; Rosalind Dixon, 'Studying law is about much more than becoming a lawyer, Malcolm Turnbull', 5 February 2018) <https://newsroom.unsw.edu.au/news/business-law/studying-law-about-much-more-becoming-lawyer-malcolm-turnbull>.
[283] Jackson (n 35) 24.

Arguably, peer judgment fits awkwardly into a discussion of a hidden curriculum as defined in this thesis. This thesis adopts the analytical approach of assessing which hidden outcomes commonly associated with legal education are within law teachers' or law schools' control. However, judgment by and of peers are relevant. For example, Jackson argues that students may find themselves trying to 'win the approval of two audiences [the teacher and peers]. The problem is how to become a good student while remaining a good guy (sic).'[284] Consequently, choosing sides between audiences who potentially have opposing views mitigates or negates the influence of one, the other or perhaps even both. In the context of this thesis, students' judgment of one another might serve to reinforce or undermine explicit outcomes. For example, TLO 2 encompasses 'service to the community', which the commentary suggests incorporates a commitment to *pro bono* work.[285] However, if a student were to find themselves aligned with peers who denigrated the concept of not-for-profit work[286] and subsequently expressed an interest in the *pro bono* or community sector, the student would likely attract a negative peer judgment.

Jackson argues that teachers' evaluations provide a model for students. For example, whether a student is 'smart or dumb, teacher's pet or a regular guy'[287] in their peers' estimation may depend on the teacher's public evaluation of a student's conduct.[288] In the context of this thesis, an examination of the attributions associated with peers might provide additional information on the influential role (or its absence) of law teachers.

[284] Ibid 25-6.
[285] Kift, Israel and Field (n 5).
[286] See for example the discussion of students perceived to favour corporate practice and their views on public-type practice in Bliss (n 226)
[287] Jackson (n 35).
[288] Ibid.

Research with law students about the effect of interactions with peers is limited, despite the absence of social networks having been identified as an important factor in law student retention.[289] American research has suggested that peers' judgment focuses on perceived values contributing to 'tribalism'.[290] For example, Bliss argues that law students sort themselves into 'corporate' and 'public interest law' groups, resulting in conflict unconnected with formal evaluation. However, the boundaries between groups were malleable, and that law students could (or would) change groups throughout law school.[291] Stewart's interviews with women at Sydney University Law School suggested a similar divide in the law student cohort.[292] Alternatively, American and Australian research has suggested that socio-economic differences may drive the assessment of peers and social networks in law school.[293]

The exclusion of students might also be individualised. For example, American law students refer to the 'gunner' as someone to be avoided in law school—the law student who is seen to be overly enthusiastic, academically inclined, but may also be aggressive in their competition with others.[294]

Feminist scholars have examined the influence of peer evaluation more closely. Women's experience of law school, while not universal, suggests that they feel excluded by a masculine emphasis on rationality and impartiality from peers. That

[289] See in particular Weiss and Melling (n 113) and interviewees' discussion of their perceived 'failure' in establishing networks, meeting friends and 'fitting in'.
[290] Bliss (n 226).
[291] Ibid.226) 884.
[292] Stewart (n 113) 838.
[293] See for example Castan et al (n 277); Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 113) 95; Granfield (n 118).
[294] See for example Bliss (n 226); Dolovich (n 249). The Reddit forum for American law students sardonically refers to regular posters as 'gunners'. The same forum also hosts a discussion of 'gunner stories' in which students share their experiences of enthusiastic, over-bearing or aggressively competitive students as well as students asking for advice on whether they might be a 'gunner'; see 'Reddit', *r/LawSchool* (Web Forum, 2020) <https://www.reddit.com/r/LawSchool/>.

might present as men dominating the class discussion.[295] It might also be due to sexist or misogynistic comments or jokes made by peers.[296] Bashi and Iskander suggest that the causes of women's silence may, however, be more complex and almost self-reinforcing. They refer to women's accounts of regulating their in-class conduct and contributions as a reflection of their desire to allow peers to contribute.[297] Some faculty members interpreted their silence as a reluctance to participate and did not call on them. As a result, women were offered fewer opportunities to contribute, reinforcing their silence.

IV SUMMARY

We can begin to identify and predict what participants might perceive as implicit or hidden in law school by excluding outcomes consistent with the explicit Australian legal education curriculum. Predicting with greater precision what participants might perceive as the hidden curriculum requires a means of sorting the incredibly diverse research and commentary on legal education so as to deconstruct it sensibly.

Jackson's description of the hidden curriculum as learning outcomes communicated to students provides a lens through which to view existing commentary on legal education. Jackson's focus is on *what* is communicated to students. Behaviourist theories of learning that emphasise authority, stimulus and reward can help explain how educational settings might create outcomes. Behaviourists assume that a stimulus-

[295] Stewart (n 57); Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 113); Weiss and Melling (n 114). Bashi and Iskander conducted observations in Yale Law School classrooms and found that men were 40% more likely to speak in class in a context where 75% of classroom interactions were initiated by students. The cohort was almost evenly split by gender; Bashi and Iskander (n 113). Neufeld's observations at Harvard found that male students were 50% more likely to contribute voluntarily in first year classes than women; Neufeld (n 113).

[296] Stewart (n 57). Stewart's interviews are valuable insofar as they provide more information on women's perceptions of personal interactions with peers, rather than on formal, objective observations of in-class exchanges.

[297] Bashi and Iskander (n 113).

response approach, supported by rewards for desired behaviour, will eliminate any other response from students. We can see aspects of a behaviourist model in law school pedagogy, especially in the predominantly teacher-centred law classroom and the use of grades and other rewards for reproducing behaviour consistent with the explicit curriculum. However, as Jackson argues, and existing research with law students would tend to support, in the drive for explicit curriculum outcomes, there may be unintended, implicit or hidden outcomes that a binary stimulus-response model does not adequately explain.

For example, in the context of Jackson's model of the teacher as an agent in transmitting implicit or unintentional outcomes, research with American law students on the effect of Socratic pedagogies found that some respond positively, adopting behaviours consistent with the explicit curriculum.[298] However, others may respond negatively, adopting anti-social behaviours;[299] becoming invisible;[300] doubting their capacity to succeed;[301] or, especially for women, perceiving that law school or law teachers are actively silencing or excluding them.[302]

Similar observations can be made about evaluation. Student responses to evaluation and feedback are diverse[303] and may flow from the content or the absence of feedback on evaluation,[304] or students' perceptions of teaching quality.[305] Again, some students may demonstrate behaviours consistent with the explicit curriculum. However, others

[298] Stone (n 91); Arterian (n 103); Watson (n 86).
[299] Arterian (n 298); Pickard (n 106).
[300] Pickard (n 299); Kennedy (n 91); Nagel (n 106).
[301] Watson (n 298); Heins, Nickols Fahey and Henderson (n 122).
[302] Stewart (n 57); Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 113); Banks (n 113).
[303] Hong et al (n 105).
[304] Segerstrom (n 198).
[305] Larcombe, Nicholson and Malkin (n 201).

may not, adopting adversarial,[306] emotionless[307] or competitive[308] attributes or behaviours.

Jackson's model of the role of the explicit curriculum, raises slightly different issues. Jackson emphasises how the explicit curriculum concurrently transmits hidden ideas or concepts. Australian research suggests that the contested nature of the explicit curriculum, and the array of stakeholders with influence over its content,[309] communicates particular messages to law students about the significance of specific perspectives on the law and legal education. The combined effect of the organisation of the Priestley 11 into domains of study,[310] an emphasis on doctrinal teaching, reforms to Australian tertiary education to introduce competition between law schools for students, and the financial influence of the legal profession have arguably driven a narrowing of the explicit curriculum to commercially valued subjects and skills.[311] Consequently, law school's explicit curriculum also communicates a hidden one; knowledge and skills with no commercial value are unimportant.

Existing commentary and research builds a simplified picture of *what* a hidden curriculum in law school is thought to include and *how* it is communicated. If that is theoretical foundation is correct, we should expect to see consistent patterns in coding participants' interviews consistent with that theoretical foundation. That is, however, unlikely. As Jackson points out, students' responses in educational settings are not uniform. Not every student will perceive the what or how of the hidden curriculum in

[306] Sturm and Guinier (n 213). Similar suggestions have been made about pedagogy in Australian law schools; see Townes O'Brien (n 11); Townes O'Brien, Tang and Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing May Begin in Year One' (n 213).
[307] Savoy (n 226); Culp (n 226); Bliss (n 226).
[308] Stevens, 'Law Schools and Law Students' (n 245).
[309] Law Admissions Consultative Committee, *Background Paper on Admission Requirements* (n 8).
[310] Bender (n 140).
[311] Boon and Whyte (n 167); Thornton, *Privatising the Public University: The Case of Law* (n 138).

the same way. Constructivist theories help identify other agents to explain that diversity. Students' characteristics, history, and experiences may play a role in reinforcing, interpreting or negating both explicit and hidden curriculum outcomes. Agents external to law school, including family, friends, peers, or employers, can also affect how students interpret their educational experience. Students may gain those experiences directly, but they might also draw on models they perceive as being authoritative.

Further, Australian research already suggests that there are agents and causes beyond law school's control and, consequently, *not* part of the hidden curriculum. Law students are actively demanding change to what law schools do.[312] It has been argued that they are continuously evaluating the relevance of law school to finding employment after graduation,[313] based on perceptions of what is valuable that they may have drawn from popular media,[314] advertising by law firms,[315] and their experiences as paralegals.[316] The reintroduction of study fees has also been identified as a motivation for students to ensure they get 'value for money'.[317]

The following chapters set out to evaluate whether the hidden curriculum that is thought to exist, and how it is thought to be communicated, are in fact perceived by the participants in this research. It also attempts to disentangle hidden outcomes attributed to law school from those beyond law school's control.

[312] Thornton, *Privatising the Public University: The Case of Law* (n 311).
[313] Law School Reform (n 110); Thornton, *Privatising the Public University: The Case of Law* (n 311).
[314] Salzmann and Dunwoody (n 171).
[315] Collier (n 173).
[316] Goldsmith and Bamford (n 146).
[317] Brennan (n 169); Thornton, *Privatising the Public University: The Case of Law* (n 141) 44-9, 91, 104.

CHAPTER 3 - THE ROLE OF THE LAW TEACHER

I INTRODUCTION

Jackson's discussion of the role of the teacher in the classroom examines how their conduct, behaviours or interactions with students produce unintended or hidden learning outcomes.[1] He argues that classroom settings enculturate students into a set of expected social behaviours. Obedience and conformance with those expectations, which Jackson acknowledges might be sincere or a façade, lead to success. Rejection of behaviours leads to exclusion, rebuke or punishment.[2]

Commentary on a hidden curriculum in Australian law schools has acknowledged law teachers' influential role.[3] Surveys of Australian law students have also found that underperforming students are more inclined to link their performance to their teacher's effectiveness.[4] However, research on Australian law teachers' role or influence in transmitting either the explicit or a hidden curriculum would not appear to exist. As discussed in chapter 2, Australian research and commentary in legal education would appear to assume that the causal link between the causes and outcomes they identify as being predominantly binary.[5] The assumed link mirrors a behaviourist model of an uninterrupted stimulus and response relationship that, in the context of legal education, would be between law students an law school generally, without

[1] Phillip W Jackson, *Life in Classrooms* (Holt, Reinhart and Winston, 1968) 31-2.
[2] Ibid.
[3] Ibid 30.
[4] Wendy Larcombe, Pip Nicholson and Ian Malkin, 'Performance in Law School: What Matters in the Beginning' (2008) 18 *Legal Education Review* 95, 114.
[5] See ch 2 III A 1.

differentiating between different agents. There is an explicit focus in some commentary on the role of evaluation predominantly in driving learning outcomes.[6]

Drawing analogies from American research is also problematic. There is very little evidence to suggest the Socratic method, on which much of the American research is focussed, is used in Australia. However, over time the traditional Socratic method of call and response has eroded in the United States.[7] Its advocates have expanded the Socratic method to include more collaborative or participative practices in which law teachers retain a central role. Anecdotally, many of those practices are common in Australian law schools but not identified as Socratic.[8] Expanding the traditional Socratic stimulus of calling on students has diversified the choice of stimuli available to law teachers to include invitations to contribute, discuss, debate or present.[9] To the extent that there is an overlap between teaching practices incorporated into an expanded definition of the Socratic method and similar practices used in Australian law schools, American research may provide a comparable basis for examining Australian law students' experiences.

[6] See especially Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37(1) *Monash University Law Review* 43; Molly Townes O'Brien and John Littrich, 'Using Assessment Practice to Evaluate the Legal Skills Curriculum' (2008) 5(1) *Journal of University Teaching & Learning Practice* 62.
[7] Orin Kerr, 'The Decline of the Socratic Method at Harvard' (1999) 78 *Nebraska Law Review* 113.
[8] See for example Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537; Penny Carruthers, Natalie Skead and Kate Galloway, 'Teaching Skills & Outcomes in Australian Property Law Units: A Survey of Current Approaches' (2012) 12 *Queensland University of Technology Law and Justice* 66; Jenny Morgan, 'The Socratic Method: Silencing Cooperation' (1989) 1 *Legal Education Review* 151.
[9] See ch 2 III C 1.

As noted above and discussed in chapter 2, we would expect some students to attribute responses to law teachers that are consistent with aspects of the explicit curriculum, for example, the adoption of professional behaviours (TLO 2), thinking skills (TLO 3) and self-management (TLO 6). However, research identifying causal links between a law teacher's actions or conduct and outcomes consistent with the explicit curriculum, at least in an Australian context, is not generally well developed. As noted in chapter 1, the Pearce Committee's review of Australian legal education was silent on what constituted 'good teaching'.[10] Models of pedagogy that deliver outcomes consistent with the explicit curriculum tend to be limited to specific contexts,[11] with no clear evidence of their general adoption. American research provides little additional assistance. There would appear to be an assumption that the Socratic method, whether traditional or an expanded version, effectively delivers legal education's intended outcomes.

Causal links between the role of law teachers and an unintended or hidden curriculum are more developed in relation to women in law school classrooms. In both individual accounts and larger qualitative studies, law students attribute outcomes inconsistent with the explicit curriculum to conduct by law teachers that is overt (e.g., explicitly aggressive, belittling or misogynistic comments)[12]

[10] Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Printing Service, 1994).
[11] Alex Steel, 'Empirical legal education research in Australia: 2000–2016 ' in Ben Golder et al (eds), *Imperatives for Legal Education Research Then, Now and Tomorrow* (Routledge, 2020) 74.
[12] See the discussion of the descriptors used in accounts by law students in Chapter 2 and the discussion of power.

and subtle (e.g., tone of voice, physical turning away or refusing to call on particular students).[13]

There is an additional aspect to the law teacher's role that Jackson does not identify and that is a feature of legal education; informal or 'out of class' exchanges between students and teachers. For Jackson, the teacher's control of the classroom space reinforces their authoritative role.[14] Students' perceptions of the teacher-as-expert may amplify that role in law school.[15] However, we know that law students also engage with teachers outside the classroom in contexts both connected to the classroom (e.g., consultation times, feedback sessions) and unconnected (e.g., social events, careers evenings). A small body of research has found that college retention rates correlate to students' subjective assessment of whether faculty members care about their progress.[16] American law students' accounts refer to the 'positively dizzying warmth' of meeting faculty outside the classroom and the perception of 'openness, universal solicitude and receptivity'.[17] Again, there would appear to be no empirical research with Australian law students or with law students generally[18] about the

[13] See the discussion of power in Chapter 2, especially in the context of women in law school classrooms.
[14] Jackson (n 1).
[15] Robert Nagel, 'Invisible Teachers: A Comment on Perceptions in the Classroom' (1982) 32 *Journal of Legal Education* 357, 357; Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (NYU Press, 2004) 3; Toni Pickard, 'Experience as Teacher: Discovering the Politics of Law Teaching' (1983) 33 *The University of Toronto Law Journal* 279.
[16] For a comprehensive overview of existing research on college student retention in the United States and the role of student-teacher relationships see Christine Brown, 'Faculty Validation of Students: An Exploration of Validation Theory Through a Survey of Faculty Attitudes' (PhD Thesis, Immaculata University, 2017).
[17] Duncan Kennedy, 'How the Law School Fails: A Polemic' (1970) 1 *Yale Review of Law and Social Action* 71, 73.
[18] One exception would appear to be an account of a program initiated at a small, private law school in the United States. However, the student cohort would appear to be unique. The author refers to the students being predominantely older students returning to study; Winston Frost, 'It Takes a Community to Retain a Student: The Trinity Law School Model' (1999) 1 *Journal of College Student Retention: Research, Theory & Practice* 203.

effect of informal or personal exchanges with faculty. Neither is there any research on the extent to which out of class exchanges might support or erode outcomes consistent with the explicit curriculum.

A *How do law teachers affect students?*

As discussed in chapters 1 and 2, Jackson's examination is generally limited to an identification of teacher's behaviours and consequential responses by students. There is little discussion of how or why there is a causal link between the two. It could be argued that a behaviourist model explains why students respond by adopting the behaviours modelled, explained or enforced by a teacher. Behaviourists would argue that a pedagogy in which an overarching figure of authority (in this case, a teacher) controls the delivery of stimuli is a core element of the learning process. Students' reproduction of the expected behaviour produces a reward, for example, praise or high marks. Consequently, according to behaviourists, the same behaviours would be repeated in the expectation of receiving the same reward. [19] If this were accurate, then one would expect to see participants in the interviews conducted for this research to attribute outcomes to law school as an agent consistently.

However, there are difficulties with this hypothesis. For some students, reward may be a driver to adopt particular behaviours, some of which may be consistent with the explicit curriculum, while others may be inconsistent and therefore hidden. For example, American commentary suggests that the competitive manner in which some law teachers deploy the Socratic method may drive

[19] See Chapter 2, the discussion of behaviourism and the role of educators in a behaviourist classroom. See also Burrhus Skinner, 'The Technology of Teaching' (1965) 162 *Proceedings of the Royal Society* 427.

competition between peers leading to anti-social or aggressive behaviours.[20] Secondly, as Jackson points out, not all students respond in the same way. Some may choose to comply with behaviours, while others choose to subvert or reject them entirely.[21] Similar responses have been identified in some American literature.[22] Lastly, while behaviourist models may explain the comparatively simple expectation in primary school settings of 'doing what you are told',[23] law school introduces a more complex and nuanced network of expected responses, encompassing models of thinking,[24] speaking[25] and professional behaviour.[26] Similarly, law students' reactions would arguably be more complex than those that can be assigned to primary school students.

A constructivist model of learning[27] better explains the diversity of responses identified by Jackson. For constructivists, there is an array of agents that may intervene in or interrupt the causal link between stimulus and response or, in the context of this chapter, law teacher and law student. Consistent with the theory of students actively constructing their knowledge from the experiences to which they are exposed,[28] a student's characteristics and personal history may also play

[20] See for example Kerr (n 7); Kennedy (n 17).
[21] Jackson (n 1).
[22] See for example Andrew Watson, 'The Quest for Professional Competence: Psychological Aspects of Legal Education Symposium: The Teaching Process in Legal Education' (1968) 37 *University of Cincinnati Law Review* 91.
[23] Simple educational settings was predominantly the focus of Skinner's attempts to extend his methods into schools; Burrhus Skinner, *Technology of Teaching* (BF Skinner Foundation, 2001).
[24] Carl Schneider, 'On American Legal Education' (2001) 2 *Asian-Pacific Law & Policy Journal* 76; Cynthia Hawkins-Leon, 'The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues' (1998) [1998](1) *Brigham Young University Education and Law Journal* 1; Alan Stone, 'Legal Education on the Couch' (1971) 85 *Harvard Law Review* 392.
[25] Stone (n 24); Hawkins-Leon (n 24); Ruta Stropus, 'Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century' (1996) 27 *Loyola University of Chicago Law Journal* 449.
[26] Association of American Law Schools, 'Law Professors in the Discharge of Ethical and Professional Responsibilities', *AALS Statement of Good Practices* (Web Page, 12 July 2017) <https://www.aals.org/about/handbook/good-practices/ethics/>.
[27] See ch 2 III B.
[28] Ibid. See also John Dewey, *Experience and Education* (MacMillan Publishing, 1963).

an intervening role. That is, the student themselves may be an agent. Any of these agents may intervene directly to mitigate, interpret or even negate the causal link between law teacher and law student.

B *Purpose*

This chapter uses the LACS to identify how law students at the two universities the subject of this research perceive law teachers' roles and the associated outcomes. In doing so, it identifies outcomes consistent with the explicit curriculum and hidden ones.

As acknowledged in chapter 1, insofar as a teacher controls assessment and feedback, there is a potential overlap between the role of law teachers and evaluation. However, just as Jackson and behaviourists distinguish between stimulus and response, this chapter focuses on the stimulus aspect of the perceived relationship, namely law teachers, and the learning outcomes it is perceived to produce.

Consistent with this thesis' hypothesis that agents external to the relationship between law teachers and their students intervene, it also identifies those agents and the outcomes that participants attribute to them.

C *Method*

The discussion that follows sets out the results of both coding and textual analysis of participants' interviews. Interviews were analysed to identify attributional statements—statements in which the participant attributed an outcome to a cause or causes. Each statement was coded to identify the outcome and the cause. There was no code applied to designate an outcome as explicit or

hidden—that process was left to a closer textual analysis of the interviews. The rationale for adopting that approach is explained in detail in chapter 1.[29]

Each cause was then coded to identify the agent or agents that the participant perceived to be responsible. Each outcome was coded to identify the perceived target.[30] As noted above, coding for outcomes did not differentiate between explicit or hidden outcomes. Identifying whether the outcomes were consistent with the explicit curriculum or not was done through a closer textual analysis of the interviews.

The objective of coding interviews was not to diagnose the causes and their associated outcomes definitively. The focus of attributional coding is on participants *perceptions*. The coding methodology reflects this thesis' adoption of a constructionist perspective and its focus on how students perceive and construct legal education outcomes.

The benefit of coding is to provide a systematic way of analysing interview data. It allows for the grouping of like statements across interviews. Doing so allows for broad comparative analysis based on the coding and closer textual analysis of similar attributions between participants.

The focus of this chapter is on the role of law teachers. 'Law teacher' was coded as the agent of a cause where, in the context of the participant's interview, they attributed an outcome to a law teacher's statement, behaviour, or role.[31]

[29] See ch 1 IV F 4.
[30] For a more detailed worked example of the coding process see ch 1 IV F 4.
[31] See Appendix A for the complete coding manual

D *Results*

Coding results suggest that law teachers play a substantially less significant role as agents in producing both explicit and hidden outcomes when compared to others, tending to contradict predominantly American literature about the importance of their role. Participants were even less likely to attribute an outcome to a law teacher when the participant themselves was coded as the target. Women, in particular, were more likely to attribute outcomes to law teachers affecting peers than themselves. ANU participants were more likely to attribute outcomes to actions they took themselves than to law teachers.

When considering the text of interviews, a causal connection was drawn between a law teacher and *some* explicit and hidden outcomes. However, participants commonly perceived that personal characteristics like age, experience at law school or personal resilience mitigated or negated many of the most serious hidden outcomes assumed to flow from the role of law teachers.

II LAW TEACHERS AS AGENTS – RESULTS OF CODING

Participants perceived law teachers to be agents much less frequently than other agents coded in participants' interviews. Participants perceived law teachers as a distinct or concurrent agent in 189 or 9% of all coded attributions (n=2082), regardless of the target. Participants perceived others as distinct or concurrent agents much more often. For example, of all coded attributions, the perceived agent was coded as the participant themselves in 873 (42%)[32] of instances, law

[32] 'Participant' was coded as the agent with the participant perceived they were the principal source of the motivation or condition. For example, age, inherent abilities or personal values that they did not attribute to any other agent. See the codebook at Appendix A.

school in 760 (36%),[33] legal employers in 332 (15%),[34] and law school peers in 284 (13%).[35] Across all interviews, the average number of attributions in which a law teacher was coded as a distinct or concurrent agent almost six times per interview. In comparison, law school was coded as a distinct or concurrent agent almost 23 times.

Among individual participants, there were significant differences in the number of outcomes they attributed to a law teacher, suggesting that some participants perceived the role of law teachers to be more significant than other participants. Some did not perceive a law teacher was the origin of an outcome at all, while others discussed their perception of a law teacher or teachers at length.

It should be acknowledged again that there was no differentiation in the coding between explicit and hidden outcomes. That is, the analysis that follows provides only a broad measure of the perceptions of a law teacher's role. Whether the outcomes are consistent with the explicit curriculum or hidden is considered in much greater detail in part III below.

The target—the person, group, thing or entity identified in the outcome as having been affected—was also coded for each outcome. The target was coded as 'participant' where participants perceived that the outcome affected them personally. The average number of attributions in which participants perceived

[33] 'Law school' was coded as an agent where participants identified no other specific agent. See the codebook at Appendix A.
[34] 'Employer-law' includes agents for which participants work, or have worked, whether as a paralegal or in some other capacity and representatives of legal employers with which participants interacted in other settings including career fairs or interviews. See the codebook at Appendix A.
[35] 'Peer-law' and 'Friend-law' were coded as agents separately. The latter were coded where the participant explicitly identified the agent as a friend in law school, rather than as another student or students. See the codebook at Appendix A.

law teachers to be a distinct or concurrent agent remained comparatively small when the target was taken into account. In all attributions where the participant was coded as the target (n=1661), law teachers were coded as distinct or concurrent agents in 123 or 7% of instances. In comparison, law school was coded as the agent in 502 (30%) of instances, participants themselves 266 (16%)[36] and legal employers 216 (13%).

A *Coding and participant characteristics*

Some caution needs to be taken with comparing total numbers of instances coded across interviews given the over-representation of some groups and the under-representation of others.[37] Participants characteristics (i.e., gender, age, university, year of commencement, and program) were also recorded. By comparing the average number of instances coded within groups, it is possible to draw some tentative comparisons. Again, some caution needs to be exercised in comparing average numbers of attributions since it can be affected by different factors. For example, shorter interviews are likely to produce fewer attributional statements. However, the underpinning emphasis on the spontaneity of attributions means that the results are still broadly representative of the independent reflections of participants. Further, by comparing averages, some differences in individual interviews can be encompassed within a broader picture.

[36] Attributions in which the participant was coded as both agent and target most commonly reflected where participants perceived that an internal motivation, ability or value had compelled, prevented or assisted them in achieving an outcome for themselves (e.g. a perception that the participant's maturity had improved their confidence with public speaking).
[37] See the discussion in ch 1 IV G 1 concerning the overrepresentation of some groups among participants.

The average number of attributions in which a law teacher was coded as a distinct or concurrent agent was generally the same, regardless of the participants' age, stage of study, program, university or year of commencement. However, the average number of women's attributions to a law teacher as an agent was higher than men's. In the 25 interviews with men, law teachers were coded as agents in 47 instances or, on average, almost twice per interview. In the 40 interviews with women, 141 instances were coded, on average 3.5 times per interview.

Regardless of the participant's personal characteristics, the average number of attributions in which a law teacher was identified as a distinct or concurrent agent was smaller when they perceived themselves as the target (i.e., when the target was coded as 'participant'). For example, participants enrolled in LLB programs perceived a law teacher as a distinct or concurrent agent and themselves as the target on average in 1.9 instances per interview, compared to 2.9 times if coding for the target was disregarded (i.e., on average, one less attribution to a law teacher per interview).

On closer analysis, the decline in the total and average number of attributions to a law teacher appeared to be associated with a perception that their peers were the target. That is, the reason for the decline in attributions to a law teacher when the target was coded as 'participant' appeared to be explained by a large proportion of attributions being coded as law teacher/agent and peer/target. In those instances, participants tended to cast themselves in the role of observer of the relationship between a law teacher and the participant's peers. These attributions were common when participants perceived a law teacher to be

engaged in belittling or other hostile conduct or where participants explained that the law teacher's conduct did not match the participant's personal values. For example, one participant discussed what he perceived was the effect of a law teacher 'showing off' in front of his peers.

> [P]robably the most profound time in my study here where I didn't like what I had signed on to do was in the last three years with a lecturer who also tutored one of my units. And he was the stereotype. He'd had a really interesting background that drew you in and you'd think 'This guy's great and how he's got into the law is sounds really interesting and fantastic.' And then he did the talk about the leased vehicle and 'Should I give my child this wad of cash for their 21st birthday?' *And the 20-year-old young males in the room, jaws were on the ground. And you could see it was everything they'd ever wanted in the law.* And this guy was really solidifying the stereotype. *And I just thought this is not why we're here. It's not what we're supposed to be doing. These are young impressionable people that are really influencing here.* (Emphasis added)
>
> Male, 34, LLB, Canberra Law School

The participant perceived the law teacher to be espousing values inconsistent with their own ('This is not why we're here'). The outcome of the conduct was to solidify a certain perception or stereotype of the profession in the minds of some of the participants' peers.

The decline in the average number of attributions coded as law teacher/agent when the participant was considered was generally the same regardless of the participants' age, stage of study, program or year of commencement. However, there were two notable exceptions.

1 *Participants coded as target - women*

On average, instances in which a law teacher was coded as an agent and the participant as target appeared 1.4 and 2.2 times per interview for men and women, respectively. While, on average, the number of attributions to law teachers was smaller for both men and women when they perceived themselves as the target, the decrease for women was much greater; 3.5 times on average when the target was disregarded compared to 2.2 where the target was coded as the participant (compared to a decline from 1.9 to 1.4 for men). That is, the coding suggested that when the target was introduced, women appeared to be more inclined to attribute the conduct of a law teacher to an outcome affecting their peers, rather than themselves. In a closer analysis of the text of interviews, women tended to spontaneously use collective nouns like 'us', 'we',[38] or 'everyone' more often than men when talking about the influence or effects of a law teacher's actions.

Women's use of collective nouns in interviews tentatively supports an assertion in the literature that women are more inclined to adopt a less individualistic and more cooperative approach to their studies or to conflict. For example, Gilligan refers to the prioritisation of 'networks of connection' and an 'ethic of care' for others by women when confronting conflict or aggression.[39] In the context of legal education, Granfield's research at Harvard,[40] and Weiss and Melling's

[38] Using the LACS method, codes are assigned having regard to the context within which the attribution is made. Consequently, in context, 'us' and 'we' were connected with peers and not some other target group.
[39] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1993) 40-1.
[40] Robert Granfield, *Making Elite Lawyers* (Routledge, 1992) 96-7.

interviews at Yale,[41] found women referred to a consistent or growing sense of empathy toward others, and a fear that it may be lost. Some of the interviews with women in this research in which collective nouns are used occurred when they perceived peers were being belittled or embarrassed by law teachers or where law teachers were perceived as unhelpful. However, the sample in this research is small and, as both Epstein[42] and Thornton[43] warn, care should be taken in suggesting that all women's experience is the same. This is discussed in more detail in the textual analysis of interviews in part III below.

2 *Participants coded as target – ANU*

The average number of attributions in which a law teacher was coded as an agent was similar in interviews with participants regardless of whether they studied at the ANU or the Canberra Law School; 2.7 times per interview for participants enrolled at the ANU compared to 3 times per interview for participants enrolled at the Canberra Law School. However, when coding for the target as the participant was included, the average fell significantly in interviews with ANU participants. On average, ANU students perceived a law teacher as a sole or concurrent agent of causes that affected them personally in only 1.2 instances per interview; less than half as often. By comparison, Canberra Law School students perceived a law teacher as a sole or concurrent agent of causes that affected them personally in 2.4 instances per interview, representing a smaller decline. That is, the coding suggests that ANU students perceived law teachers

[41] Catherine Weiss and Louise Melling, 'The Legal Education of Twenty Women' (1987) 40 *Stanford Law Review* 1299, 1320-1.
[42] Cynthia Fuchs Epstein, *Deceptive Distinctions: Sex, Gender and the Social Order* (Yale University Press, 1988) 11-2.
[43] Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) 101.

to have caused outcomes that affected them personally much less often than their peers at the Canberra Law School.

One possible explanation is that the number of attributions in which the participant themselves was coded as the agent was higher for ANU students when compared to Canberra Law School students. That is, the coding suggests that ANU students were much more likely to perceive that they had personally caused an outcome.

In the 29 interviews with ANU students, the *participant* was coded as a discrete or concurrent agent 502 times or, on average, a little more than 17 times per interview. In comparison, in the 36 interviews with Canberra Law School students, the participant was coded as a discrete or concurrent agent 366 times or, on average, a little more than 10 times per interview. One interpretation of the coding is that ANU students were less likely to perceive law teachers as affecting them personally because of a greater sense of independence or self-confidence in responding to different experiences.

Arguably, an analogy can be drawn with the findings of a study with first year law students by Castan et al. Students who were academically successful at secondary school were more likely to perceive that they had a more direct or personal control over their success at law school.[44] As discussed in chapter 1, ANU is perceived to be a more prestigious law school. Competition to gain entry to ANU is stiff. It is likely that ANU students were more academically successful at secondary school than their Canberra Law School peers. The result is notable.

[44] Melissa Castan et al, 'Early Optimism - First-Year Law Students' Work Expectations and Aspirations' (2010) 20(1/2) *Legal Education Review* 1.

If these results were generally applicable, law students who were successful at secondary school might perceive that they are less susceptible to outcomes attributable to law teachers. However, this interpretation is tentative at best without any additional assessment of the students' self-perceptions or academic records more generally.

B *Discussion*

Despite the concern[45] in some research about the potentially significant outcomes that law teachers might visit on students, raw coding suggests that their conduct has a less significant effect when compared to other agents, at least at the two universities the subject of this research. As a whole, participants attributed outcomes to law teachers as agents less often when they identified themselves as the target, regardless of the participant's characteristics.

We cannot conclude that law teachers are universally perceived as playing a comparatively lesser role in producing explicit or hidden outcomes than other agents. Participants' attributions were spontaneous. Some attributed more outcomes to law teachers than others, suggesting that those participants perceived the role of a law teacher in producing outcomes, regardless of whether they are explicit or hidden, to have to be less significant. It is also possible that participants who attributed an outcome to law school, rather than a specific law teacher, used 'law school' as a collective noun for their experiences with several law teachers. However, even if a proportion of causes participants attributed to

[45] Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 21.

law school were reattributed to law teachers, the coding suggests that teachers still appear to be perceived by participants to play a lesser role.

If we interpret the coding of participants' responses as indicating law teachers are perceived less often than other agents as influential in driving outcomes, it tends to contradict conclusions about their role in both the explicit and the hidden curriculum. For example, both behaviourists and advocates of teacher-centred Socratic methods argue that the teacher's role, rather than some other classroom element, is central to both the pedagogy and the outcomes.[46] Jackson's model of the hidden curriculum and critics of teacher-centred law school pedagogy suggest that the abuse of their authoritative position by law teachers produces unintended or hidden outcomes. If, as the coding suggests, law teachers are perceived as agents less frequently, it would suggest that fewer explicit and hidden outcomes would be attributable to them, requiring closer consideration of other agents' roles.

It is not immediately apparent from participants' interviews why law teachers were perceived as agents less often. Nagel offers one explanation; ironically, students' perception of law teachers makes teachers invisible to students.[47] Nagel argues that while students see and listen to law teachers, they perceive them as separate or isolated, primarily due to their position of authority. Nagel's construction is similar to the concerns of the Socratic method's critics about the hierarchical structure of law classrooms.[48] Rather than being a means of oppression, Nagel argues that students simply choose to ignore law teachers in

[46] See the discussion of explicit curriculum outcomes and the Socratic method in Chapter 2 and (n 8).
[47] Nagel (n 15).
[48] See especially Pickard (n 15).

the same way that they perceive law teachers ignore them.[49] The possibility that participants might have used 'law school' as a collective noun for law teachers might reflect a perception of the faculty as a homogenous or faceless group. However, in the analysis of interviews discussed below, participants referred to law teachers as being isolated or arrogant in only a small number of attributions, suggesting that the perception attributed by Nagel to students is not consistently held.

Alternatively, Nagel argues that students perceive law teachers as having little *practical* knowledge. Discounting the value of a law teacher's knowledge based on perceptions of what is practical and therefore perceived as valuable to potential employers is consistent with Thornton's research on Australian law students' push for a more vocational focus in the explicit curriculum.[50] Closer textual analysis of interviews, discussed in detail below, found that participants appeared to perceive greater value in courses in which they perceived the law teacher as practical or bringing their practical experience into the classroom.

The difference in the number of attributions between participants and participant groups suggests that the explanation is closer to Jackson's model and constructivists' position on the individualised nature of learning. The coding suggests that student responses to law teachers are diverse. The hypothesis of a dominant stimulus-response model does not appear to be accurate. There is no consistent position between groups of participants or between individual

[49] Nagel (n 15) 358.
[50] See Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012). See also the discussion of vocational pressures in relation to the curriculum in Chapter 2.

participants that law teachers are sole or even concurrent agents for outcomes generally.

By looking more closely at the instances in which participants perceived a law teacher to be a distinct or concurrent agent, we can identify the outcomes, whether they are part of the explicit curriculum or hidden, and the conduct to which participants attributed those outcomes with greater precision.

III OUTCOMES ATTRIBUTED TO LAW TEACHERS

Existing research and commentary on a law teacher's role suggests that they may play a role in outcomes consistent with the explicit curriculum or that may be unintended or hidden.[51] Participants interviews reflected the same diversity of outcomes.

A *Law teachers and the explicit curriculum*

Advocates of teacher-centred pedagogies, especially the Socratic method, argue that teachers' direct engagement with students in classrooms promotes analytical thinking,[52] critical thinking,[53] creativity in problem-solving,[54] and verbal skills,[55] which mirror TLOs 3 and 5 of the explicit curriculum in Australia.

Participants did attribute some explicit curriculum outcomes directly to a law teacher. However, they focused on the skills encompassed in TLO 1, especially

[51] See the discussion earlier in this chapter and the discussion of power in Chapter 2.
[52] Schneider (n 24); Hawkins-Leon (n 24); Stone (n 24).
[53] Stone (n 24).
[54] Schneider (n 24).
[55] Stone (n 24); Hawkins-Leon (n 24); Stropus (n 25); Louis Del Duca, 'Educating Our Students for What? The Goals and Objectives of Law Schools in Their Primary Role of Educating Students-How Do We Actually Achieve Our Goals and Objectives?' (2010) 29 *Penn State International Law Review* 95.

knowledge of the law and TLO 3 (critical analysis, reasoned choice, and creative solutions).

Unlike the assumption made in some commentary that adopting a single or specific approach to engaging with students[56] achieves learning outcomes, participants tended to attribute outcomes consistent with the explicit curriculum to what might be described as good classroom teaching as incorporating a diversity of approaches. For example, one approach to which participants regularly attributed a perception that they had a better understanding of the law was the course structure. Participants attributed their ability to remember concepts and apply them analytically to a perception that a law teacher had structured a course logically or had broken down skills or concepts into progressive steps, contributing to overall clarity in the content.

Another consistent attribution participants made in the context of what they perceived as good classroom teaching was a law teacher's passion or enthusiasm for teaching contributing to their understanding. Conversely, participants perceived disorganised or unenthusiastic law teachers as ineffective. Participants described disorganisation differently, including what they perceived as poorly structured lectures or confusing instructions for classroom activities. It was a little more difficult to identify what participants perceived as a lack of enthusiasm. One participant referred to a law teacher as 'bland'.[57] In comparison, enthusiastic law teachers were perceived as being more inclined to

[56] See ch 2 III C 1.
[57] Male, 22, LLB, Canberra Law School.

interact with students. One participant attributed their perception of enthusiasm to a specific law teacher's concern for wellbeing.[58]

A further element of good classroom teaching identified by some participants was a law teacher's willingness to engage in or facilitate discussion and debate. As noted above, some participants also attributed outcomes associated with analytical or creative thinking to law teachers whom they perceived as willing to share practical experiences or allow students to share their own (relevant) experiences. Conversely, law teachers whom participants perceived as inflexible or dogmatic in their classroom interactions also tended to be described as arrogant, egotistical or unhelpful.

One potential motivation identified in research for a law student's assessment of a law teacher as ineffective is the law student's academic performance. Underperforming law students may be quick to point to a perceived failure in teaching as the cause.[59] This thesis did not have access to participants' academic records. However, participants did not explicitly link poor academic outcomes to disorganised, unenthusiastic or inflexible law teachers. Participants instead attributed a lack of success to law teachers more frequently in connection with assessment and feedback. This is discussed in more detail in Chapter 5 on evaluation.

Although more commonly discussed in American legal education, [60] a broader outcome associated with teacher-centred classrooms is students' emulation of professional attributes or behaviours modelled by law teachers. One of the

[58] Female, 22, LLB, ANU.
[59] Larcombe, Nicholson and Malkin (n 4); Castan et al (n 44).
[60] Watson (n 22).

explicit outcomes thought to be attributable to law teachers is the emulation of the behaviours that reflect TLO 2 (professional responsibility) and TLO 6 (self-management).[61]

Although participants tended to focus explicitly in their attributions on outcomes associated with TLO 1 and TLO 3, positive reflections on law teachers were commonly associated with the motivation to follow a particular interest in the law. For example, some participants attributed their interest in working with community legal centres to their experience with specific law teachers they thought were inspirational. Others attributed an intention to work as a criminal prosecutor, academic, or commercial areas like contract law to inspirational law teachers.

However, if we look closely at participants' attributions of occupational objectives to inspirational law teachers, one consistent aspect was that law teachers were rarely the *sole* cause or agent. In interviews with participants who attributed particular career intentions to law teachers, they commonly referred to a similar pre-existing interest. For example, a participant who attributed their interest in community legal work to a law teacher also referred to an interest in criminology and the causes and effects of crime. Another participant who attributed interest in criminal prosecution to a law teacher had also discussed their intention to become a police officer while in high school. This is discussed further in connection with external influences below.

[61] Stone (n 24); Hannah Arterian, 'The Hidden Curriculum' (2009) 40 *University of Toledo Law Review* 279. This is also explicitly acknowledged as an obligation on law teachers by the Association of American Law Schools; Association of American Law Schools (n 26).

It was also generally unclear from participants interviews what made an inspirational law teacher or how they had arrived at that perception. Arguably, the concurrence of the law teachers' and participants' interests or values may be a more influential factor than the law teachers' approach to teaching. However, one participant drew several factors together to explain what he perceived to be the link between enthusiastic teaching, successful students, and the inspiration to pursue a career path.

> You know if as a result of your teaching a student finds that particular, whatever it is that they're teaching, hard to grasp. However, if a more enthusiastic teacher was enthusiastic about teaching that student, you might find that a student might really enjoy that particular path of law, and as a result goes on to make a career in it. A successful career. But because of that convener, on the other side of the coin, that doesn't teach particularly enthusiastically, struggles to show or to cause that student to grasp that particular law, he (sic) may not go on to be a successful lawyer who really enjoys his career.
>
> Male, 22, LLB, Canberra Law School

A small number of participants also attributed a decision to persevere with their studies to a law teacher, consistent with research in the United States suggesting a correlation between students' positive perceptions of faculty and retention rates.[62] One participant referred to a law teacher who shared that they had also struggled at law school. Another referred to conversations with law teachers in which they had explained 'there are cases that you're not going to win 100 per cent of the time. It's OK to fail in real life, and it's OK to fail some in school.'[63]

[62] Brown (n 16).
[63] Male, 23, LLB, Canberra Law School.

However, this type of attribution was uncommon. Other participants referred to law teachers as helpful or supportive in specific instances but tended to attribute a decision to remain in law school to a perception that they had invested too much time or money to withdraw. Alternatively, they attributed the motivation to persevere in the face of challenges to an internal value or drive.[64] It cannot be concluded that law teachers do not affect law students' decisions to stay in law school. However, taken together with the greater frequency of participants' attributions to other agents, the smaller number of attributions to law teachers tends to support or reinforce the perception of law teachers having a less influential role on participants.

B *Law teachers and a hidden curriculum*

Existing commentary suggests that law teachers' misapplication or abuse of their authoritative position in classrooms promotes diverse responses among law students. Students' responses are thought to range from adopting similar behaviours to different forms of withdrawal; silence, invisibility, or physically absenting themselves from classes.[65] Students who do not adopt or adapt begin to question whether they 'fit in' at law school based on a mismatch between what they perceive as legal education's objectives and their abilities.[66] Law students' accounts of the misapplication or abuse of law teachers' power, albeit predominantly American, refer to overt and subtle conduct. Law students use

[64] This is discussed in more detail in chapter 5.
[65] See Kennedy (n 17); Stone (n 24).
[66] See ch 2 III C 1.

descriptors like 'hostile',[67] 'abrasive',[68] 'indifferent'[69] or 'inaccessible'[70] to describe conduct they have seen. Alternatively, law teachers' conduct may be more subtle; '[t]ones of voice, physical mannerisms, facial expression, cast of eye.'[71]

It is perhaps unsurprising that among participants, none self-identified as having adopted hostile or abrasive behaviours modelled by law teachers. Some participants instead attributed peers' hostile behaviour or the risk that peers might adopt that behaviour to a perception that it was being promoted or modelled by law teachers.

Participants also did not attribute any outcomes to law teachers they perceived as ineffective (i.e., disorganised, unenthusiastic or inflexible) other than a sense of frustration. They tended to restrict their perceptions to individual law teachers, making no connection to any consequent perceptions of law school or the legal profession.

One common attribution to law teachers was what participants perceived as promoting competition between law students, often connected to the prospects of gaining employment after graduation. However, it cannot be concluded that competitive behaviour necessarily constitutes part of a hidden curriculum at law school. Participants rarely saw law teachers as the *sole* agent in promoting competition. For example, one participant, discussing her experience at a law

[67] Kennedy (n 17) 71; Stone (n 24) 413.
[68] Stone (n 24) 413.
[69] Kennedy (n 17) 72.
[70] Ibid 49; Law School Reform, *Breaking the Frozen Sea: The case for reforming legal education at the Australian National University* (ANU Law Students Society, 2010).
[71] Kennedy (n 17).

school before enrolling at Canberra Law School, perceived it as a subtle or implicit message based on law teachers' acquiescence to other students' aggressive behaviours.

> In my first year of law, I felt very much like ... because we had mixed classes a bit like you do at the moment where there's upperclassmen. I suppose, you know, they're in their third or fourth year with first-year students. And when that was my first year, they would talk over you. They would tell you were wrong. They were more opinionated in class, and they would just go, 'You're wrong. Just stop.' And it would be the students doing that. And the lecturers at the time would sort of almost facilitate in that way to sort of go 'Well we're weeding out the weak.' So, I felt that when I was first at uni studying law, that's the impression that I got. We got told that you're all the smartest people from where you came from, but here, you're on the same level as everyone else.'
>
> Female, 27, LLB, Canberra Law School

These types of attributions tended to reflect the assumption made in some research that competition is endemic to law school or driven by students who have competed to gain entry.[72] It was unclear whether participants perceived peers had begun to adopt competitive behaviours reinforced by law teachers or whether their peers were already competitive. The influence of peers, and participants' perceptions of them, are examined more closely in Chapter 6.

[72] See for example Henry Giroux and Anthony Penna, 'Social Education in the Classroom: The Dynamics of the Hidden Curriculum' (1979) 7(1) *Theory & Research in Social Education* 21, 33; Elizabeth Cagan, 'Individualism, Collectivism, and Radical Educational Reform' (1978) 48 *Harvard Educational Review* 227. See also the discussion of evaluation and competition in Chapter 2.

Further, not all participants perceived law teachers' discussion of law school's competitive environment to be promoting competition. Some perceived it to be a reminder of the high standards expected of law students, explained by reference to other cohorts.

> Well, I find when you go to a lecture usually there's a bit of a spiel from the convenor about the quality of the students who partake in the course. And I guess it just signals to the cohort or the students who are taking the course that, you know, it's just not good enough. To do a little better. Which is fair enough. I get that. That almost always happens, I think.
>
> Male, 24, LLB, Canberra Law School

Other conduct attributed to law teachers and its outcomes were much clearer. Participants did use similar descriptors to their American counterparts in their negative perceptions of some law teachers and attributed similar outcomes. However, one theme not discussed in existing commentary or research is that outcomes differed in their significance according to the level of hostility or aggression perceived by the participant. The types of conduct by law teachers and their outcomes tended to fall into four broad categories.

First, some participants discussed experiences with a law teacher whom they perceived as aggressive or hostile in their approach to both the participant and their peers. Participants reflected on experiences of being shouted at in class by law teachers or being singled out for embarrassment if they did not know the answer to a question. One participant referred to the experience of helping a peer whom a law teacher had singled out and being told not to do it again.

While attributions like this were uncommon, the outcomes attributed to these experiences significantly affected the participant. Consistent with some American commentary,[73] participants attributed decisions to avoid classes and even whole courses (where possible) to a hostile or aggressive experience with a law teacher. Some attributed reconsideration of their decision to pursue law, or a career in the law, to their experience. One attributed a perception that legal practice may involve dealing with similar behaviour and that 'if I can't deal with this guy then I'm really not cut out for the real world of law'.[74]

All the participants who discussed conduct they perceived as hostile or aggressive were women. However, not all law teachers to which participants referred were men. None attributed the conduct to a perception that the law teacher had singled them out based on their gender.

Comments or conduct in this broad category are serious in their substance and outcomes. They are not uncommon in accounts of American legal education but are less commonly discussed by Australian research. Women's perception of the law classroom as a hostile or aggressive environment, is serious, especially when there is a larger number of women than men in the two law schools the subject of this research.[75] It represents only a small proportion of attributions coded in interviews. However, participants' responses indicate that they perceive law school, or the legal profession, is a social culture in which they do not believe they fit. They perceive that lacking the required knowledge (e.g., getting the answer wrong) is punishable. Alternatively, their response is inconsistent with

[73] See especially Kennedy (n 17).
[74] Female, 30, LLB, Canberra Law School.
[75] See ch 1 IV G 3.

what they perceive is expected by law school (e.g., do not help others) or to perceive that they lack the skills to withstand the type of behaviour exhibited. Consequently, they attribute thinking about leaving or accepting that the behaviour is common.

The second broad category of teachers' conduct reflected conduct referred to in American accounts of legal education; the unapproachable law teacher. Among participants, there was no overlap between teachers perceived as aggressive and teachers perceived as unapproachable. No participant attributed a perception of a law teacher being unapproachable because of their hostile or aggressive demeanour. Instead, participants tended to attribute dismissive or unhelpful behaviours to a perception of unapproachability. Some arrived at the perception as a result of experiences in which they had sought assistance and received none, or what they perceived as not enough. One participant attributed unapproachability to law teachers being too busy to help students, although they did not explain how they perceived busyness. However, it is noteworthy that the pressures on Australian law teachers attributed to reforms to tertiary education explored in Thornton's research[76] are also being observed by participants. For example, although not affecting them personally, one participant recounted their experience of working as a research assistant to a law teacher who they perceived as struggling to manage their various commitments to teaching, research, faculty administration and family.

The types of conduct in this second category generally produced hidden outcomes of discouragement or de-motivation. However, despite assertions in

[76] Thornton, *Privatising the Public University: The Case of Law* (n 50).

American literature that dismissive teachers may be as likely to encourage students to reconsider whether they fit in at law school or evaluate their abilities, there was no evidence among participants that they had done so.

The third broad category of teachers' conduct would not appear to have been explored in research or commentary on legal education; instances where law teachers' conduct was perceived as not explicitly directed to the participant. Participants were less likely to attribute outcomes affecting their studies or career intentions to comments or conduct in this category. Participants here tended to refer to comments in lectures or larger groups, especially when they were inconsistent with the participants' values or career objectives. For example, one participant referred to a law teacher's comment that community service was unrealistic and that they were more likely to be 'working in a heartless corporate firm'.[77] Another referred to an instance where they perceived a law teacher, who was also in practice, was boasting about their financial success. In a related but less forthright example, some participants who expressed an interest in community or government practice referred to law teachers consistently using private or commercial practice references as a basis for their explanation of particular skills.

Participants were unlikely to attribute doubt about their decision to pursue law to this type of conduct. At worst, participants attributed a perception that law school promoted commercial legal practice. Some considered it demotivating. Most considered it merely disappointing.

[77] Male, 21, LLB, Canberra Law School.

It is impossible to separate comments attributed to law teachers in this broad category that may have been an attempt at humour, unintentional or intended as a genuine reflection on the legal profession. However, this research focuses on the perceptions of the audience gathered from the statement rather than the speaker's objective.

A fourth broad theme in participants' attributions, consistent with American research, was the perception of law teachers' inconsistent or differential treatment of law students in the classroom, for example, engaging with some students more than others. It was generally the case that participants who perceived law teachers had acted inconsistently or partially also perceived that they had been disadvantaged. Participants' responses were, again, diverse. Some saw it as demotivating or discouraging. One participant was more inclined to see it as the consequence of a law teacher having a bad day. None attributed a decision to leave a class, course or law school to differential treatment.

Unlike the first broad category of conduct, the outcomes attributed to unapproachable teachers, public statements or differential treatment affected participants less significantly. However, participants who discussed comments like those referred to in the third category of public statements, especially those they perceived emphasised commercial practice, attributed another hidden outcome; that some law teachers promoted private, commercial careers. We will return to this perception below and in the discussion of the explicit curriculum and outcomes attributed to law school in Chapter 4.

C *Discussion*

Consistent with existing commentary and research in America and Australia, participants' attributions to law teachers reflected outcomes reflecting the explicit curriculum and some which did not.

Participants tended to attribute explicit curriculum outcomes to law teachers whom they perceived as organised, enthusiastic, flexible or inspirational. These types of attribution are somewhat inconsistent with the assumption made by advocates of teacher-centred or Socratic method pedagogies that the pedagogy itself contributes to learning outcomes. They are arguably more consistent with the argument by advocates of more active or flexible approaches to teaching that engaging with students is more likely to encourage learning. However, participants' attributions appear to be addressed more directly (although not solely) to their perception of the characteristics of a 'good' law teacher rather than to specific pedagogies.

Participants tended to attribute outcomes consistent with the explicit curriculum to organised, enthusiastic or flexible teachers, especially knowledge, thinking and problem-solving. However, they were not clearly attributable to the teacher alone. Participants who perceived a law teacher to be similar to themselves were more likely to have outcomes consistent with the explicit curriculum attributed to them.

However, it cannot be argued that organised or enthusiastic teachers will consistently contribute to explicit curriculum outcomes. Participants' attributions reflected a diversity of responses, some of which were contradictory. For example, while some perceived that law teachers sharing practical

experiences was valuable, others perceived it as discouraging from the perspective of their pre-existing career objectives.

Conversely, there were a range of conduct and behaviours by law teachers to which participants attributed a perception that they would not or did not 'fit' the legal profession or legal practice. Some were consistent with the types of behaviours referred to in American and Australian students' accounts; hostility, aggression, belittling, unapproachability, differential treatment. Some would not appear to have been previously identified, especially those outcomes where law teachers were thought to be promoting certain types of conduct or practice while devaluing others, leading to a perception that law school favoured particular career paths.

Another finding from interviews that would not appear to have been explored in research is the different outcomes participants perceived to flow from different types of conduct or behaviour. Accounts by some, predominantly American, authors have tended to group hostile, aggressive, unapproachable and differential conduct together without drawing causal links between behaviours and outcomes.[78] However, consistent with Jackson's model, participants' attributions tended to reflect a diversity of responses, not all of which produced a perceived outcome, in response to different conduct. There also appeared to be some correlation between whether the participant perceived the conduct to be directed at them and its affective nature.

Participants tended to attribute significant outcomes—questioning their abilities or their choice of study or career—to law teachers' conduct they perceived as

[78] Kennedy (n 17).

hostile, aggressive or belittling. From a hidden curriculum perspective, these participants would appear to have drawn from those exchanges a perception of law school or the legal profession as environments in which they did not fit. Alternatively, they would need to adapt their behaviours to persevere.

Participants did attribute hidden outcomes to behaviour they perceived as less aggressive or not directed to them personally, for example, promoting particular career paths. However, participants would not appear to have found those outcomes particularly affective or significant for them personally. Instead, they were considered frustrating or discouraging without being associated with any long-term outcomes by the participant.

This raises an important question; can we assign outcomes to a hidden curriculum if they have little or no effect on some students? Both Jackson and constructivists models would argue that we can. Students responses are diverse. Some may conform, appear to conform or reject the outcome. Students' conformance or rejection is influenced by a range of factors, some of which are external to the classroom, including their characteristics, experience and other agents.

The following section will look more closely at the interaction between the hidden outcomes that participants perceive to flow from law teachers' conduct and other influences that might mitigate or even negate them.

IV THE INTERACTION BETWEEN THE ROLE OF THE LAW TEACHER AND OTHER AGENTS

Just as the outcomes perceived by students to be attributable to law teachers are diverse, there is also a diverse array of intervening agents. However, based on interviews, two agents play a more significant intervening role in outcomes; participants themselves and law school.

A *Participants as agents*

In 873 or 42% of all coded attributions (n=2082), the participant was coded as a concurrent or discrete agent. 'Participant' was coded as the agent when the participant perceived they were the principal source of the motivation or condition. For example, participants may have referred to their age, inherent abilities or personal values that they did not attribute to any other agent.[79] The personal characteristics to which participants referred might reinforce or mitigate outcomes.

1 *Career intentions*

One example of where the participant as an agent would appear to have had a reinforcing or concurrent effect is when the participant perceived a law teacher to reflect or support values they shared. As discussed earlier, some participants referred to law teachers as inspirational and, consequently, motivating them to pursue a career in community legal centres, criminal law or contract law. However, a closer analysis of those participants' interviews suggested a close association between the career they had been motivated to pursue and their pre-

[79] See the codebook at Appendix A.

existing interest in similar areas of law. It is impossible to determine whether the law teacher or the participant was the determinative agent in those circumstances. However, participants' interest pre-dated their contact with the law teacher, suggesting the participant was perhaps a primary agent.

A related example is the diversity in participants' responses to law teachers using their vocational experience or examples drawn from commercial legal practice to illustrate a concept. Participant's characteristics, specifically their career intentions, appeared to affect their perception. Some perceived teachers' use of workplace examples as valuable. Others perceived it as promoting a focus on commercial legal practice and excluding other career options. Closer analysis of participants' interviews suggests that, similar to perceptions of inspirational teachers, the difference in responses may be associated with the extent to which a participant perceives a law teacher shares their values or motivations. Participants who found personal stories valuable also indicated that they intended to work in litigation or commercial legal practice. Participants who perceived law teachers' stories as promoting commercial practice tended to indicate they were more interested in work with community legal centres or as a legal academic. Nevertheless, no participant attributed a decision to abandon or pursue an area of practice to law teachers' personal stories.

It is difficult to argue there are hidden outcomes in circumstances where no participant indicated they had altered their career intentions due to encounters with law teachers they perceived as inspirational or exposure to law teachers' commercial law experiences. It is also difficult to argue that it constitutes a hidden curriculum in law school if the promotion is not uniform; participants

referred to law teachers presenting various perspectives. What is apparent from participants' accounts is that law teachers are perceived as promoting different interests or careers. Law students who have a pre-existing interest, or reject it entirely, may 'hear' the promotion more clearly than their peers. It is arguable that where law students have a pre-existing career interest or objective, a law teacher is unlikely to be influential in career choice but may be a source of affirmation or confirmation.

2 *Confidence and resilience*

Some accounts, predominantly American,[80] focus on law teachers' role in provoking a loss of confidence in some law students, an outcome that is wholly inconsistent with the explicit curriculum. The same accounts argue that there are two likely responses. On the one hand, once confidence is lost, the outcome is irreversible, and students choose to hide or leave.[81] On the other, students respond with a demonstration of resilience and a desire to improve their performance to meet perceived expectations.[82]

Participants attributed responses as those identified in American literature to law teachers' actions or conduct. Some attributed a loss of confidence and a consequent decision to absent themselves from classes or courses to law teachers' conduct. Alternatively, some referred to a desire to improve their performance as a result of what they perceived as feedback from law teachers.

[80] Kennedy (n 17).
[81] Ibid.
[82] Watson (n 22).

However, participants also provided insight into what might compel an individual law student to adopt one approach or the other.

(a) Participant characteristics and responding to law teachers

Participants' personal attributes played a significant role in shaping their response to law teachers, especially when they perceived a law teacher's comment to be negative. Several participants reflected on an aspect of their personality that had helped them respond to law teachers. For example, one participant reflected on how she had initially lost confidence because of a law teacher but was motivated to return out of a desire to progress her studies.

> It was a little bit hard … at the beginning, how unit convenors tackled on my shyness. I would only really attend class if I had to… But it's something that I'm tackling on. And I'm starting to attend class, and I'm like, 'This is ridiculous. I can't just huddle up'. And you know most of the real knowledge that I could take on is through the lecturers' experience themselves, not in a textbook. So, I'm pushing myself to go back to class more regularly.
>
> Female, 22, LLB, Canberra Law School

Not all participants could identify the source of their motivation to overcome deficits in performance or ability. Where participants did reflect on their motivation in more depth, they attributed it to various causes, all of which they identified as being innate or personal. However, there were three broad themes across several interviews; career intentions, age, and economic drivers.

In the context of the first broad theme of career intentions, some participants attributed their motivation to overcome what they perceived as discouragement by a law teacher to a personal drive to become a lawyer. Younger women and

men commonly linked the motivation to improve their performance in response to law teachers' criticism to personal success or the likelihood of finding employment. However, for older women or women with carer responsibilities, it was often (but not always) linked to an altruistic narrative about overcoming obstacles to help others rather than money or prestige. For example, one participant who had worked with community services before her enrolment discussed her desire to work in drug and alcohol courts as a motivator to overcome personal challenges.[83] Others discussed their personal experiences with domestic violence and family law as a motivation to move past difficult experiences with law teachers and work in the family law sector themselves.

The responses from a majority of older women and women with families are broadly consistent with the findings of a much larger study of law students' ethical identities in the United States and the United Kingdom and offer additional insight.[84] Based on a survey of almost 1,000 law students, Moorhead et al. found that women law students tended to value the welfare of others more than their male peers. However, they also suggested that law students were significantly influenced by factors external to law school.[85] Among participants in this research, older women and women with carer commitments attributed a motivation to overcome criticism to a desire to serve the interests of others more often than men or younger female peers. It is arguable that, consistent with Moorhead's research, external factors (e.g., personal experiences) played a significant role in maintaining an altruistic motivation and preventing its

[83] Female, 47, LLB, Canberra Law School.
[84] Richard Moorhead et al, 'The Ethical Identity of Law Students' (2016) 23(3) *International Journal of the Legal Profession* 235.
[85] Ibid 245.

diminution for this group of participants. At the same time, this research would also suggest that the gender-based distinction referred to by Moorhead is too broad, and there are more nuanced differences based on lived experiences within gender.

The second broad theme was the intervening influence of participants' age. Some participants associated age with increasing self-confidence, to which they attributed an ability to manage criticism or negative feedback better. Other participants associated age with being less concerned about others' perceptions of them, including law teachers. A small number of participants who had left law school and then returned attributed a perception of law being easier the second time around to their age and maturity. Age was a key motivator for mature-age students to persevere with their studies despite a lack of confidence.

> But then again, I talk to myself and say, 'You're going to turn x age anyway, right?', barring nothing happening. So, when I'm 55, I will be [participant] who is 55 and working as a legal assistant for [a law firm], or I'll be [participant] 55 a solicitor. It's up to me what that will be. And so that's what keeps me going or motivated.
>
> Female, 51, LLB, Canberra Law School

The third broad theme common among many participants in their third or fourth year at law school (regardless of their age) was they attributed a less influential effect to law teachers' criticism to the fact that they had expended too much time and effort to leave.

> Well, I think to put it really simply, the motivation for finishing is that I've come this far and done this much work that even though I've been tempted at times, I was never going to not finish it.

There were some variations within this third theme among participants. For some, it was merely the time they had spent. For others, time and sustained motivation to become a lawyer or pursue an objective overlapped so that they could also see their effort as meaningful. A small number of participants attributed the intention to persevere to the time expended and the cost that they had incurred. The inclusion of cost is noteworthy. The reintroduction of fees in Australian tertiary education has been identified as a potential driver of consumer-type behaviour among students choosing a university.[86] Law school deans have also identified it as a driver for law students pressing law school to focus on vocational skills to increase their employability and repay deferred fees.[87] However, it is difficult to identify empirical evidence of law students constructing that connection in the existing literature. Although not common in interviews, there would appear to be some evidence that participants acknowledge the cost of their studies, even if deferred. However, in the context of responding to law teachers, participants did not see it as a basis to evaluate their learning or press for change but instead as a reason to persevere or accept what they perceived as ineffective teaching.

(b) Self-assessed deficits

Although no participants attributed an irreversible loss of confidence to law teachers, some participants attributed a decision to avoid classroom participation to a *self-assessed* lack of confidence or lack of ability rather than as a response

[86] Linda Brennan, 'How prospective students choose universities: a buyer behaviour perspective' (PhD Thesis, Melbourne University, 2001) <http://hdl.handle.net/11343/39537>.
[87] Thornton, *Privatising the Public University: The Case of Law* (n 50).

to the conduct of a law teacher. That is, they attributed no causal link between a law teacher and their decision to remain silent in class.

The majority of participants in this group were young women. They attributed their lack of confidence to various causes, for example, fear of public speaking, fear of looking stupid, perceived lack of preparation or 'impostor syndrome'. None of these participants attributed their fear or concern to an external agent, instead attributing it to something innate or personal. For example, one participant identified at least three concurrent causes, all of which were attributable to her perception of herself.

> I always feel like I'm going to ask a stupid question. It's probably not a stupid question. But I think for me I get nervous when there's a lot of people you know. Even when it comes to public speaking and we have to present something in class, it takes a lot to do. But it's something I can do. If it's an assignment, you've had over two weeks to prepare for it. Where raising my hand in class, I haven't had two weeks to prepare.
>
> Female, 23 LLB, Canberra Law School

When asked whether she could remember any example of where she felt she had asked a 'stupid question', the participant could not recall any.

There was no identifiable pattern across interviews with young women participants who perceived a self-identified deficit. Participants from the ANU and Canberra Law School, and public and private school backgrounds, reflected on an underlying lack of self-esteem, confidence, or ability that they attributed to themselves and how it had affected their experience at law school. Just as with career intentions, there is no definable hidden outcome. However, unlike career

intentions, participants did not attribute confirmation of a self-identified deficit based on their gender to law teachers. It opens a much more fundamental question about men and women's relative socio-cultural positions, which is outside this thesis's scope.

B *The interaction between participants, law teachers and law school*

Law school was coded as a concurrent or sole agent in 760 (36%) of all attributions—far more than law teachers (189 or 9%). Law school was coded as the agent where participants did not attribute a cause to a specific law teacher or attributed to what they perceived as their general experience.

In some instances in which participants attributed a cause to law school, it may have been used as a collective noun for experiences with more than one law teacher. Alternatively, participants may have chosen to attribute a cause to law school when they did not want to identify a law teacher specifically. The attributional method and LACS rely on spontaneous attributions. Consequently, participants were not pressed in interviews to narrow an attribution to a law teacher where they had not already done so voluntarily.

Participants' attributions to law school applied to all aspects of Jackson's taxonomy of the hidden curriculum. However, there was a small number of instances in which participants discussed what they perceived as the relationship between law teachers and law school. From a hidden curriculum perspective, some participants perceived law teachers as the target of a cause and outcome rather than the agent. In those circumstances, participants were inclined to see law teachers as having a much less significant role in the production of outcomes.

Participants' examples of instances in which they saw law teachers as the target rather than an agent were diverse. They included, for example, interactions with peers or limits on what law teachers could do or say imposed by the law school. However, what is common within those attributions is that law teachers are neither consistently nor universally seen as agents of hidden outcomes. The intervening role of another, more powerful agent may partly explain why they are perceived as agents less frequently.

For example, a small number of participants perceived that law teachers could be misled or pressured by law students. One participant discussed how they perceived law students misled law teachers into believing that the cohort was generally content. Reflecting on several belittling in-class exchanges between peers, the participant concluded that 'lecturers don't see this. They see happy faces in front of them in classes and people getting along. But outside, it's not the same culture.'[88]

Another referred to peers who may be able to repeat professional values, creating the impression of conformance, but may be motivated by inconsistent objectives.

> And you can tell looking at these same students you know when the lecturers start on their moral evangelism rants, saying how important it is that we champion x y z values. You look around the room, and you can see some people whose eyes just glaze over and they roll into the back of their heads, and you just know. They might know what their values are. They will recite them perfectly under exam conditions, but you can tell in their heart and not committed to those values.

[88] Male, 21, LLB, Canberra Law School.

Male, 23, LLB, ANU

A small number of participants perceived that law school interfered with the ability of law teachers to introduce classroom activities. For example, one participant discussed how what they perceived as the law school's commercial interests meant that some classroom activities had been abandoned.

> A lot of law students will say, 'Because I've never done advocacy before, and I'm really afraid to talk to someone face to face, I'm just going to avoid it.' Or 'I'm going to complain to the faculty and say this is unfair you know I don't think this is important to me. I'm going to get enough students to rebel against this, and I'm going to do it.' So, the unit convener or the faculty goes, 'OK, well the students are the money-making machine here, and we're just going to appease them and say, "OK, fine, we won't do mooting, we won't make you do a negotiation, we won't make you do court-based advocacy, we will make it a take-home assignment"'. And that makes it easy for those people.

Male, 23, LLB, Canberra Law School

Another discussed how law school's desire to avoid upsetting students and cover material quickly might place limits on academic freedom. They perceived that 'if anyone were seen to be spruiking a particular ideology' would 'generate a great deal of consternation amongst the students and complaints.'[89]

The weight that can be placed on some of these attributions imputing motives to their peers are questionable. However, they echo some observations made by law teachers themselves to Thornton[90] on law students' active role in changing

[89] Female, 35, JD, ANU.
[90] Thornton, *Privatising the Public University: The Case of Law* (n 50).

the curriculum and the effect of reforms to tertiary education on academic freedom. They reinforce law students' position as active observers and interpreters rather than passive recipients. Although limited, the active role of law students also suggests that, consistent with constructivist learning models, some of the outcomes assumed to be within the control of law teachers or law school are subverted by influences beyond their control, placing them outside the scope of a hidden curriculum. This is examined in more detail in Chapter 4 and the role of the explicit curriculum.

V SUMMARY

Coding attributional statements in participants' interviews and closer analysis of interview text indicates that while participants attributed both explicit and hidden outcomes to law teachers in interviews, law teachers were perceived to play a far less significant role in producing outcomes than other agents.

When considering the text of interviews more closely, some outcomes assumed in predominantly American literature to flow from law teachers as agents—both explicit and hidden—were evident. Participants attributed outcomes consistent with the explicit curriculum, especially knowledge of the law (TLO 1) and thinking skills (TLO 3) to law teachers they perceived as enthusiastic and organised. However, participants did not perceive a single or specific pedagogy as being consistently effective in delivering outcomes. Despite the assumption made in American literature about the value of teacher-centred pedagogies like the Socratic method, participants tended to attribute instances in which they perceived they learned effectively to more flexible teaching methods.

Participants appeared to value opportunities to engage and ask questions rather than be passive recipients of information.

Participants did attribute hidden outcomes to the actions or conduct of law teachers. Consistent with some accounts of law students' experiences, participants attributed reconsideration of their decision to study law or become a lawyer to overtly hostile conduct by law teachers (e.g., shouting, belittling or preventing a participant helping others). Alternatively, they attributed a decision to adopt or accept hostile behaviour to pursue a career in law. Worryingly, all of the participants who referred to this type of conduct were women, although none perceived that their gender contributed to the conduct. Law teachers who engage in this type of conduct arguably contribute to a hidden outcome inconsistent with the explicit curriculum; law school and the legal profession are hostile environments or environments in which they may not fit.

However, unlike the predominantly American research that groups a range of conduct together as the cause of hidden outcomes, this research suggests that not all conduct leads to the same serious outcomes. For example, participants tended to attribute absenting themselves from classes or reconsidering their studies to only the most extreme forms of law teacher conduct. Less extreme conduct, for example, disorganised, inflexible, unenthusiastic, unapproachable, or partial law teachers, still produced hidden outcomes in the form of de-motivation or discouragement, but participants perceived other agents intervened to mitigate or even negate more serious consequences like leaving law school. For example, a participant's career objectives played a role in motivating them to persevere with their studies, mitigating any discouraging effects that a law teacher might

be assumed to apply. For young women and men, the motivation was primarily associated with being a lawyer. However, older women and women with carer responsibilities attributed their motivation to altruistic objectives of helping others. For this group, personal characteristics played a substantial role in negating the influence of law teachers. For others, a growing sense of confidence, a decreasing level of sensitivity to criticism associated with increasing age and maturity, or a rational calculation of the time or money they had already spent on law school, served to mitigate or negate hidden outcomes.

There was no consistent position between participants concerning other hidden outcomes, such as the promotion of competition. Some participants perceived law teachers as actively promoting competition, while others saw it as a reminder of the high standards law school expected.

Participants attributed a hidden outcome to law teachers whom they perceived as promoting particular careers or specialisations in legal practice—something that the explicit curriculum neither expects nor advocates. For some, the outcome was perceived as positive, encouraging them to pursue a particular career. For others, it was perceived as negative, appearing to reinforce a perception that law school favoured or promoted commercial or private legal practice. Again, participants' perceptions appeared to be influenced by whether they held a pre-existing interest in the career or not.

Personal characteristics appeared to affect how participants interpreted law teachers, rather than law teachers being the agent of a hidden outcome. The intervening influence of personal characteristics suggests that some assumed hidden outcomes are attributable to participants rather than, or perhaps despite,

law teachers. Participants perceived that they had drawn on skills or values that they already possessed, or have acquired from elsewhere, rather than attributing them to a law teacher. Arguably, participants' experiences with law teachers may have contributed to those skills or values, but that was not how participants perceived it.

In summary, participants interviews suggest that law teachers are not consistently or universally perceived as contributing to explicit or hidden curriculums. Consideration needs to be given to law students' role when interpreting commentary or research on law teachers' role in learning outcomes.

A causal connection can be drawn between a law teacher and *some* outcomes, which might be explained by a simple binary relationship of stimulus and response. For example, enthusiastic and organised law teachers who allow students to engage with them are perceived to contribute to some outcomes consistent with the explicit curriculum. Conversely, law teachers who are aggressive or hostile are perceived as creating a hidden outcome, inconsistent with the explicit curriculum, namely that law school and the legal profession are similarly hostile, alienating some students while compelling others to adapt to that hostility. However, the mitigating or negating effects of attributes or values that law students perceive they already possess make a stimulus-response model difficult to sustain in respect of all outcomes or all law students. Put another way, while participants did perceive there to be hidden outcomes, other agents appeared to play a significant role in intervening and mitigating more serious outcomes.

CHAPTER 4 - THE ROLE OF THE EXPLICIT CURRICULUM

I INTRODUCTION

Jackson's discussion of the explicit curriculum broadens the focus from interpersonal relationships between students and teachers to the effects of the structures within which those interactions occur.[1] Jackson uses 'curriculum' broadly to denote a menu of learning outcomes but excludes extra-mural activities occurring outside the school setting. This chapter uses 'explicit curriculum' in the same way as Jackson, that is, to describe the menu of subjects and learning outcomes prescribed in formal curriculum documents.

According to Jackson, the explicit curriculum carries hidden outcomes in terms of both its structure and its content. The structure of the explicit curriculum directs the course of study, excluding some concepts or discussion while including others, implicitly communicating that excluded material is unimportant or not relevant. It also controls individual action. By directing students to achieve prescribed outcomes, it limits opportunities for independent research or study. The sequential nature of the explicit curriculum, and the reliance by later subjects on knowledge gained in earlier subjects, also limits opportunities for students to engage with subjects in the order of their choosing. The limits on choice implicitly communicate that those areas are less important than the prescribed subjects and outcomes.[2]

Unlike Jackson's approach to the teacher's role, teachers may find themselves subject to the same limits as their students. For example, semester planning, timetabling and

[1] Phillip W Jackson, *Life in Classrooms* (Holt, Reinhart and Winston, 1968).
Jackson equates his use of 'crowds' to describe to 'traffic control'
[2] Ibid.

other expectations placed on a teacher to perform tasks other than teaching create limits around how a subject might be taught, what might be included in instruction, and the time available to spend with students.

A *Hidden outcomes of the explicit Australian legal education curriculum*

The content of the explicit curriculum in Australian legal education is primarily determined by the Priestley 11,[3] affirmed as the knowledge that a law graduate is expected 'to know [and] understand … as a result of learning',[4] and adopted by admitting authorities[5] as a prescriptive list of what an applicant for admission must have covered in their law degree. Although it is intended to provide a means of standardising legal education across law schools, it also represents a form of limitation or control. Australian law schools are compelled to offer the 11 listed subjects in their LLB and JD offerings to ensure their graduates are eligible for admission.[6] Consequently, the Priestley 11 are assumed to explicitly identify essential knowledge for law students, despite the LACC's insistence that the Priestley 11 'are, and always were intended to be, indicative rather than prescriptive.'[7]

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[3] Law Admissions Consultative Committee, 'Law Admissions Consultative Committee (LACC)', *Legal Services Council* (Web Page, 1 February 2021) <https://www.legalservicescouncil.org.au/Pages/about-us/law-admissions-consultative-committee.aspx>.

[4] Sally Kift, Mark Israel and Rachel Field, *Learning and Teaching Academic Standards Project - Bachelor of Laws - Learning and Teaching Academic Standards Statement* (Department of Education, Employment and Workplace Relations, 2010) 1.

[5] Most jurisdictions in Australia have adopted the Model Legal Profession statutory regime that defines the academic qualifications for admission by listing the same subjects as the Priestley 11; see for example *Legal Profession Act 2006* (ACT) ss 21-2, and *Court Procedures Rules 2006* (ACT) div 3.11.2. NSW and Victoria have instead adopted the *Legal Profession Uniform Law* Rule 5 of the *Legal Profession Uniform Admission Rules* defines the 'specified academic qualifications prerequisite' by replicating the Priestley 11.

[6] Eduardo Capulong, 'Experiential Education and the First-Year Curriculum', *Best Practices for Legal Education* (Blog Post, 10 Februrary 2021) <https://bestpracticeslegaled.com/2021/02/10/experiential-education-and-the-first-year-curriculum/>.

[7] Law Admissions Consultative Committee, 'Redrafting the Academic Requirements for Admission', Law Admissions Consultative Committee, 2019) [1.3] <https://www.legalservicescouncil.org.au/Documents/redrafting-the-academic-requirements-for-admission.pdf>.

The Priestley 11 has been subject to only minor amendments since its first iteration in 1992.[8] Despite recommendations to 'move away from a solitary preoccupation with the detailed content of numerous bodies of substantive law'[9] and attempts by the LACC to bring the Priestley 11 into line with the TLOs,[10] substantive changes have produced stubborn opposition to change from some educators[11] and sectors of the profession.[12] The LACC's most recent initiative to alter the Priestley 11 has been 'postponed indefinitely'.[13] Although made before the most recent attempt to amend the Priestley 11, Weisbrot's observation on the chilling effect on Australian legal education is still relevant:

> I suspect that if Professor Langdell walked into a contemporary law school in the United States or Australia, he would feel right at home. Although the elective programs at modern law schools have expanded enormously and become ever more specialised, and clinical electives are now available, the nature of the core curriculum, the dominance of doctrine, and the basic approach to pedagogy have changed very little.[14]

Although almost uniformly adopted by Australian admitting authorities and, consequently, law schools, the Priestley 11 has been persistently criticised as

[8] Ibid.
[9] Australian Law Reform Commission,, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, 17 February 2000) [2.82].
[10] Law Admissions Consultative Committee, 'Redrafting the Academic Requirements for Admission' (n 7).
[11] Legal Profession Admission Board of NSW, 'Some Comments on LACC Redrafting the Academic Requirements for Admission' (2019) <https://www.legalservicescouncil.org.au/Documents/LPAB-comments-on-LACC-redrafting-the-academic-requirements-for-admission.pdf>.
[12] See the comments of Law Firms Australia summarised in Law Admissions Consultative Committee, 'Redrafting Academic Requirements: Report on Submissions' (2019) <https://www.legalservicescouncil.org.au/Documents/report-submissions-on-revised-draft-of-academic-requirements.pdf>.
[13] Law Admissions Consultative Committee, 'Law Admissions Consultative Committee (LACC)' (n 3).
[14] David Weisbrot, 'What Lawyers Need to Know, What Lawyers Need to Be Able to Do: An Australian Experience' (2002) 1 *Journal of the Association of Legal Writing Directors* 21, 35.

cementing a series of implicit messages for law students arising out of what is taught (the selection of units and exclusion of others) and how it is taught.[15]

1 *What is taught – Inclusions and exclusions*

Jackson argues that the inclusion of some subjects in the explicit curriculum, and the exclusion of others, creates implicit messages about their comparative value. Similar arguments have been made about the Priestley 11.[16] For example, the limited menu of subjects in the Priestley 11 and its unchanging and seemingly unchangeable nature has been accused of discouraging innovation in teaching[17] and preventing the adaptation of its content to changes in the broader legal landscape.[18] Consequently, it implicitly communicates that emerging areas of law are of little value. Its emphasis on mastery of the law assumed to be relevant to practice has also been interpreted as excluding law students who do not intend to be lawyers.[19] Despite the assertion that a law degree supports students entering a range of professions,[20] the focus on subjects considered core to legal practice creates an implicit message that law school is dedicated to educating lawyers.

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[15] The LACC itself acknowledged the 'sustained criticism' in 2010; Law Admissions Consultative Committee, 'Rethinking Academic Requirements for Admission', Law Admissions Consultative Committee.

[16] Ibid.

[17] International Legal Education and Training Committee, *Internationalisation of the Australian Law Degree* (International Legal Services Advisory Committee, 2004) 7. However, this is not universally accepted; see for example Sally Kift, 'For Better or For Worse?: 21st Century Legal Education' (Lawasia Downunder, 20-24 March 2005); Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24(3) *Melbourne University Law Review* 965; Kate Galloway and Peter Jones, 'Guarding Our Identities: The Dilemma of Transformation in the Legal Academy' (2014) 14 *QUT Law Review* 15.33).

[18] Margaret Thornton, 'Dreaming of Diversity in Legal Education' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 549.19).

[19] Ibid.

[20] Rosalind Dixon, 'Studying law is about much more than becoming a lawyer, Malcolm Turnbull', 5 February 2018) <https://newsroom.unsw.edu.au/news/business-law/studying-law-about-much-more-becoming-lawyer-malcolm-turnbull>.

The reinforcement of the traditional concept of teaching students to 'think like a lawyer' and build skills relevant to practice has also been used to connect the ageing Priestley 11 to the newer TLOs.[21] Adopted as an attempt to make the Priestley 11 more relevant, law schools, including the Canberra Law School,[22] have emphasised a practical approach to teaching Priestley subjects as a means of differentiation. Ironically, law schools' attempts to force a more flexible approach to the Priestley 11 by 'cover[ing] all the mandated content in the Priestley 11, *flavoured by the realities of practice*' (emphasis added)[23] may have been reinforced the exclusion of students who do not intend to practise.

The silences in the Priestley 11 have attracted ongoing criticism as reinforcing its exclusionary effect or giving priority to commercial practice over other perspectives. Family law, for example, was explicitly excluded in the original drafting of the Priestley 11. Despite calls for its inclusion, it remains absent,[24] consequently communicating to students that it is of lesser importance in professional practice. The Australian Law Reform Commission[25] and the Productivity Commission[26] identified

[21] Kate Galloway et al, 'Working the Nexus: Teaching Students to Think, Read and Problem-Solve Like a Lawyer' (2016) 26(1) *Legal Education Review* 5. However, the adoption of a more vocational orientation is not universally popular among law schools or law teachers; see Chapter 2 and Margaret Thornton's interviews with members of the legal academy in Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012).
[22] University of Canberra, 'Bachelor of Laws - SCB101', (Web Page, 2020) <https://www.canberra.edu.au/coursesandunits/course?course_cd=SCB101>.
[23] Professor Nick James, Dean of the Faculty of Law at Bond University quoted in Grace Ormsby, 'Priestley 11 'not keeping up' with reality', *Lawyers' Weekly* (online, 26 May 2019) <https://www.lawyersweekly.com.au/biglaw/25707-priestley-11-not-keeping-up-with-reality>.
[24] Thornton, 'Dreaming of Diversity in Legal Education' (n 18).
[25] Australian Law Reform Commission, *Review of the adversarial system of litigation: Rethinking legal education and training* (Issues Paper No 21, 1997) [5.14].
[26] Productivity Commission, *Access to Justice Arrangements* (Report No 72, 5 September 2014) vol 1, 547.

the exclusion of alternative forms of dispute resolution as producing an implicit emphasis on adversarial approaches to problem-solving.[27]

Subjects beyond the Priestley 11 are not entirely excluded from an LLB or JD program. Australian law students are required to complete additional subjects to meet the requirements for graduation.[28] Within the parameters set by the *TEQSA Act*[29] and the AQF,[30] individual law schools can determine how many additional subjects are required, how many are compulsory, and what additional subjects students can elect to study to complete the requirements for the degree. Law schools determine the elective subjects they will offer. From a hidden curriculum perspective, the choice of electives identifies for students the additional strands of knowledge considered valuable by the law school they attend.

Some flexibility is available to law students to pursue a subject not offered by the law school at which they are enrolled. For example, students can elect to pursue cross-institutional study or seek recognition of other courses as fulfilling part of the degree's requirements. However, both options are often at the discretion of the student's 'home' university, [31] and it is difficult to find data on how often approvals are granted.

[27] Alternative dispute resolution is included in 'Civil Procedure' in the Priestley 11, but is not identified as a distinct subject area.
[28] See for example Australian National University, 'Bachelor of Laws (Hons)', *Programs and Courses* (Web Page, 2020) <https://programsandcourses.anu.edu.au/program/allb#inherent-requirements>; University of Canberra (n 22).
[29] *Tertiary Education Quality and Standards Agency Act 2011* (Cth) ('*TEQSA Act*').
[30] Australian Qualifications Framework Council, *Australian Qualifications Framework* (Australian Qualifications Framework Council, 2nd ed, 2013).
[31] See for example ANU College of Law, 'Studying Elsewhere Approval', *ANU College of Law* (Web Page) <https://law.anu.edu.au/studying-elsewhere-appoval>; ANU College of Law, 'Application for credit/status', *ANU College of Law* (Web Page) <https://law.anu.edu.au/application-creditstatus>; University of Canberra, 'Credit', *University of Canberra* (Web Page) <https://www.canberra.edu.au/future-students/credit>.

2 *How it is taught – The centrality of doctrine*

Within the Priestley 11, each subject includes a list of the substantive content to be covered. For example, the Priestleys's listing for contract law includes formation, including capacity, formalities, privity and consideration; content and construction of contract; vitiating factors; discharge; remedies; and assignment.[32] It has been argued that the Priestley's prescriptive listing of topics within subject areas reinforces the importance of doctrine over other forms of knowledge, encouraging students to adopt a black letter, structured or even emotionless approach to problem-solving.[33] Critical perspectives are not listed in the Priestleys, implicitly encouraging an uncritical acceptance of rule-based problem-solving[34] and a concept of the law as impermeable.[35] Simultaneously the exclusion of critical perspectives implicitly devalues, for example, race-, gender- or socioeconomic-based critiques of the current law.[36] The increasingly limited scope for critical or social justice perspectives on the law has, in turn, been identified as encouraging a decline or change in students' altruistic motivation.[37]

Despite the significant outcomes the inclusions and exclusions of the Priestley 11 is thought to promote, there is very little empirical data on the extent to which law students perceive it affects their experience at law school. A survey conducted with students at the ANU suggests both support for and opposition to an approach focusing

[32] Law Admissions Consultative Committee, 'Prescribed academic areas of knowledge', (December 2016).
[33] Galloway and Jones (n 17). See also Bender's discussion of a similar phenomenon in the US legal curriculum; Leslie Bender, 'Hidden Messages in the Required First-Year Law School Curriculum' (1992) 40 *Cleveland State Law Review* 387.
[34] Weisbrot (n 14).
[35] James (n 17).
[36] Thornton, 'Dreaming of Diversity in Legal Education' (n 18).
[37] Thornton, *Privatising the Public University: The Case of Law* (n 20); Melanie Poole, 'The Making of Professional Vandals: How Law Schools Degrade the Self' (Honours Thesis, Australian National University, 2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029993>.

on training law students to enter predominantly commercial legal practice.[38] In a related but not identical context, a survey of 67 final and penultimate Australian law students found that more than 60% of students agreed that their studies were 'equipping me for a career in law' *and* 'preparing me for a wide range of careers'.[39] The duality of responses suggests that, at least among the respondents surveyed, they did not perceive a specific focus on one or the other.

Despite being as important to the explicit curriculum as the Priestley 11, it is difficult to identify any discussion or research on the outcomes thought to flow from the TLOs. Arguably, the absence of any detailed discussion or analysis might result from the relative age of the TLOs compared to the Priestley 11. In addition, some empirical research with Australian law schools suggests that the implementation of practices to support student achievement against the TLOs has been slow, hampered by a lack of resources and time to redesign courses to target the prescribed outcomes.[40] As a result, research on the outcomes perceived by students is challenging to implement and conduct.

A *The role of external agents in the explicit curriculum*

Jackson's discussion of the effects of an explicit curriculum is generally restricted to implementing a curriculum determined by a higher education authority, for example, a central curriculum authority or a school board. However, law schools'

[38] Law School Reform, *Breaking the Frozen Sea: The case for reforming legal education at the Australian National University* (ANU Law Students Society, 2010). See also the personal account of one student opposing the focus on preparing students for private practice in Poole (n 37).
[39] Richard Johnstone and Sumitra Vignaendra, *Learning Outcomes and Curriculum Development in Law: A report commissioned by the Australian Universities Teaching Committee* (Department of Education, Science and Training, 2003) figure 10.3.
[40] Penny Carruthers, Natalie Skead and Kate Galloway, 'Teaching Skills & Outcomes in Australian Property Law Units: A Survey of Current Approaches' (2012) 12 *Queensland University of Technology Law and Justice* 66.

implementation of an explicit curriculum has been subject to a much more diverse array of causes and agents, some of which sit outside a recognisable or bureaucratic curriculum-setting hierarchy. Australian law schools sit awkwardly at a crossroads between historical agents and modern reforms that have compelled a narrowing of the content and substance of the explicit curriculum.

Historically, Australian legal education has consistently been closely associated with the legal profession that has tended to encourage a more vocational orientation in the content of the explicit curriculum.[41] That tendency has, arguably, been amplified by an increasingly commercial or profit-oriented approach by the profession to delivering services.[42] Consequently, the profession is perceived as lobbying law schools to focus even more heavily on vocational skills and offer more commercially oriented electives to produce 'job ready' graduates suited to the new commercial environment.[43] Reforms to Australian tertiary education and funding have extended law firms' reach into law school as potential sources of sponsorship and financial support, [44] creating the perception of an ever-increasing level of influence. [45]

The same reforms to tertiary education have also introduced additional pressures on law schools' implementation of the explicit curriculum. Declining government funding for universities has led to attempts to replace it with increased tuition fee

[41] Reyes and Johnstone refer the relationship as being one of law schools persistent subservience to legal practice; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26 *Sydney Law Review* 537.
[42] Michael Kirby, 'Legal Professional Ethics in Times of Change' (1998) 72 *Australian Law Reform Commission Journal* 5; Joanne Bagust, 'The Legal Profession and the Business of Law' (2013) 35 *Sydney Law Review* 27.
[43] See for example Margaret Thornton's discussion of changes at La Trobe and the 'homogenous relationship between law and business'; Margaret Thornton, 'Among the Ruins: Law in the Neo-Liberal Academy' (2001) 20 *Windsor Yearbook of Access to Justice* 3. See also Thornton, *Privatising the Public University: The Case of Law* (n 20).
[44] Thornton, *Privatising the Public University: The Case of Law* (n 20) 51.
[45] Ibid 52.

revenue.[46] The resultant competition between law schools for enrolment has compelled them to attempt to differentiate their curriculum to gain a competitive advantage, despite generally uniform admission requirements.[47] As discussed earlier, some law schools have advertised themselves as adopting a practical perspective in response to the rigidity of the Priestley 11. The potential advantage in attracting career-oriented students in a competitive market raises a question about the extent to which external economic pressures, rather than law schools' pedagogical approaches, compel the adoption of a 'highly practical approach'[48] to teaching.

Aside from pressure on law schools' curriculums produced by the profession or regulatory reform, it has also been argued that law schools face increasing pressure from students themselves. Some academy members have pointed to lobbying from students to change the curriculum to offer more vocationally or commercially oriented knowledge and skills.[49] The reintroduction of fees for tertiary education, either paid up-front or deferred and repaid through income tax, is cited as the origin of students' push for more commercial, vocational or practical opportunities.[50] Law students are perceived as 'investors' with the expectation of receiving a financial return in the form of employment.[51] To achieve the expected return, law students have pushed for the inclusion of subjects and skills within the curriculum that they perceive increase the likelihood of employment. However, how students determine what will make is

[46] See ch 2 III C 2.
[47] Margaret Thornton and Lucinda Shannon, "Selling the Dream': Law School Branding and the Illusion of Choice' (2013) 23(1/2) *Legal Education Review* 249, 253; Thornton, *Privatising the Public University: The Case of Law* (n 20) 37-8.
[48] 'Bachelor of Laws', *University of Canberra* (Web Page) <https://www.canberra.edu.au/coursesandunits/uc-courses/course?course_cd=SCB101>.
[49] Thornton, *Privatising the Public University: The Case of Law* (n 20).
[50] Andrew Boon and Avis Whyte, 'Will there be Blood? Students as Stakeholders in the Legal Academy' in Fiona Cownie (ed), *Stakeholders in the Law School* (Hart Publishing, 2010) 187.
[51] Thornton, *Privatising the Public University: The Case of Law* (n 20) 44-9, 91, 104; Linda Brennan, 'How prospective students choose universities: a buyer behaviour perspective' (PhD Thesis, Melbourne University, 2001) <http://hdl.handle.net/11343/39537>.

exceptionally difficult to identify.[52] There would also appear to be some dissonance between students' perceptions of what is valued and what employers expect.[53]

Arguably, the effect of lobbying from the profession and students to create a vocational or commercial curriculum, compounded by the financial incentive to differentiate, has compelled law schools to narrow their elective offerings to those that have some vocational relevance.[54] There is also some evidence to suggest that attempts to retain or introduce critical perspectives on the law or offer social-justice-oriented electives face opposition from some students. Critical or social perspectives on the law are perceived to have little relevance to finding employment.[55]

B *Purpose*

Although some research and commentary argue that both the content and silence in the explicit curriculum may affect learning outcomes for students,[56] clear evidence of causal links is generally limited. At the same time, the role of influences beyond the law school's control confuses and even contradicts the assumption of its central, authoritative role in producing those outcomes. This chapter uses the LACS to identify how law students at the two universities the subject of this research perceive the effects of the explicit curriculum. It also attempts to analyse and disentangle the extent to which law students are affected by external causes and agents, including the legal

[52] See for example the discussion of the role of popular media on US law students; Victoria Salzmann and Philip Dunwoody, 'Prime-Time Lies: Do Portrayals of Lawyers Influence How People Think about the Legal Profession' (2005) 58 *Southern Methodist Law Review* 411. Alternatively, recruitment advertisements directed to law students by the profession have been identified as potentially affecting career intentions and expectations; Richard Collier, 'Be Smart, Be Successful, Be Yourself - Representations of the Training Contract and Trainee Solicitor in Advertising by Large Law Firms' (2005) 12 *International Journal of the Legal Profession* 51.
[53] See ch 2 III C 2 and especially Elisabeth Peden and Joellen Riley, 'Law Graduates' Skills - A Pilot Study into Employers' Perspectives' (2005) 15 *Legal Education Review* 87.
[54] Thornton, *Privatising the Public University: The Case of Law* (n 20) 100.
[55] Law School Reform (n 38).
[56] See discussion above.

profession and their career objectives, in their perceptions of the curriculum's value, utility, and exclusionary effects.

C *Method*

Consistent with Jackson's construction, the focus of this chapter is on attributional statements in which participants perceived outcomes to be attributable to the educational setting of law school, or within law school's control, and that were not interactions with individual law teachers or relevant to evaluation.

The breadth of the coding for 'law school' presented an obstacle to the research; Could attributional statements be coded to identify the cause and its agent where an outcome could objectively be attributed to different elements of the explicit curriculum? It is difficult to draw a clear distinction between, for example, outcomes attributable to the explicit content of the Priestley 11 and how the ANU or Canberra Law School might structure individual subjects. Given the diversity of explicit curriculum instruments and differences in its delivery, the potentially broad range of agents could be seen as a weakness in the research.

Rather than attempting to develop a series of codes that reflected the diversity of causes, the decision was made to code attributions in which participants did not attribute an outcome to a law teacher or another agent to 'law school'. A secondary code was applied to attributional statements to identify them as related to 'assessment'. Consequently, the sections that follow focus on attributional statements in which participants *did not* perceive the agent to be a law teacher or related to assessment.

The undifferentiated approach to coding for 'law school' is justified on four bases. First, consistent with the LACS insistence on spontaneous attribution, respondents

were not asked to attribute a cause specifically to, for example, the Priestley 11, the TLOs or some other administrative structure within the law school if they did not do so spontaneously. Secondly, even if a respondent were pressed to attribute the cause to a specific curriculum element, they might not have a detailed knowledge of, for example, learning outcomes in the TLOs or the prescribed content of specific subject areas in the Priestley 11. Thirdly, this thesis focuses on students' perceptions rather than an objective evaluation of whether law school effectively achieved specific, explicit learning outcomes. Precision in connecting a specific learning outcome to a particular experience in law school was not this thesis' objective. Some participants may have perceived an outcome attributable to a cause or agent that a more knowledgeable observer may see as incorrect. However, that demonstrates the strength of the method rather than a weakness. To the extent that participants may have incorrectly (according to the curriculum framework) attributed an effect to an aspect of the explicit curriculum, it begins to reveal how participants have interpreted their experience.

Lastly, the LACS is not determinative of any research findings. As explained in Chapter 1, this research does not use LACS as a diagnostic tool. Instead, it identifies themes across interviews and collects similarly themed attributional statements for closer analysis. The emphasis on the spontaneity of participants' attributions and perceptions means that it is not always possible to authentically or reliably draw a direct causal link to a specific element of, for example, the explicit curriculum. Distinctions have been drawn and themes identified in this chapter only where it remains faithful to participants' attributions. As discussed in Chapter 3, some participants may have attributed outcomes to law school as a distinct or concurrent agent where they could not attribute outcomes to law teachers. However, consistent

with the emphasis on spontaneity, participants were not pressed to refine their attributions based on the interviewer's guess that a participant was evasive or vague. Consequently, section IV below does not attempt to offer definitive diagnoses of the effects of law school. Instead, it offers some broad comparisons that warrant further exploration in section V.

It should also be acknowledged that, just as with coding for law teachers, there was no differentiation in the coding for outcome between outcomes consistent with the explicit curriculum and those that might be hidden—that process was left to a closer textual analysis of the interviews. The rationale for adopting that approach is explained in detail in chapter 1.[57]

D *Results*

Raw coding suggests that law school plays a significant role as an agent in producing both explicit and hidden outcomes. However, its role increases in significance according to the participant's age and the number of years they have spent at law school. Notably, when compared to the role of law teachers, age and experience appear to mitigate the role of law teachers but amplify the role of law school. The law school that the participant attended also appeared to play a role. Like coding for law teachers, participants enrolled at ANU perceived that law school played a less significant role in producing outcomes than their peers at Canberra Law School. As suggested in chapter 3, this may be associated with ANU participants having had greater academic success at secondary school and consequently perceiving greater control over outcomes.

[57] See ch 1 IV F 4.

When the text of interviews is analysed more closely, the principal outcome in which law school plays the most significant role is promoting the explicit outcome of rational or logical decision-making. Of some concern is a hidden outcome that participants perceived that the same rational or logical approach could also be applied to intimate or personal relationships. On the other hand, the explicit outcome of critical thinking was generally not perceived to be attributable solely to law school. Consistent with constructivist theories, adopting critical thinking or awareness of problem-solving in context was more likely to be identified as an outcome by older students and as having been co-constructed by them as they applied their own life experiences to problems.

Consistent with the small body of existing research, participants perceived that there was substantial pressure to learn vocational or practical skills as a means of becoming more attractive to employers. However, the pressure was not perceived to come from law school and would not, therefore, constitute a hidden outcome. Neither was the pressure of repaying tuition fees perceived to play a significant role. The agents of that pressure were diverse and, in large part, attributable to law students themselves.

II LAW SCHOOL AS AN AGENT

The coding of participants' attributions suggests that law school is perceived to have a significant role in outcomes, even where that influence is not associated with assessment. 'Law school' was perceived as a distinct or concurrent agent in 760 or 36% of all coded attributions (n=2082); on average almost 23 times *per* interview, regardless of the target. The only agent perceived as a distinct or concurrent influence a larger number of times was participants themselves (873 or 42%).[58] Participants

[58] 'Participant' was coded as the agent with the participant perceived they were the principal source of the motivation or condition. For example, age, inherent abilities or personal values that they did not attribute to any other agent. See the coding glossary at Appendix A.

perceived law school as a distinct or concurrent agent more than twice as many times as the next most common agents; legal employers (332 or 15%)[59] and law school peers (284 or 13%).[60]

When attributional statements related to law school assessment are removed from the total number of attributions to law school, there is only a slight decline in its perceived influence. Participants perceived law school as a distinct or concurrent agent unrelated to assessment in law school in 682 (32%) of all coded attributions.

Notably, while some participants made no attributions to a law teacher, every participant's interview included at least one attribution to law school as a distinct or concurrent agent. One explanation for the larger number of attributions to law school is that it is a result of the interview methodology rather than a difference in participants' perceptions. As noted in Chapter 1, participants were explicitly asked whether their approaches to problem solving or relationships had changed since they commenced their studies. Remembering that participants were invited to participate in a discussion about law school[61] and the invitation to focus explicitly on personal changes, participants may have been more likely to make attributions in which they were coded as the target and law school as the agent. There is an acknowledged risk of participants constructing answers in any interview-based research to meet what they perceive as the interviewer's expectations.[62] None of the questions explicitly directed participants to consider the role of law teachers. Consequently, their attributions to law

[59] 'Employer-law' includes agents for which participants work, or have worked, whether as a paralegal or in some other capacity and representatives of legal employers with which participants interacted in other settings including career fairs or interviews. See the coding glossary at Appendix A.
[60] 'Peer-law' and 'Friend-law' were coded as agents separately. The latter were coded where the participant explicitly identified the agent as a friend in law school, rather than as another student or students. See the coding glossary at Appendix A.
[61] See ch 1 IV G 1 and ch 1 IV H 2.
[62] See ch 1 III D 5 and Ryan Carlson et al, 'Motivated misremembering of selfish decisions' (2020) 11(1) *Nature Communications* 2100.

teachers might be considered more spontaneous, having been produced without a perception of prompting.

A *Coding and participant characteristics*

As discussed in chapter 2, some care needs to be taken with drawing conclusions based on the number of attributions to a single agent across all interviews. For example, the number of attributions in which law school was coded as a distinct or concurrent agent differed between participants, suggesting that some participants attributed more causes to law school than others. However, some tentative comparisons can be drawn by examining the average number of attributions coded to law school within particular groups.

There was comparatively little difference between participants based on gender or program in the average number of attributions to law school (excluding assessment). That is, gender or program appeared to make little difference to coding for law school as an agent. However, there were two notable exceptions.

1 *Law school as agent – ANU and Canberra Law School*

The coding for attributions to law teachers, discussed in chapter 3, suggested that participants at ANU tended to perceive law teachers as having a less significant role in outcomes than their peers at the Canberra Law School. However, that difference was not apparent until coding for the target was also considered. Until coding for the target was introduced, the average number of attributions to law teachers were similar for ANU and Canberra Law School participants. More specifically, the coding suggested that ANU participants perceived law teachers to play a less significant role in outcomes that affected them *personally*.

Notably, the coding for law school revealed the same distinction much earlier. That is, the coding suggested that ANU participants perceived law school to play a less significant role in outcomes *regardless of the target*. Canberra Law School students attributed outcomes to law school on average almost 12 times (11.7) *per* interview. However, ANU participants attributed outcomes to law school a little more than nine times (9.1) *per* interview. Put another way, Canberra Law School students, on average, made three more attributions to law school as a discrete or concurrent agent than ANU students, regardless of the target.

Similar to the attributions discussed concerning law teachers, attributions to law school can be further refined by reference to the target—the person or thing the cause affected. The target was coded as 'participant' where participants perceived that the cause affected them personally.

The difference in perceptions between the two groups was even more marked when coding for the target was introduced. Consistent with other results, the total and average numbers of attributions to law school as an agent fell when coding for the participant as the target was introduced for both groups. However, the average number of attributions in which law school was coded as the agent and the participant as the target was much smaller in interviews with ANU students (3.8 times *per* interview) than Canberra Law School students (9.6 times *per* interview). Put another way, on average, there were five fewer attributions to law school in which ANU students perceived they were affected personally, but only two fewer attributions in interviews with Canberra Law School students.

As discussed in Chapter 3,[63] one possible explanation is that ANU students perceived *themselves* as agents much more often than students at Canberra Law School. ANU participants attributed an outcome to themselves as agents, on average, a little more than 17 times *per* interview. In comparison, Canberra Law School participants attributed an outcome to themselves as agents a little more than ten times *per* interview. One interpretation of the coding is that, consequently, ANU students were less likely to perceive law school as affecting them personally because of a greater sense of independence or self-confidence in responding to different experiences. However, in the absence of any self-perception assessment of participants, this explanation is far from definitive.

2 *Law school as agent - Age*

On average, law school was coded as a distinct or concurrent agent in interviews with 18-21-year-old participants 9.4 times *per* interview, regardless of the target. It increased to 10.9 times for 22–25-year-old participants, 11.4 times for 26–29-year-old participants, and 14.2 times for 30-33-year-old participants but fell for participants aged 34 and older. That is, as the participants' ages increased, so did the number of outcomes they attributed to law school as an agent before falling again for participants older than 34 years.

Consistent with other sub-groups, there was a decline in the average number of attributions in which law school was coded as a distinct or concurrent agent and the target as the participant. However, the coding suggested a similar trend among older participants that law school had a more significant role in outcomes. For example, law school was coded as a distinct or concurrent agent and the target as the participant in

[63] See ch 3 II A 2.

interviews with 18-21-year-old participants on average 5.8 times *per* interview. That increased to 7.2 times for 22–25-year-old participants, 6.6 times for 26–29-year-old participants, and 10 times for 30-33-year-old participants before falling again for participants aged 34 and older.

There was also a correlation between the time a participant had spent in law school and coding for attributions to law school. On average, the number of attributions participants made to law school that they perceived as affecting them personally gradually increased from first year (7 times *per* interview) to fifth year (16 times *per* interview).

It should be noted that the emphasis here is on the *age* of the law student, not the number of years at law school. The largest proportion of participants was 24 years old, but their law school enrolment ranged from one year to seven. No group might be described as first, second, penultimate or final year students of the same age. The lack of any direct connection between age and years spent at law school may result from several causes, for example, different ages at first enrolment or different rates of progression through the degree. Consequently, assuming a direct correlation between age, time spent at law school and perceptions of its role would be incorrect.

It is difficult to identify any research on the relationship between the age of law students and legal education. Nevertheless, age would appear to affect law students' perceptions of their law school experience. In chapter 3, age appeared to correlate to increasing self-confidence or an increasing commitment to completing law school,

which appeared to mitigate any negative feedback participants attributed to law teachers.[64]

Patterns in coding would suggest that age may affect the extent to which participants perceived law school to be an agent in producing outcomes, both generally and on them personally.

3 *Law school as agent compared to law teacher as agent - Gender*

There was no significant difference in the decline in the average number of attributions coded to law school as an agent between male and female participants. When law school was coded as an agent and the participant as the target, the average fell from 10.4 times *per* interview to 7.3 for men and 10.6 to 6.8 for women. Although the average number of instances coded in interviews with women fell further, the decline was similar in both groups. There are, on average, three fewer attributions coded to law school for both men and women when the participant is identified as the target. While superficially unremarkable, it suggests a significant difference in how women participants constructed perceptions of law school compared to law teachers.

As discussed in Chapter 3, for attributions in which a law teacher was coded as an agent, the average number of attributions by female participants dropped from 3.5 times *per* interview when the target was disregarded to 2.2 where the target was coded as the participant. The drop was smaller for men, from 1.9 times *per* interview to 1.4, suggesting that men perceived law teachers' influence to affect them personally whereas women also perceived effects on others.

[64] See ch 3 A II.

In chapter 3, it was suggested that the more significant decline might reflect research and commentary that posits women, and women in law school, demonstrate a greater sense of empathy or a preference for cooperative approaches to conflict.[65] This appeared to be reinforced in interviews in which women used more collective nouns like 'us' and 'we' when discussing the effects of law teachers' conduct. In comparison, a closer analysis of interviews in which law school was coded as the agent reveals that both men and women tended to use the same collective noun when describing its perceived effect on others, namely, 'law students'.

Arguably, the difference in women's perceptions between law teachers and law school suggested in the coding tentatively reinforces an argument of a more empathic or cooperative approach. In chapter 3, women's attributions often focused on the outcomes from interpersonal exchanges between a law teacher and peers. There is a personal quality to those exchanges. On the other hand, law school is arguably perceived as impersonal or monolithic and the personal element of those exchanges is absent. Put another way, the absence of any significant difference between men and women in their attributions to law school is perhaps unsurprising given that there are no direct, observable interactions that might elicit an empathic reaction.

B *Discussion*

Some caution needs to be exercised in the conclusions offered in the sections above. First, a much more diverse array of experiences is captured within the code for 'law school' than 'law teacher'. Secondly, the code for 'law school' encompasses effects that participants perceived to come from the educational setting of law school, and are perceived as being within the control of law school, but not attributable to individual

[65] See ch 2 I A

law teachers or associated with evaluation. The breadth or, arguably, imprecision of 'law school' and the inability to clearly define the aspect of its operation to which a participant has attributed an effect is addressed in more detail earlier in this chapter. The sections above do not attempt to offer definitive diagnoses of the effects of law school. Instead, they allow some broad comparisons to be made and patterns to be identified that warrant further exploration in the sections below. When compared to coding for law teachers, discussed in chapter 3, it also begins to reveal some differences in participants' perceptions between law school and law teachers.

If one accepts that the total and average numbers of attributions in which the agent was coded as law school broadly indicates the breadth of its influence as either a discrete or concurrent agent, law school would appear to be perceived as having a more significant role in producing outcomes than law teachers. As discussed above, that may be a result of the broad nature of the code itself. It may also result from the interview design that encouraged participants to focus more on law school than individual experiences with law teachers. Nevertheless, it suggests that law school is a persistent agent in participants' perceptions and is likely to play a significant role in outcomes encompassed within the explicit curriculum and those that are not.

This tentative conclusion is reinforced when attributions associated with evaluation are excluded. While in all 65 participants' interviews, at least one outcome was coded as being attributed to law school, an attribution to law school associated with evaluation was coded in only 35 interviews. Put another way, 30 participants did not perceive law school evaluation (e.g., exams, assignments or essays) as having any effect on themselves or peers. On its face, this would appear to be good news. At least among participants, it suggests the role of grades would appear to be comparatively

less influential than other aspects of law school. However, it is insufficient to support an argument that law school has a less significant effect in encouraging a focus on extrinsic motivation and competition than research and commentary have suggested.[66] This is discussed in more detail in Chapter 5.

If one accepts that the coding suggests a significant role for law school among participants generally, the result is unsurprising. The increasingly large amounts of time students spend at school, compared to the comparatively shorter periods they might spend with others (e.g., family), is an assumption that underpins Jackson's theory of it being a primary site for the transmission of a hidden curriculum. In a related context, Moorhead et al.'s research on the ethical identity of English and American law students found that there was a decline in some aspects of ethical behaviour when comparing first-year students to third- and fourth-year students. Their research suggested that continued exposure to law school may have a compounding effect.[67]

The length of time spent in law school might also explain the perceived decline in the influence of law teachers and the concurrent increase in the influence of law school. Memories of individualised experiences with law teachers may have faded to be replaced by a more generalised perception of the effect of law school over time. However, this explanation is not entirely satisfactory. Time spent in law school was not the only relevant factor. Instead, the patterns in the coding would appear to suggest that, consistent with theories of social learning, students' age may also play an important role in interpreting educational experiences rather than merely time served behind a law school desk. The increasing age of participants also correlated with more

[66] See the discussion in Chapter 2, especially the discussion at II C 3 (a) (iii).
[67] Richard Moorhead et al, 'The Ethical Identity of Law Students' (2016) 23(3) *International Journal of the Legal Profession* 235.

attributions to law school and fewer attributions to law teachers, regardless of how long they had been at law school.

As noted previously in this thesis, participants may attribute effects to more than one agent. Law school may be a distinct *or* concurrent agent. Nevertheless, it is difficult to conclude that the influence of law school increases as law students progress through their studies. Contrary to the assumption that law school plays a primary role in producing outcomes, age and participants' perceptions of their maturity and confidence appear to play an important role in mitigating the effects of law teachers. They also appear to play an important role in amplifying their perceptions of the role of law school more generally.

Similarly, the coding would also appear to suggest that there is a difference between participants based on the university they attend. Coding for law school appeared to reinforce a result discussed in chapter 3 that ANU participants may be more impervious to outcomes thought to be produced by law teachers and law school than their Canberra Law School peers. As suggested in chapter 3, that may be related to ANU participants' previous success at secondary school creating a perception that they have greater personal control over outcomes, consistent with other research with first-year law students at other universities.[68] It may also be related to socioeconomic factors, which was also suggested in the same research.[69] However, the cause is not directly relevant to this thesis. The key result is that, at least between ANU and

[68] Melissa Castan et al, 'Early Optimism - First-Year Law Students' Work Expectations and Aspirations' (2010) 20(1/2) *Legal Education Review* 1. See also Kerri-Lee Krause et al, *The First Year Experience in Australian Universities: Findings from a Decade of National Studies* (Centre for the Study of Higher Education, 2005).
[69] Ibid.

Canberra Law School participants, some other factor intervenes in what has generally been assumed to be a binary relationship between law school and law students.

Coding patterns did not suggest any difference in the perceived effects of law school between men and women. This outcome represented a significant difference when compared to patterns in the coding for law teachers. One possible explanation is that it might reflect women's greater empathy or focus on cooperative or collective approaches to conflict. As discussed in Chapter 3, some reflections on the effects of law teachers offered by women resulted from examples of aggressive or confrontational experiences, which would naturally prompt an empathic response. In comparison, reflections on law school as a de-personalised, institutional entity arguably lack the immediacy or visceral qualities of inter-personal conflict. Consistent with Bandura's theory of social learning,[70] the context in which some experiences occur can significantly impact individual learners. However, Bandura did not examine the role of gender as affecting the significance an observer attached to participant experiences. Nevertheless, it emphasises the argument made elsewhere[71] that experiences in law school classrooms may be interpreted very differently by men and women.

III PARTICIPANTS ATTRIBUTIONS TO LAW SCHOOL

Participants attributions tended to be consistent with criticisms of the Priestley 11 as encouraging a doctrinal or structural approach to legal problem-solving. There was comparatively little discussion of the effects thought to flow from the selection of subjects themselves.

[70] See Chapter 2 II B and Albert Bandura, *Social Learning Theory* (General Learning Press, 1977).
[71] See the discussion in Chapter 2 C I and the findings of this research in Chapter 3 III

A *What is taught – Selection of subjects*

Among participants, there was generally minimal discussion of the selection of required units or the perception that mandating specific units as necessary for legal practice meant that law school was focused on training lawyers to exclude other professional careers. That is not to suggest that all participants were necessarily happy with the limits imposed by required subjects or the requirement that they be successfully completed. For one participant, it appeared to be more a sense of resignation:

> When I thought about how much time and money I spent in trying to develop skills *and which I suppose are required of a practitioner*, I stayed in the course just in case one day I actually was sure I wanted to be a practitioner. (emphasis added)
>
> Male, 24, LLB, Canberra Law School

Another (angrily) attributed a perception that family law is 'not significant, that society doesn't value it'[72] to its exclusion from the Priestley 11. In a similar context, another perceived the required units as being a 'hurdle' that they would have to overcome to achieve their goal of being a family lawyer:

> I think it is my goal to still be a family lawyer. That keeps me going. It seems like the most challenging [units] are the ones that maybe I just don't overly have a passion for. But they are units that you are required to do. So, in order for me to be the lawyer I want to be at the end of it, I obviously have to go through the hurdles that is law school.
>
> Female, 23, LLB, Canberra Law School

[72] Female, 33, JD, Canberra Law School.

For at least these two participants, their mandated studies in contract, equity and property had not addressed the 'building blocks' of family law that had initially justified its exclusion.[73]

Although most participants did not attribute any direct causal link between particular perceptions and the requirement to complete particular subjects, several participants did reflect on the importance or value they placed on the ability to pursue electives that were of interest to them. For example, one participant attributed their completion of the required units early in their degree as being 'quite nice' because they could spend the balance of their time in elective courses.[74] Another attributed a decision to pursue 'the funky theory electives' at law school because it allowed them to do multi-disciplinary research that they perceived the required units either did not permit or spent comparatively little time examining.[75] Although these participants did not attribute any perception of the required subjects compelling them to adopt a particular perspective of the purpose of law school, they hint at a perception that it had imposed limits on pursuing knowledge or skills they saw as having value.

The absence of any discussion about subject choice by the majority of participants could be interpreted as an implicit acceptance that the required subjects were essential for legal practice. Alternatively, it is arguable that participants had not considered that identifying particular subjects as essential had affected them at all. The two interpretations are not, however, mutually exclusive. For law students with little or no

[73] Law Admissions Consultative Committee, *Background Paper on Admission Requirements* (Law Council of Australia, 2010) [1.1]; Council of Legal Education Victoria, *Report of Academic Course Appraisal Committee on Legal Knowledge Required for Admission to Practise* (Council of Legal Education Victoria, 1990).
[74] Female, 21 LLB, Canberra Law School.
[75] Female, 24, LLB, ANU: 'And then in terms of the core subjects the interdisciplinary or critical theory aspects in the experience I've had have always been one lecture in a semester and they'd be like 'Oh yeah also like feminism and law and stuff happen sometimes.''

experience of legal practice, it would be surprising if most participants did not either accept or acquiesce to the view that the courses included in the Priestley 11 were necessary to becoming a lawyer. Outright refusal to complete one or more of the required units is unlikely since it is likely to mean that they will not complete the requirements for the degree or admission. The process of transmission described by Jackson assumes that students will passively accept the implicit or hidden concepts that an explicit curriculum communicates, unaware that it is happening. On the face of the interview data, it is difficult to conclude which of these explanations—acquiescence or passive acceptance—is correct. However, for at least some participants like those extracted above, it would appear to be more an active decision rather than passive transmission.

B *How it is taught – Doctrine and structured problem-solving*

Participants more commonly attributed changes to their understanding of the law and their approach to problem-solving to the substantive content of their studies at law school, often to their experiences in required subjects. For most participants, their attributions tended to affirm that law school and the approach to teaching the required subjects, in particular, were the primary sites for those changes. For many, their attributions often reflected what they perceived as the positive effects it had had on them. However, consistent with both Jackson's and constructivists' observations on the diversity of student experiences and responses, participants perceived those changes as equally diverse. The diversity in responses appeared to be associated with the extent to which participants attributed effects to other agents concurrently with law school.

For some participants, their exposure to the required subjects had led them to adopt an approach to problem-solving that was consistent with criticisms of the Priestley 11 as encouraging a doctrinal or rules-based approach:

> Contract law, property law admin law: It's not necessarily relevant to be thinking about in an empathetic sense when you're learning contract law or property law because it's not so much to do with the person. And I believe this is even true in practice. While it's always to do with the person, and in practice, there is always empathy required and a display of understanding required, your attitude is very different when someone comes to you with a contractual problem as opposed to a family problem. And I think it's because in order to solve a contractual problem, we go to books and there are hard rules that you need to follow, the step-by-step process.
>
> Female, 21, LLB, Canberra Law School

This particular participant went further in their interview to explain their perception that it was the required subjects in which students learned about problem-solving, whereas empathy was something they perceived had come from elective subjects.

The causal link created by participants who attributed a rules-based or structured approach to the explicit curriculum was not uniformly one way. For example, some participants perceived that there was a close alignment between their perception of the subjects' inherent focus and their current thinking or aptitudes:

> I just really like problem questions. I don't know why I didn't think or relate to this before when I started law for the first time, but my brain really works in problem kind of ways, and I really like the problem-solving aspect. And it doesn't matter what it was as well. Contract law; I was into it because it had a problem-solving thing. I didn't care about the cases, but I found it interesting anyway. And like property law. I don't really care about

property law, *but I found that kind of black letter law problem solving really interesting in a way I did not expect when I started*. (emphasis added)

Female, 24, LLB, ANU

Notably, participants' who referred to their adoption of a methodical approach to problem-solving also perceived they had adopted some of the implicit values that it encompasses, including the minimisation or exclusion of emotion.

> But when you've done evidence, when you look at cases, why they fail, why they succeeded, and all of that, you start getting a sense that you're going to have to be very meticulous, very methodical about it and be very factual. Don't put emotion. And I remember I think it was [a lecturer] in that subject. Don't put meat. Bare bones. That is the law.

Female, 55, LLB, Canberra Law School

Superficially, if one accepts that the practice of law is predominantly one of logical problem-solving, this might appear unproblematic. TLO3, for example, refers explicitly to 'legal reasoning' as the practice of 'identifying the legal rules and processes and applying [them] to reach a reasonable conclusion'.[76] However, some participants perceived that the 'legal reasoning' model they attributed to law school was equally applicable to their relationships. Some research has acknowledged this effect in passing,[77] but it has not been consistently assumed or identified:

> But I would also say that law school does make you think because of the whole IRAC thing. It gives you options. Like when you're talking to clients. That's what you're trying

[76] Kift, Israel and Field (n 4) 18.
[77] Molly Townes O'Brien, Stephen Tang and Kath Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing May Begin in Year One' (2011) 2 *The International Journal of the First Year in Higher Education* 49.

> to do. You try to minimise the risk. And the thing is, if you keep doing this for four years, it just becomes like a real habit thing again. You just take it with you everywhere now.
>
> Male, 21, LLB, Canberra Law School

> Before, I think my approach to disputes didn't have a framework, like really messy. And law school tries to give me a kind of framework. *And I think that's a really good thing I can apply to life.* (Emphasis added)
>
> Male, 24, LLB, Canberra Law School

Attributions like these should give law teachers a moment of pause. It is generally argued by both advocates and critics that, traditionally, the law and legal problem-solving is predominantly a logical, structured application of rules to facts.[78] However, the Australian explicit curriculum does not suggest that the approach is anything other than specific to its legal context. Nevertheless, responses like those above tended to suggest that the values of rationality in problem-solving they attributed to law school had begun to 'leak' into their personal lives or were intentionally applied because they perceived it as beneficial. Moreover, to the extent that legal problem-solving minimises or excludes emotion, it presents a worrying implicit or hidden effect; for some participants, a similar approach potentially has value in their relationships with family, friends or intimate partners.

Not all participants who attributed a change in their approach to problem-solving perceived that they had adopted a structured approach to applying rules. Instead, they

[78] See ch 2 III C 3; Edward Coke, *The First Part of the Institutes of the Laws of England: Or, A Commentary Upon Littleton : Not the Name of the Author Only, But of the Law Itself* (J & W Clarke, 19th ed, 1832) vol 1; Catherine Elgin, 'Impartiality and Legal Reasoning' in Amalia Amaya and Maksymilian Del Mar (eds), *Virtue, Emotion and Imagination in Law and Legal Reasoning* (Hart Publishing, 2020) 47; Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996).

perceived that they had developed an understanding that legal problem-solving needed to have regard to the context in which it was occurring. Criminal law, in particular, was often identified by participants who attributed a greater awareness of what they often termed the 'grey' (as opposed to black and white) in legal problem-solving.

> But it's specifically from criminal law because you read about all the shit people have been through. And so, I've picked up a newfound empathy towards criminals and people with drug addiction and stuff like that because you just don't know what they've been through. Whereas before I went into law school, I didn't think about that.
>
> Female, 33, Undergraduate, Canberra Law School

> Maybe I've come to see the world a little bit more in shades of grey than in terms of in black and white, which is very much how I would describe myself when I started law school.
>
> Female, 24, LLB, ANU

Notably, participants who attributed a greater awareness of the context within which problems arose to law school did not consistently identify law school as the sole agent. Other influences appeared to play a role in mitigating or diluting a more rigid approach. For example, one participant referred to the role of law teachers in criminal law and professional responsibility units in promoting 'open discussions and getting to understand other people's perspectives'.[79] Gender also appeared to play a role in mitigating the rigid approach some perceived to be inherent in required subjects, reflecting some research and commentary on the inherently masculine nature of legal

[79] Female, 23, LLB, ANU.

problem-solving.[80] Men tended to prefer reason-based or methodical approaches to problem-solving when compared to women. For example, one participant, having discussed the utility of IRAC as a problem-solving methodology, explicitly rejected the suggestion that emotion could be excluded from the law or legal problem-solving.

> When people say the law is meant to be unemotional, it's meant to be objective, whereas I feel in everything we've done, there's always emotion wrapped up in it. There's always going to be emotion. Judges are never going to be, whether they know it or not, or they're trying to combat it, there's always going to be emotion affecting their decision. I just think it's impossible as humans to take away the emotion from it. If you're doing that, you're just going to have just a robotic approach to it. I feel the law is very emotional.
>
> Female, 23, Undergraduate, ANU

Adopting what some participants saw as a more open-minded approach to problem-solving or a greater awareness of the context in which problems arose is not outside the scope of the explicit curriculum. In addition to 'legal reasoning', TLO 3 also expects graduates to demonstrate the ability to critically analyse materials and 'identif[y] the hidden structures: for example, legal and non-legal issues; premises and hypothesis; factual, theoretical and ideological assumptions'.[81] Some participants' attributions suggest that law school, especially the required subjects, appear to do well in communicating the values of logic and doctrine inherent in 'legal reasoning'. In contrast, the additional objective of 'critical thinking' as defined in TLO3 requires either explicit effort on the part of law school or law teachers or is an outcome at which some participants arrive through a combination of influences in which law school and

[80] See for example Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 78); Catherine Weiss and Louise Melling, 'The Legal Education of Twenty Women' (1987) 40 *Stanford Law Review* 1299.
[81] Kift, Israel and Field (n 3) 18.

the required subjects play only a partial role. Participants who perceived that law school or law teachers had made no effort to encourage an expanded understanding of legal reasoning in context were more likely to place greater value on, and adopt, rigid and emotionless problem-solving. If one accepts that interpretation, it is arguably consistent with criticisms of the required subjects encouraging a doctrinal focus but adds a condition; *unless law school does something to mitigate it.*

This might appear unremarkable. It is generally accepted that law school's role is to support students in achieving learning outcomes, including the 'thinking skills' in TLO3. However, consistent with this thesis's focus, participants' perceptions offer empirical evidence of how students perceive the comparative focus on legal reasoning and critical thinking in TLO3. Among participants generally, there was a perception that greater emphasis was placed on logic and reason, whereas significantly less emphasis was placed on critical thinking or problem-solving in context. That empirical evidence would appear to be consistent with previously theoretical constructions of the emphasis on doctrine, albeit subject to a condition.

Participants' attributions also hint at how the implicit value placed on doctrinal, rules-based problem-solving might be addressed. Participants' attributions present a somewhat surprising perception; while legal reasoning and the implicit values it encompasses might be attributable predominantly to law school, critical thinking might be perceived as predominantly co-constructed between law school and law students. Put another way, critical thinking, or an awareness of the context within which legal problems might arise, represents an outcome more closely aligned with a social constructivist theory of learning than a one-way transmission of knowledge or values. If this is correct, then it suggests an opportunity to engage with law students'

personal experiences, backgrounds and histories to encourage an evolution in thinking skills from ‘legal reasoning’ to ‘critical thinking’.

Participants’ attributions examined in chapter 3 arguably reinforce this opportunity for law teachers. In their discussion of what constituted ‘good teaching’, participants tended to attribute positive effects to law teachers who enthusiastically engaged with them directly. As noted above, for at least one participant, an awareness of other perspectives on the law was attributable to law teachers explicitly facilitating that discussion.

From a hidden curriculum perspective, participants’ attributions might be summarised in this way; Doctrinal or rule-based approaches encourage structured and emotionless approaches to legal problem-solving. However, such approaches are the first evolution in thinking, amenable to change for some students through direct and active engagement with their personal characteristics.

IV THE ROLE OF OTHER INFLUENCES

In the previous section, other influences beyond law school appeared to affect participants’ perceptions of problem-solving and the achievement of explicit learning outcomes. External influences also appeared to play a role in participants’ perceptions of what law school *did not* teach. As discussed earlier, it has been argued that law students’ perceptions of skills valued by potential employers, alongside regulatory reforms that encourage a consumer orientation among law students, are placing pressure on law schools to manipulate the explicit curriculum to meet those demands. More specifically, there is a perceived demand from law students to offer more vocationally or commercially focused courses and adopt a more skills-based approach

to teaching existing courses.[82] If that is correct, then the consequent effects on the explicit curriculum are not part of a hidden curriculum in legal education but are, instead, expectations and values imposed on the curriculum from outside.

A *Course selection – The demand for more commercially oriented subjects*

None of the participants discussed a desire for more commercially oriented subjects. For the small number of participants who had an intention to enter commercial practice, contract law appeared to their principal interest. Notably, a small number of participants who had enrolled at ANU after having been enrolled at other law schools attributed a *positive* perception of a less commercially oriented focus to the environment they found.

> I went into [another Australian university] and had this very big sort of culture shock where the first subject I did out of the gates was contracts. And a lot of people, to my surprise actually, were really interested in commercial law at 17 and wanted to be patent lawyers and all the rest of it. That was just never something that sat particularly well with me. That was something I think that was quite culturally pushed at [another Australian university] as well. There was definitely more of a culture of commercial law, which never interests me and was very misaligned with my values, I suppose.
>
> Female, 24, LLB, ANU

Participants often expressed dissatisfaction with the selection of courses available as electives, although that tended to be based on particular interests rather than career objectives. As discussed earlier, some participants found that the electives offered,

[82] See ch 2 II C 2 and section II above.

especially at ANU, had allowed them to pursue interests or develop attributes not addressed in the required units.

B *Practical skills and experience*

Compared to the selection of subjects or electives available, it was not uncommon for participants to express dissatisfaction with what they perceived was the lack of practical skills in existing courses. Participants tended to distinguish between what they perceived as the artificial environment of law school compared the to 'real world' of legal practice.

Participants who drew this distinction fell into two broad categories. The first group were those participants who had some experience in legal workplaces. The second were those participants who had little exposure to legal workplaces or had undertaken clinical units within the law school.

1 *Attributions to workplace experience*

This group of participants attributed their perception of the difference between law school and legal practice to what they had experienced or observed. Participants referred to differences in focus between law school, which they perceived tended to emphasise developing knowledge of the law, and the workplace, which they perceived placed a greater emphasis on applying the law in context.

> The difference to me is that in law school, you get a set of written facts in a problem. And then going from someone walks in or calls on the phone, you have to try to find the facts and then figure out exactly what their interests are and then figuring out what we can do

> to help, or how that dispute can be resolved, I think that part is all cut out in these problems that are written down.
>
> Male, 22, LLB, Canberra Law School

One might identify an inconsistency at this point between the earlier discussion about the development of thinking skills and the role of experience and workplace experiences. More specifically, the earlier discussion did not refer to the role of workplace experiences in supporting the development of participants' thinking. However, the interview data does not support an argument that workplace experience builds thinking skills. Very few participants referred to their work experience as developing a greater sense of empathy or sensitivity to the pressures on clients. Attributions to the workplace, like the one above, tended to focus more on differences in the *process* of problem-solving or the *processes* associated with legal work. The difference may appear to be a fine one, but what was missing from many participants' attributions to the workplace was a causal link to a greater awareness of the 'hidden structures' or 'legal and non-legal issues' to which TLO 3 refers.

Attributions to workplace experience creating a perception of legal work as a process were not uncommon. For example, two participants – one at Canberra Law School and the other at ANU – discussed their dissatisfaction with working in personal injuries and the perception that legal work was largely repetitive or routine.

> Every day I'm pleading the same thing. Just sue the same insurer for the same injury.
>
> Female, 22, LLB, Canberra Law School

These types of perceptions may be somewhat unfair. Law clerks are likely to be given work that an employer believes matches their experience rather than novel or

challenging problems. For example, some found what they perceived as the 'intellectual challenge' rewarding,[83] while others saw it as the opportunity to draw connections between their studies and the tasks they had been asked to perform.[84] Several participants attributed a positive perception of the law to the supportive nature of the lawyers with which they worked.[85] However, the majority tended to attribute negative perceptions of the law and legal work to their workplace experience. As noted above, some attributed a perception of legal work as mundane. Other perceptions or experiences were concerning. Several participants attributed a perception of legal work as requiring superhuman effort:

> Participant: Lawyers have to be a hundred per cent a hundred per cent of the time.
>
> Interviewer: Who tells you that?
>
> Participant: My boss.
>
> Male, 26, LLB, Canberra Law School

Others were not certain that they could support the demands that they had seen placed on the lawyers with which they worked:

> I see lawyers, and I work very closely with lawyers, a team of 22 lawyers every day, and I look at the responsibility of the choices they make. It's not that I don't think I'm capable of that, but I don't want to carry that.
>
> Male, 35, LLB, Canberra Law School

[83] Female, 23, LLB, Canberra Law School.
[84] One participant had found employment using their skills in a foreign language to assist in a large and complex discovery project involving overseas parties; Female, 22, LLB, ANU.
[85] Female, 22, LLB, Canberra Law School.

For some, their attributions related to behaviour by lawyers with whom they worked that might, if true, objectively be considered inappropriate or unprofessional, including a lack of professional care in managing matters, being excluded from activities based on their gender, or being belittled and sworn at by supervisors.

> So, there was a lot of workplace bullying going on, and I hadn't been employed for a long time, so I didn't know how to react to it. I was pretty early on in my professional career and my entire working life. I didn't know how to react to it.
>
> Male, 22, LLB, Canberra Law School

Regrettably, the causes to which participants attributed their perceptions—excessive demands, challenges to work/life balance, misogyny, and bullying—occur in workplaces. There is an increasingly large body of research on the occurrence and effects of these types of demands and behaviours on Australian lawyers.[86] What was perhaps most striking in participants' interviews was that none attributed to law school a sense of surprise, alarm or, as demonstrated in the quote above, a lack of preparedness. None of the participants blamed law school for their experience or for what they perceived as their lack of experience in dealing with challenging situations.

[86] Reports of distress, mental illness and substance abuse in the legal profession are generally well known. However, a sample of empirical data for the Australian profession can be found in a series of reports beginning in the 1990s: The Law Society of Western Australia, *Report on the Retention of Legal Practitioners: Final Report* (The Law Society of Western Australia, 1999); Beaton Consulting, *Annual professions survey: Research summary* (BeyondBlue, 2007); Norm Kelk et al, *Courting the Blues: Attitudes towards depression in Australian law students and legal practitioners* (Brain & Mind Research Institute, 2009); RT Michalak, *Causes and Consequences of Work-Related Psychosocial Risk Exposure: A Comparative Investigation of Organisational Context, Employee Attitudes, Job Performance and Wellbeing in Lawyers and Non-Lawyer Professionals* (PsychSafe Pty Ltd, 2015). Thornton's research with women law students and lawyers provides a body of empirical evidence of the effects of discrimination and misogyny; Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 80). The treatment of women in the Australian legal profession has been more recently drawn into sharp focus by inquiries into harassment and sexual assault; see for example Helen Szoke, 'Review of Sexual Harassment in Victorian Courts: Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT' (Report, March 2021).

Participants who had the most difficult experiences had decided not to enter legal practice but to work in related fields.

Although the observations above are generally applicable to participants interviewed, participants enrolled in JD programs already employed in predominantly public service roles tended to attribute their perceptions to their experiences with either in-house lawyers or the Australian Government Solicitor. For example, one participant employed with a government regulator referred to already getting their 'real-life lawyering fix' from their employment.

> Because I'm in a pseudo-legal role in a pseudo-legal environment, I get that fix of real-life lawyering out of that.
>
> Male, 30, JD, Canberra Law School

For this smaller group of participants, there was very little dissatisfaction or disappointment expressed about those experiences. Where participants enrolled in JD programs did make attributions to their experience working with lawyers, it tended to be associated with a desire to gain a better knowledge of the substantive law, rather than vocational skills, from their experience at law school. JD students presented a very different set of perceptions to those that have been attributed to LLB students. However, what they had in common with their undergraduate peers was that their workplace experiences appeared to satisfy any desire for practical or skills-based training.

2 *Attributions by participants seeking work experience or with clinical experience*

The other broad group of participants who discussed perceptions of the lack of practical skills in law school had no legal work experience or had experience in law

school clinical programs. Attributions among this group were very different to their peers who had work experience.

Like their peers, this group distinguished between their studies providing knowledge of the law and practical experience being an opportunity to apply it. However, unlike their peers with work experience, this group tended to attribute to law school what they perceived as their lack of preparedness to enter legal practice or to 'be a lawyer'.

What participants' without work experience perceived law school had not provided was diverse. Some perceptions were expressed at a high level of generality or abstraction, like 'being a lawyer.'

> I think it's just because I think I've realised through law school there's so many different types of law, and you don't really have an idea of what being a lawyer is like at all going to law school. It doesn't really give you that idea. So, I never really knew what being a lawyer was.
>
> Female, 23, LLB, ANU

Some referred to skills like courtroom advocacy or public speaking, even though employers generally do not rate the desirability of those skills very highly.[87] For one older participant, the skills they perceived were missing were more consistent with their peers' experience in the workplace.

> I think you miss all the little things about what it actually means to be a practising lawyer. So, the simplest things to how to fill out an affidavit to filing in court to the administrative and logistical elements of being a lawyer.

[87] Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A discipline assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) vol 4; Peden and Riley (n 53).

Female, 33, JD, Canberra Law School

The diversity of participants' attributions tends to affirm observations by law deans and teachers,[88] and the very small body of empirical research with students,[89] that students are generally uncertain or unaware of what practical skills or practical training are. While participants perceived practical training was something that law school should do, there was no clear picture among participants of what practical training needed to cover.

Just as the skills this group of participants' perceived were missing in law school were diverse, so were the causes for their perceptions. Some participants did not attribute their perception to any cause. One participant attributed to a parent already in practice their perception that law school was different to legal practice, and the latter would provoke their 'passion'.[90] Another attributed a perception that law firms wanted graduates competent in courtroom advocacy to television shows.[91]

A small number of participants attributed to law school itself their perception of the skills required, particularly those who identified advocacy as a desirable skill. It is noteworthy that participants who tended to focus on advocacy came almost exclusively from Canberra Law School, suggesting that its public statements of 'highly practical approach' was evident in its pedagogy. For example, after reflecting on feedback they interpreted as highlighting a weakness in public speaking and their abilities as an advocate, the participant explained that:

[88] Thornton, *Privatising the Public University: The Case of Law* (n 20).
[89] Law School Reform (n 38).
[90] Female, 20, LLB, ANU.
[91] Male, 34, LLB, Canberra Law School.

> The reason why I came to UC was that I was told that UC prepares their students more for litigation as opposed to research. I was told that's why they're so tough on presenting cases here at UC because they really want to prepare yourself for representing your client in a court for litigation. So that's why it's such a big focus.

Female, 24, LLB, Canberra Law School

For those participants with no workplace experience but experience in law school clinical courses, their perception of practical skills was more precise but tended to focus on the time-critical nature of working in community-based law. The perception is unsurprising given that law school clinics tend to cooperate with, or focus on, community legal services.

> All it's really shown me is there's a gap between what you're learning and how you're going about the structure of what you're doing to demonstrate those skills. There's a gap between that and what really happens. That's the glaring thing that it's sort of made clear. Writing essays and reports is not the same as drafting letters or pieces of advice or file notes, or taking down client interview notes. It's not the same as essay writing or report writing, where you have the time to sit there and think about a sentence for 15 or 20 minutes. It's all fast-paced and reactive, and then you take away that and build on it and make it better, and then you draft a letter.

Male, 24, LLB, Canberra Law School

There are some similarities between the attributions by participants with workplace experience and those with clinical experience that reflects how meaningful those experiences might be. For both groups, their perceptions of legal practice, or the ‘gap’ between law school and legal practice, is heavily influenced by their personal experience in the particular workplace setting. While that may be unsurprising, it is

surprising that participants tended to generalise their perception of their specific experiences to legal practice as a whole. Participants did not often perceive that other workplace settings might be different or demand different skills. If this is true, it reinforces that participants perceive legal practice as playing a more significant role in forming perceptions of might be valued than law school. Consequently, it offers some empirical evidence affirming that the pressure to include more practical skills in the explicit curriculum predominantly comes from outside law school and, more specifically, from law students themselves.

At the same time, the generalisation of single experiences to legal practice as a whole tends to affirm the observation that there is some vagueness or uncertainty among law students about what practical skills might encompass. Attempting to apply a single experience to the whole of the profession is arguably naïve and demonstrates that, for this group of participants, a lack of a broader awareness of what skills are actually required.

3 *The pressure to get work experience*

Commentary and research on Australian legal education have acknowledged the 'rush' to find summer clerkships, internships and other work experience among law students.[92] It has been suggested that the motivation for doing so comes from an increasingly vocational oriented mindset among law students who are now compelled to pay for their studies,[93] despite limited empirical data to suggest that HECS or HECS-HELP debts have a significant effect on tertiary students beyond their first year.[94] If

[92] Andrew Goldsmith and David Bamford, 'The Value of Practice in Legal Education' in Fiona Cownie (ed), *Stakeholders in the Law School* (Hart Publishing, 2010) 127.
[93] Thornton, *Privatising the Public University: The Case of Law* (n 20).
[94] Elisa Birch and Paul Miller, 'The impact of HECS debt on Australian students' tertiary academic performance' (2006) 33(1) *Education Research and Perspectives* 1.

that is correct, then the pressure to find legal work would be evident in participants' interviews and they would be likely to attribute it to a concern for finding work experience to improve the prospects for employment.

At the same time, one of the striking features of participants' interviews, especially those with work experience, is the generally poor experiences they have had. It would be reasonable to assume that they would share those experiences with peers. However, if the experience is often bad, why is there still a 'rush' to be subjected to it?

Throughout participants' interviews, there was a consistent theme of the importance of work experience. For those participants who had found clerkship positions, work experience was expressed as the motivation for having found that role. For those who did not, it was the motivation for pursuing a clerkship or paralegal role. The most common cause identified by participants for looking for work experience was their perception that it would make them more attractive to employers in an environment they perceive as highly competitive. Although the themes were consistent, there were predominantly two agents to which participants attributed the perception of increased attractiveness.

A small number of participants attributed the perception that work experience was essential to finding employment to contact with law firms themselves. For many participants, their perception was attributable to attending law firm presentations or career fairs and talking to representatives of law firms. Those participants perceived law firms to place importance on work experience as a prerequisite to gaining an interview.

While law firms played a role, it was much more common for participants to attribute a perception about the importance of work experience to discussions with peers.

However, the nature of those experiences was diverse. For some participants, it took the form of what was perceived as friendly or valuable advice.

> I just remember there was one of my friends had an older sister who'd done really well. She said, 'Guys, you need to start looking for experience.'
>
> Female, 27, JD, ANU

At the other end of the spectrum from friendly advice was perceiving it as one aspect of competition with peers.

> It's just like everyone's competing. Everyone's at the same degree in the same degree studying the same class. But I often feel like it's just one big competition. And it's about who did better than who or who got that summer internship where and who has more connections or who knows justice blah blah or the barrister blah.
>
> Female, 24, LLB, Canberra Law School

Peers also appeared to constitute an agent in terms of participants' observations of them, rather than as a result of direct conversation. For example, participants attributed to their observations of peers a perception of the importance of work experience to finding clerkships or employment after graduation.

> I think I saw later year students doing it. And so I think just that influence. There was a push; you should get extra experience because the degree is not enough for you to graduate and get a job.
>
> Female, 23, LLB, ANU

> I know one person. They really struggled very very hard to get ... I don't think they have a legal grad job. And like especially with the idea of clerkships, you know if you don't at

> least have the clerkship, or if you don't apply, it's a bit ‘Eh’. Or if you don't have anything kind of as good as a clerkship, forget about it.
>
> Female, 22, LLB, ANU

Consistent with some commentary on the experiences of ANU students,[95] the same participant also perceived that the student law society played a role in emphasising the importance of work experience. They were, in turn, driven by meeting the needs of peers.

> The law student society definitely pushed the clerkship evenings careers stuff, how to do interviews and networking. So, there's that push, at least. Well, there's that encouragement. Well, I guess it's coming from the demand of other students wanting these events. And then me thinking 'Well, I should go along. Obviously this is the thing to do.' I guess students also think the same way.
>
> Female, 22, LLB, ANU

This extract also identifies another common experience with no specific agent, that is, ‘it’s the vibe’.[96] Some participants commented on a perception that there was a general mood or belief among their peers that work experience and clerkships were essential to gaining employment after graduation, but there was no clear attribution to anyone or anything. One participant suggested it was ‘just a message that everyone seemed to get’. Another summed up the ‘vibe’ concept this way:

> I couldn't point to any specific examples, but I think that's the vibe you get from students. I mean, I'm not sure. Maybe it's the explicit vibe like 'Oh, I'm doing mooting so that I can get a job', or maybe it's just that I'm inferring it because I see people doing mooting. I see

[95] Poole (n 37).
[96] *The Castle* (Roadshow Entertainment, 1997).

> people doing 20 hours a week as a paralegal in some firm in the city, and they're doing all this stuff. I see them doing this, and I'm thinking, 'Wow, they're doing a lot.' And then I make the inference that it must be because they want a job, but that's not necessarily true, I suppose.
>
> Male, 24, LLB, Canberra Law School

What is notable in participants' interviews was that, although many perceived law school as failing to provide practical or vocational skills, law school was not perceived as an agent or cause to find work experience. That is, it could be argued that one of the hidden effects of law school's explicit curriculum and its perceived failure to provide practical or vocational skills is to compel students to seek work experience outside. However, that was not the perception among participants. As the discussion above suggests, while the push to get workplace experience may significantly affect participants, it was perceived as attributable to law firms, peers, or just 'the vibe'. This tends to be reinforced by the observation that participants did not appear to perceive that work experience would be educational but that it was a prerequisite to be considered employable. Some participants went so far as to attribute less pressure to find work experience to law teachers.

> I just sort of want to enjoy university. I need a job because I need the money, so doing something that I actually enjoy and does pay the bills, I think, is perhaps a little bit more important to me at the moment than getting myself into the field. And I actually came to that conclusion after I spoke to one of my law tutors. I asked her opinion because I had two job opportunities. It was [a job in a non-law industry] or a more professional job in an office, and I said to her, 'Look I'm worried that if I graduate university and I don't have this background behind me in a professional environment, I'm not going to be a desirable candidate, looking at all the competition around me, and the amount of people that

> graduate from law school every single year or any degree at all.' And she said to me, 'You can still get a job in law, or a good job, without that sort of experience. If you're a graduate, people expect you to just be a graduate. They don't expect you to necessarily have like three years of work experience behind you.'
>
> Female, 21, LLB, ANU

Regrettably, as the earlier discussion suggests, most participants did not have the same experience as this participant or, if they did, did not attribute any outcome to it.

Of concern was that some participants who perceived that there was a push to find work experience also perceived that their personal circumstances would make it difficult for them to compete for clerkship positions and, consequently, make them uncompetitive in seeking employment after graduation.

Two participants from immigrant families, for example, perceived that racial or ethnic discrimination might play a part in presenting barriers to finding clerkships. For one, their perception was based on their experience of a lack of racial diversity in interview groups in which they found they were the only applicant of colour.[97] For another participant, their family and carer responsibilities had affected their academic success, which, in turn, they perceived affected their ability to compete for clerkships and even clinical opportunities in law school.[98] For yet another, they perceived their disability was seen as a disadvantage to potential employers.[99] Lastly, was a perception that socioeconomic and family backgrounds translated into more extensive networks within the legal profession that provided an advantage to some students over others in the competition for clerkships. For example, one participant attributed their motivation

[97] Female, 22, LLB, ANU.
[98] Female, 30, LLB, Canberra Law School.
[99] Female, 23, LLB, ANU.

to find a clerkship to overcoming the advantage they perceived some of their peers had.

> I needed an edge on my colleagues if I did choose to practice one day. Because at times it feels like you're either at the top or you know someone in an organisation to get in down here [in Canberra].
>
> Male, 24, LLB, Canberra Law School

Participants enrolled in JD programs who may have considered leaving their current roles and entering legal practice tended to attribute the barriers to work experience or even full-time employment to age, financial and family concerns. They were unlikely to consider a clerkship or even an internship a viable option if it meant losing part or all of their current income.

The number of participants who perceived they faced a disadvantage was small. However, their interviews presented some issues of concern if the competition for clerkships is perceived to be simply part of the law school experience.

C *Discussion*

Participants' attributions are consistent with the small body of commentary on how important law students perceive practical or vocational skills to be, and that it is the underlying motivation of ensuring their employability after graduation. As the discussion in the sections above suggests, it is a powerful motivator among participants. The interviews suggest a perception that work experience is desirable and an absolute prerequisite to successfully finding employment. It is also consistent with law schools' perceptions of students as playing a significant role in pushing for more practical training to be incorporated into their curriculums.

From a hidden curriculum perspective, the desire to be taught more practical skills, or the motivation to find work experience, would not appear to be attributable to law school. Although the perceived omission of practical skills from the explicit curriculum might be expected to compel law students to look outside law school for that training, it is not a perception that participants held. Alternatively, it could be arguable that the drive to gain practical skills or work experience may be implicit within the explicit curriculum by virtue of law school's silence or failure to discourage the drive to find practical experience. However, again, that is not evident in participants' attributions or perceptions.

However, participants' attributions also suggest that the primary motivation for pushing for change in the explicit curriculum is neither clear nor consistent. First, for participants with no work experience or experience only in law school clinics, there was generally no clear concept of what practical skills might encompass, only that they were necessary. Participants who were able to identify what skills might be required tended to generalise to the whole profession from the narrow set of experiences to which they had been exposed. Secondly, there were diverse agents or causes to which perceptions were attributed that either practical skills or workplace experience were essential. Finally, some of the interviews suggest that it is a 'legacy perception', created, handed down between and maintained by law students themselves.

Participants' explicit attributions were often missing any attribution to the need to repay their tuition fees. Only two participants referred to tuition fees.[100] Neither directly linked fees to employment. Instead, they referred to fees as a driver for personal participation. One participant explained the connection this way:

[100] Female, 30, LLB, Canberra Law School; Female, 24, LLB, ANU.

> I've come to a place where I'm like 'Well I'm paying a lot of money to be here and I'm here to be learning so why would I not say what I think or ask the question?'
>
> Female, 24, LLB, ANU

The general absence of any attribution drawing a connection between fees and employment does not contradict the suggestion that it may underpin the almost overwhelming drive among many participants to make themselves more attractive to potential employers. Nevertheless, it suggests that participants' focus was on a much closer horizon.

Perhaps novel in this data is the perceived harm that law students' vocational motivations may cause to themselves and their peers. Some participants already working as clerks or paralegals attributed a greater interest in practice to their experience. However, others attributed negative perceptions to their experience, including some experiences that are, frankly, alarming. For those participants' seeking work experience, there was a theme of competition that, in some cases, resulted in anti-social behaviour or perceptions that the profession might be fostering that competition, including discriminatory and exclusive behaviour.

V SUMMARY

While acknowledging some potential weaknesses in the coding methodology for 'law school', participants' attributions to the explicit curriculum (excluding evaluation) suggest that it plays a significant role in forming participants' perceptions. Patterns in the coding process also suggest that law school's role, as it has been constructed here, increases in significance as participants aged and spent more time in a law school setting.

Looking at participants' attributions more closely, participants generally did not perceive that the required subjects of the explicit curriculum meant that law school was focused on training lawyers to exclude other professional careers. Superficially, this may appear to be inconsistent with existing commentary that suggests that the Priestley 11, in particular, has an exclusionary effect. However, it may be that, consistent with the implicit transmission of values, participants had not perceived that outcome.

In comparison, many perceived that the content of the subjects required by the explicit curriculum affected their approach to problem-solving. Consistent with existing research and commentary, one of the hidden outcomes suggested by interviews is participants' adoption of a rigid doctrinal approach to the resolution of legal problem and the value of logic over emotion implicit within it. An additional hidden outcome, only hinted at in other research,[101] is that approach to problem-solving had either been explicitly adopted or had 'leaked' into some participants' personal lives and relationships.

In instances where participants had attributed a greater awareness of the context within which problems arose or the non-legal elements that might affect the resolution of legal problems, their attributions tended to suggest that outcome was co-constructed. While part of the explicit, expected outcome in TLO3, the hidden element appeared to be that, consistent with constructivist models of learning, it was one produced as a result of a concurrence of law school and participants' personal experiences. It was not the result of law school being solely responsible for imparting that skill.

[101] Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law StudentWellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 150.

Participants overwhelmingly affirmed law schools' perception of law students as demanding more practical skills and a greater vocational focus is correct. However, the causes and agents to which participants attributed that need were more diverse than just the pressure of paying or repaying deferred tuition fees or a desire to gain practical experience. Worryingly, there was a consistent theme that work experience, in particular, was, or had become, almost a prerequisite for employment. While the cause of both the demand for practical skills and work experience was the same—to improve participants' attractiveness to employers—work experience almost appeared to have been divorced from the practical skills that it might provide.

Importantly, participants did not perceive that law school either actively advocated for work experience or was silently complicit in the push for practical skills. Therefore, the push for practical skills or work experience would not appear to be hidden outcomes within law school's control. They are, instead, pressures to which law school would appear to be expected to respond. As discussed in chapter 1, whether it can or should respond is contentious and outside the scope of this thesis. However, what this data suggests is that it is not a purely academic or theoretical discussion. It has and is having real and tangible effects on students. In some instances, effects like perceived competition, anti-social behaviour or disadvantage are serious.

CHAPTER 5: THE ROLE OF EVALUATION

I INTRODUCTION

Jackson's model of evaluation encompasses both formal (e.g., tests and exams) and informal (e.g., verbal) methods of evaluation that occur in an educational setting.[1] Jackson's use of 'praise' to describe this element of his taxonomy is perhaps unfortunate and potentially misleading. He uses it as shorthand to generally refer to students' responses to evaluation and feedback, not solely to positive affirmation. In discussing evaluation, this chapter uses Jackson's expanded frame of reference, that is, to refer to the process of evaluation and feedback.

Although rarely explicitly naming them, Jackson's model encompasses both behaviourist pedagogy and constructivist theories of learning.[2] For example, he acknowledges the use of rewards to encourage 'good' or compliant behaviour.[3] However, he takes issue with stimulus-reward being the dominant means of explaining student behaviour. He highlights a fundamental weakness in assuming that behaviourism is the primary explanation of student learning, namely, the diversity of student responses to evaluation:

> [O]nly in very rare instances is compliance the only strategy a student uses to make his way in the evaluative environment of the classroom.[4]

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[1] Phillip W Jackson, *Life in Classrooms* (Holt, Reinhart and Winston, 1968) 19.
[2] Jackson does occasionally acknowledge the work of Skinner and Dewey as providing some advice on how to improve classroom engagement, although often in passing. Ultimately, in his closing chapter, he appears to attempt to explain not discussing them more frequently by saying 'teachers are largely ignorant of what learning theorists are up to. Moreover, despite the seeming logical link between teaching and learning, teachers do not appear to be suffering from their ignorance.'; ibid 160.
[3] Ibid 27.
[4] Ibid.

Jackson discusses a broad range of student responses to evaluation.[5] For example, he acknowledges the response of some students as one of compliance in expectation of reward. However, he also acknowledges a response never countenanced by Skinner, namely, cheating (academic misconduct) 'to avoid censure or to win unwarranted praise.'[6] At the other end of the spectrum to compliance is complete disengagement. In particular, Jackson refers to the student who chooses to 'devalue evaluation to the point where they (sic) no longer matter very much.'[7]

Jackson's model also encompasses evaluation by peers of one another in educational settings. Although not directly within the teacher's control, Jackson argues that peer evaluation in a classroom affects students' learning experiences and produces hidden outcomes.[8] Participants in interviews offered a number of perspectives on their relationships with friends and peers that deserve separate examination. Consequently, they are not addressed in this chapter but are instead addressed in chapter 6.

A *Theories of evaluation, reward and behaviour*

Although arguing there is a causal link between evaluation and student responses, Jackson posits that students rarely consciously choose their response to evaluation.[9] Behaviourist theories of learning, like those suggested by Skinner,[10] attempt to provide a psychological model to explain the causal link

[5] Ibid 27.
[6] Ibid 28.
[7] Ibid.
[8] Ibid 30.
[9] Ibid 29.
[10] See ch 2 II 3 A.

between the prompt to produce or reproduce an answer or a behaviour ('stimulus') and the role of reward.

Arguably, behaviourist models are much narrower than Jackson's discussion of evaluation. Their focus is on the connection between stimulus and the provision, timing and frequency of reward. However, inherent in the reward process is evaluation by an entity that judges whether the behaviour warrants reward. There is little discussion of evaluation in Skinner's experiments or in his design of instruction machines since a mechanism performs the evaluative process. For example, in 'Skinner boxes', evaluation is performed by a lever; when it is successfully pulled, a reward is delivered.[11] In Skinner's instructional machines, it was a simple computer that checked the answer given by the student.[12] Nevertheless, evaluation still plays an essential role in assessing whether a reward should be given.

Supported by a battery of demonstrations using animal subjects, behaviourists argue that the expectation of reward drives behaviour. Regular rewards for the correct response to the appropriate stimulus will increase the likelihood of the same response even without a reward.[13] Although generally only demonstrated in animal subjects, Skinner sought to extend the model to formal educational

[11] A 'Skinner box' was a device designed by Skinner to ensure experiments were reliable and robust. Explained simply, it was a small, closed box with no external distractions, a stimulus device (an electrical circuit or a light) and a level that would deliver a food pellet when pressed in response to the stimulus; see Barrhus Skinner, *The shaping of a behaviorist* (Alfred Knopf, 1979).10).

[12] Some of Skinner's early designs were for larger, child-sized Skinner boxes (yes, seriously) that removed external distractions but replaced the light and pellet with an instructional 'machine' with either a mechanical system to display a light or play a sound as a reward. As technology improved, Skinner became excited about the potential use of computers to take the role of the instructional machine; Burrhus Skinner, 'The Technology of Teaching' (1965) 162 *Proceedings of the Royal Society* 427.

[13] See Charles Ferster and Burrhus Skinner, *Schedules of Reinforcement* (Appleton-Century-Crofts, 1957). See also ch 2 II A.

settings.[14] Skinner's theory and his predecessor Edward Thorndike have been identified as highly persuasive among American educational policymakers and administrators, although perhaps not among educators themselves.[15]

As Jackson acknowledged, behaviourist theory may explain some behaviours in a legal education setting. For some students in some contexts, stimulus-response may be a 'best fit' model. Students' experiences in educational settings before law school have conditioned the student to reproduce knowledge or behaviour for a reward in the form of marks, grades or academic prizes. Primary and secondary schools have conditioned students to change their behaviours in the expectation of receiving a reward. For example, several American studies on competitive behaviour in law school suggest competition is endemic due to it being endemic in primary and secondary schools.[16] Alternatively, it has been argued that law school conditions students to focus on external rewards or reinforces prior conditioning through traditional forms of reward (e.g., marks, grades or academic prizes) or other forms of reward (e.g., opportunities to meet with teachers informally or serve on law review editorial boards).[17]

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[14] See Skinner's collected writings on the application of his theory to education in Burrhus Skinner, *Technology of Teaching* (BF Skinner Foundation, 2001).

[15] Ellen Lagemann, 'The Plural Worlds of Educational Research' (1989) 29 *History of Education Quarterly* 185; Robert Levin, 'The Debate over Schooling: Influences of Dewey and Thorndike' (1991) 68(2) *Childhood Education* 71.

[16] Henry Giroux and Anthony Penna, 'Social Education in the Classroom: The Dynamics of the Hidden Curriculum' (1979) 7(1) *Theory & Research in Social Education* 21, 33. See also Elizabeth Cagan, 'Individualism, Collectivism, and Radical Educational Reform' (1978) 48 *Harvard Educational Review* 227.

[17] There is no consistent agreement on the which context provides the most powerful motivator for reward. Commentary and research has suggested that it may be the Socratic method (Jenny Morgan, 'The Socratic Method: Silencing Cooperation' (1989) 1 *Legal Education Review* 151), the potential for invitations to meet with law teachers outside the classroom (Sharon Dolovich, 'Note: Making Docile Lawyers: An Essay on the Pacification of Law Students' (1998) 111 *Harvard Law Review* 2027), exams and other assessment (Steve Nickles, 'Examining and Grading in American Law Schools' (1976) 30 *Arkansas Law Review* 411 citing JL Brereton, 'Theories of Examinations' in Joseph Lauwerys and David Scanlon (eds), World Yearbook of Education 1969: Examinations (Taylor & Francis, 1969) 32, or all of these things (Dolovich). See also Nancy Levit and Robert Downs, 'If it Can't Be Lake Woebegone...A Nationwide

Despite assessment being essential to Australian legal education,[18] there is no comprehensive survey of the types of assessment used in Australian law schools.[19] However, the use of formal assessment tools leading to a final mark and grade awarded for the production of the 'right' or expected answer, or the expected attitude or behaviour is common. In the context of this thesis, if external rewards like those noted above were the primary motivator for law students, then one might expect to see a consistent pattern of attributions to evaluation as a sole agent among participants. However, as the previous chapters have already indicated, that is not the case. Other agents and causes appear to play a role in influencing participants.

As noted earlier, Jackson does not examine the underlying causes that lead to diverse student responses in any depth. His principal focus is on examining pedagogy to improve teaching. However, constructivist theories of learning would suggest there is a range of factors that, for some students, interrupt or negate the stimulus-response link. For example, constructivists' argument that students interpret their learning experiences through their personal history and experiences[20] may explain why students disengage from what they perceive as

Survey of Law School Grading and Grade Normalization Practices' (1997) 65 *University of Missouri-Kansas City Law Review* 819, 847.

[18] *Higher Education Standards Framework (Threshold Standards) 2015* (Cth) 1.4.3 ('*Threshold Standards*').

[19] The Pearce Committee undertook no survey of assessment tools; Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A discipline assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987). The follow up review of the implementation of Pearce also did not undertake a survey; Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Printing Service, 1994) 170-1. One notable exception is a survey of assessment in property law courses nationally; Penny Carruthers, Natalie Skead and Kate Galloway, 'Teaching Skills & Outcomes in Australian Property Law Units: A Survey of Current Approaches' (2012) 12 *Queensland University of Technology Law and Justice* 66.

[20] See Lev Vygotsky, *Mind in Society*, tr Alexander Luria (Harvard University Press, 1978); John Dewey, *The Child and the Curriculum* (Cosimo Inc, 2010); John Dewey, *Experience and Education* (MacMillan Publishing, 1963). See also ch 2 III B.

an assessment of irrelevant information. Put another way, students perceive either the stimulus or the reward as having limited value when compared to what they perceive *is* valued. According to constructivists, students form their perceptions of value through interactions with family, friends, and work colleagues.[21] In the context of legal education, it may also explain students' perceptions, identified in both other studies[22] and this thesis,[23] that some aspects of law school are irrelevant or have no application to what they believe is the 'real world'.

Research suggests there are aspects of evaluation that are also relevant to evaluation in law school not considered by Jackson. For example, incomplete or non-existent feedback may affect law students' perceptions of 'fitting in' at law school.[24] Incomplete or no feedback appears to encourage self-doubt in students about their performance, leading to questioning whether they have chosen the right course of study and career. However, this is primarily based on the experiences of American law students. There is very little research on Australian law students. What is available suggests that the connection between feedback and response may be more complex and, again, affected by the personal characteristics of individual law students.[25]

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[21] John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (Collier-MacMillan, 1916).

[22] See for example Miranda Stewart, 'Conflict and Connection at Sydney University Law School: Twelve Women Speak of Our Legal Education Feminist Symposium' (1991) 18 *Melbourne University Law Review* 828; Law School Reform, *Breaking the Frozen Sea: The case for reforming legal education at the Australian National University* (ANU Law Students Society, 2010). See also Thornton's interviews with law teachers; Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012) 74.

[23] See especially ch 4 VI B.

[24] See for example Nancy Soonpaa, 'Stress In Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students' (2004) 36 *Connecticut Law Review* 353.

[25] Law School Reform (n 22) 49-50; Wendy Larcombe, Pip Nicholson and Ian Malkin, 'Performance in Law School: What Matters in the Beginning' (2008) 18 *Legal Education Review*

B *What is being evaluated?*

As noted earlier, Jackson never clearly identifies the hidden or implicit outcomes that evaluation produces, other than in the form of compliant or disengaged behaviour.

As discussed in chapter 4, some participants attributed a doctrinal or structured approach to problem-solving to the explicit curriculum.[26] It has also been argued that the value placed on reason and doctrine in problem-solving promotes adversarialism and competition[27] despite the explicit curriculum's advice that not all legal issues require a 'legalistic or adversarial' response.[28] However, there is very little empirical evidence of Australian law students adopting an adversarial approach. [29] There is also no consistent agreement on the source or cause of what is perceived to be an adversarial culture or personality among law students. For example, it has been argued that law schools' use of appellate cases emphasises identifying a 'winning' argument[30] that is expected to be cited in assessment. Alternatively, conflict is inherent in the law as a masculine

95; Kerri-Lee Krause et al, *The First Year Experience in Australian Universities: Findings from a Decade of National Studies* (Centre for the Study of Higher Education, 2005).

[26] See ch 4 III B.

[27] See for example Susan Sturm and Lani Guinier, 'The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity' (2007) 60 *Vanderbilt Law Review* 515. Similar suggestions have been made about pedagogy in Australian law schools; see Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37(1) *Monash University Law Review* 43; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'No Time to Lose: Negative Impact on Law Student Wellbeing May Begin in Year One' (2011) 2 *The International Journal of the First Year in Higher Education* 49.

[28] Sally Kift, Mark Israel and Rachel Field, *Learning and Teaching Academic Standards Project - Bachelor of Laws - Learning and Teaching Academic Standards Statement* (Department of Education, Employment and Workplace Relations, 2010) 18.

[29] For two examples see Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law StudentWellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 150, 177; Tom Fisher, Judy Gutman and Erika Martens, 'Why Teach ADR to Law Students? Part 2: An Empirical Survey' (2007) 17 *Legal Education Review* 5.

[30] See for example Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Postmodern, Multicultural World Teaching of Legal Ethics' (1996) 38 *William and Mary Law Review* 5.

construct.[31] If this is correct, one would expect to see participants attribute their adoption of an adversarial position to evaluation on the basis that it is the 'right' answer or simply what is expected. However, as previous chapters suggest, not all participants agree that the law is, or should be, a site for conflict.

It has also been argued that the narrow focus of legal problem solving on doctrine devalues emotion or the social context in which issues arise.[32] Again, there is no consistent position on why the law and legal education attempt to exclude emotion. Alternatively, it has been suggested that emotion is too difficult to incorporate in explicit learning outcomes. Consequently, emotion is not assessed, thereby being implicitly devalued.[33] If that were correct, it might be difficult to identify any attributions to this cause unless participants were aware of it.

Lastly, it has been argued that the devaluing of emotion is a consequence of the inherently masculine nature of the law and the characterisation of emotion as predominantly female.[34] In earlier chapters, some female participants perceived that emotion was not relevant to their studies and attributed their perception to their experience with the curriculum.[35] Others attributed their perception partially to the curriculum but also their developing maturity and awareness in

[31] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1993) ch 2. See for example Thornton's interviews with law students (93-5) and particularly barristers (195); Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996).
[32] See ch 2 III C (a) (ii).
[33] Mantz Yorke and Peter Knight, 'Self-theories: some implications for teaching and learning in higher education' (2004) 29(1) *Studies in Higher Education* 25.
[34] See for example Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 31); Catherine Weiss and Louise Melling, 'The Legal Education of Twenty Women' (1987) 40 *Stanford Law Review* 1299.
[35] See ch 4 III B.

reading case law.[36] Women participants might also attribute the devaluing of emotion to evaluation.

C *Assessment, evaluation, law school and employment*

A central argument of this thesis is that there is a significant emphasis in Australian research and commentary on legal education placed on the role of law school in promoting particular behaviours or attitudes among law students. However, as both Jackson and constructivists suggest, there are diverse influences that can affect whether students do, or do not, adopt those behaviours and attitudes.

One significant influence on law students that has been identified in primarily Australian research is the competition for employment. Finding lucrative employment in the law is a consistent reason given in empirical research by Australian law students on their reasons for enrolling in law school.[37] In chapter 4, workplace experience was perceived to be almost a compulsory prerequisite to finding employment. However, research in Australia[38] and America[39] argues that law students see the likelihood of employment as contingent on academic performance at law school. As a result, evaluation becomes a proxy for assessing the likelihood of finding a job. However, it is apparent is that law school has very little direct control over whether their graduates will successfully find

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[36] Ibid.

[37] Pearce, Campbell and Harding (n 19) Table 3.8; Livingston Armytage and Sumitra Vignaendra, *Career Intentions of Australian Law Students 1995* (Centre for Legal Education, 1995) Table 4.1. See also Linda Brennan, 'How prospective students choose universities: a buyer behaviour perspective' (PhD Thesis, Melbourne University, 2001) 83 <http://hdl.handle.net/11343/39537>.

[38] See for example Thornton, *Privatising the Public University: The Case of Law* (n 22).

[39] See for example Douglas Henderson, 'Uncivil Procedure: Ranking Law Students Among Their Peers' (1994) 27 *University of Michigan Journal of Law Reform* 399; Christopher Matthews, 'Sketches for a New Law School,' (1989) 40 *Hastings Law Journal* 1095.

employment. While it attempts to make them *employable*, making them *employed* is neither part of the explicit nor hidden curriculum. One might expect that participants would attribute at least some elements of the competition for employment to influences external to law school. At the same time, some participants may perceive law school as having some role in improving or degrading their chances of employment, thereby attributing some greater degree of control to law school than it exercises.

D *Purpose*

Although there is some American and Australian research on the role of evaluation in law school in influencing students' behaviours and attitudes, the causal links are often unexplored or unclear.[40]

This chapter uses the LACS[41] to identify how participants might perceive evaluation and its outcomes. It also uses the LACS to identify external influences that participants perceive reinforce, mitigate or negate law school evaluation.

E *Method*

This chapter focuses on attributions by participants in which 'law school' is coded as the agent of an outcome.[42] Attributions to evaluation were also coded as 'evaluation' to differentiate attributions related to the curriculum. The code

[40] See A above.
[41] Anthony Munton et al, *Attributions in Action: A Practical Approach to Coding Qualitative Data* (John Wiley & Sons, 1999).
[42] An attribution is defined in the LACS as 'any statement in which an outcome is indicated as having happened or being present, because of some identified event or condition'; ibid 136.41) 136. Concerns with the breadth of coding for 'law school' are discussed in detail in chapter 4 I C.

for ‘evaluation’ is defined to include both formal and informal methods of evaluation. The coding method adopted differentiates evaluation that participants associate with law school from evaluation associated with peers. The former is coded as ‘law school’ being the perceived agent. The latter is coded as either ‘friend-law’ or ‘peer-law’ being the perceived agent.[43]

In considering these attributions, none of the participants was explicitly asked about evaluation. All of the attributions to evaluation were spontaneous. Consequently, when asked about, for example, how their approaches to problem-solving had changed,[44] participants tended to draw on experiences of evaluation as an example spontaneously. Consequently, one could argue that these attributions are authentic and carry considerable significance.

As acknowledged earlier in this chapter, Jackson’s model encompasses evaluation by peers. That element of the model is not analysed here but is discussed in more detail in chapter 6.

F *Results*

Despite concerns in predominantly American literature about the effects of evaluation,[45] the coding suggests that evaluation is perceived to play a much less significant role in the production of outcomes than other agents. Some participants did not discuss evaluation at all in their interviews. Law school and

[43] The coding adopted differentiates between friends and peers. The former are agents with whom the participant identified themselves as being close or intimate. The latter are agents that the participant identified as other law students but with whom they had no close or personal relationship. The complete code book is at Appendix A.
[44] See the discussion of methodology in chapter 1 and the structured questions used in interviews.
[45] See the discussion in Chapter 2, especially the discussion at II C 3 (a) (iii).

the curriculum *excluding* evaluation is perceived to be a much more significant agent.

However, the coding suggests that participants were much more inclined to perceive evaluation as producing outcomes that affected them personally when compared to other agents. As discussed in chapters 3 and 4, participants commonly made attributions to law teachers and law school when their friends or peers were identified as the target. There were, on average, comparatively fewer attributions to evaluation producing outcomes that affected peers, suggesting that evaluation was perceived as a more individualised activity.

Although the coding suggests participants perceived evaluation to play a comparatively less significant role in outcomes, some caution needs to be exercised in concluding that evaluation is insignificant. Arguably, the absence of explicit attributions to evaluation may also tend to suggest that evaluation is endemic. That is, a culture of evaluation is so deeply embedded in participants as a result of their experiences throughout primary and secondary school[46] that they are explicitly unaware of its role. However, this thesis did not extend to asking participants to compare their experiences between, for example, secondary school and law school. Therefore, there is no empirical data against which to test this argument. Consequently, it cannot be concluded on the basis of the coding alone that the outcomes assumed to flow from evaluation in law school (e.g., competition) are hidden outcomes of law school or of some other agent.

[46] Ibid.

Analysis of the text of participants' interviews suggests that evaluation is perceived as a standalone or independent agent at law school. That is, none of the participants drew any connection between teaching and evaluation. For example, none suggested that high marks were attributable to good teaching. Neither was poor performance in evaluation attributable to poor teaching. Arguably, the perception is consistent with the conclusions in chapter 3 that law teachers generally are perceived as having only a small role in producing outcomes.

The outcomes attributed to evaluation tended to fall into two broad categories; short-term and long-term. Long-term outcomes fell into two further categories; participants who performed well in evaluation and those who performed poorly. Only participants who attributed long-term outcomes to poor performance in evaluation perceived a causal link between law school and their performance. For those participants, law school had revealed the lack of some innate quality, had failed to provide feedback to support performance, or failed to provide any feedback at all.

Two consistent themes come from both coding and analysis of interviews. First, there is a perception that law school is responsible for promoting or reinforcing individualism. Those participants who performed well perceived that law school rewarded their individual and innate intelligence, skills or abilities. Those who performed poorly perceived that law school's lack of support meant failure needed to be overcome alone. Secondly, the significant emphasis participants placed on doing well in assessment was driven by the likelihood of finding employment. That is, neither evaluation nor law school appeared to create either

pressure to perform well, or competition. Those outcomes were more commonly attributed to the participant themselves or to perceptions of what employers want.

II LAW SCHOOL EVALUATION AS AN AGENT

As discussed in Chapter 3, 'law school' was coded as a distinct or concurrent agent in 760 or 36% of all coded attributions (n=2082); on average almost 23 times per interview, regardless of the target. Only participants themselves were coded as a distinct or concurrent agent more often (873 or 42%). Law school was coded as a distinct or concurrent agent more than twice as many times as the next most common agents; legal employers (332 or 15%) and law school peers (284 or 13%).

However, when attributions related to evaluation are identified separately, the coding suggests that evaluation is perceived as significantly less important. That is, the coding suggests that while participants consistently and frequently identify law school as an agent, *evaluation* would appear to be perceived as playing a substantially less significant role in outcomes. At least one outcome was coded as being attributed to law school in every one of the 65 interviews conducted. However, an attribution to evaluation was coded in only 35 interviews. Put another way, the coding suggests that evaluation was not perceived as having any effect as a discrete or concurrent agent by 30 participants.

The comparatively less significant role of evaluation in producing outcomes suggested in the coding is reflected in the average number of instances in which evaluation was coded as a discrete or concurrent agent. For example, law school

(including evaluation) was coded as a discrete or concurrent agent in 10.4 and 10.6 attributions on average for male and female participants. In comparison, evaluation was coded as a discrete or concurrent agent in 0.8 (i.e., less than once) and 1.5 attributions on average for male and female participants.

Unlike other agents discussed in this thesis, there was no marked difference in the average number of attributions to evaluation between groups according to gender, age, university, program or year of enrolment. The coding suggests that all groups saw evaluation as playing a comparatively less significant role in outcomes when compared to law school. The range of averages was only 1; the highest average number of attributions coded to evaluation being 1.8 (participants 41 years of age and over) and the lowest 0.8 (male).

A *Weaknesses in the methodology*

Similar to the explanation for the difference in perceptions of law teachers compared to law school as discussed in chapter 4, the difference here may also be the result of the methodology. As noted in Chapter 1, and consistent with the objective of ensuring spontaneity in attributions, participants were not asked explicitly about evaluation. Consequently, participants may have been more inclined to make attributions to law school more generally than to evaluation specifically.

B *Evaluation as agent and participants as the target*

Consistent with coding for law teachers and law school, the total and average numbers of instances in which evaluation was coded as a discrete or concurrent agent fell when coding for the participant as the target was considered. However, unlike coding for law teachers and law school, there were no significant

differences in the overall decline across characteristics. Regardless of the gender, age, stage of study or university, the average number of instances in which evaluation was coded as a distinct or concurrent declined by broadly similar factors. For example, the average fell from 0.8 and 1.5 attributions on average for male and female participants regardless of the target to 0.6 and 1.3 where the target was coded as the participant. Similar declines occurred across age groups, universities and undergraduate and postgraduate cohorts.

Notably, the decline across all groups was slight. One explanation is that the overall number of attributions coded to evaluation was comparatively small. Therefore, there was unlikely to be significant change compared to instances in which the target was coded as the participant. An alternative explanation is that participants were more likely to associate evaluation with an effect on that participant than effects on others. That is, evaluation, although not significant, was more likely to be perceived as affecting the participant. Conversely, participants were less likely to make observations about evaluation's perceived outcomes for friends or peers.

Arguably, the greater likelihood of attributing outcomes to evaluation that affected the participant may be associated with the predominantly individualised nature of evaluation that has been observed in some subjects.[47] Alternatively, it might reflect the individualised, competitive nature of evaluation.[48] That is, participants were less likely to perceive outcomes affecting peers since evaluation is not a cooperative or group activity and there is little contact with peers around the activity. However, in the absence of any comprehensive survey

[47] Carruthers, Skead and Galloway (n 19).
[48] Townes O'Brien (n 27).

of assessment methods on which that hypothesis could draw, this is a tentative conclusion at best.

In the context of law students' concerns about law school evaluation and the likelihood of employment, attributions in which 'employer-law' was coded as the target were also considered. Instances in which 'employer-law' was coded as the target provide a superficial indication of the number of attributions in which participants perceived evaluation to affect employment in the legal profession. Overall, there were only six instances in which evaluation was coded as the agent and 'employer-law' as the target. The very small number of attributions in which participants appeared to draw an explicit link may be explained on the basis that a participant's prospects of employment were coded as the participant being the target. Put another way, participants were more likely to attribute to evaluation outcomes affecting their personal fortunes or future rather than making an abstract or objective connection between evaluation and employment.

C *Discussion*

Superficially, the comparatively less significant role evaluation plays in participants' perceptions than other agents might be a welcome result. A growing body of literature in the United States argues that law school evaluation focuses on extrinsic motivation with subsequent effects on motivation and mental health.[49] The coding suggests that participants perceived evaluation to have a less significant role in producing outcomes.

[49] See the discussion in Chapter 2, especially the discussion at II C 3 (a) (iii).

An alternative argument is that the smaller number of coded attributions to evaluation lends weight to the assertion that the outcomes assumed to flow from evaluation *are* potentially part of legal education's implicit or hidden curriculum. As Giroux and Penna have suggested, evaluation and competition are endemic within educational settings.[50] From a macro-sociological perspective, they are part of the social and cultural backdrop against which legal education occurs of which participants are explicitly unaware. [51] All participants have come through primary and secondary schooling that uses a system of evaluation and grading. Consequently, they are arguably steeped in an educational culture of evaluation and are explicitly unaware of it. Therefore, they are likely to make few explicit attributions to evaluation as an agent. Although initiated into this perspective as children, the continued use of evaluation and grading in law school arguably perpetuates or reinforces it. This thesis is discussed further below in the context of specific attributions.

The comparatively slight decline in the average number of attributions coded to evaluation when the target is considered is also noteworthy. It might be argued that the number of attributions overall is so small that very little can or should be made of it. However, in the analysis of coding for law teachers and the curriculum, women appeared to be more likely to reflect on the effects on others than their male peers. There was a much more significant decrease in the average number of women's attributions in which law teachers and law schools were

[50] Giroux and Penna (n 16); Cagan (n 16).
[51] See ch 1 IV A 1 and ch 2 II C (a) (iii) and especially Pierre Bourdieu, 'Habitus' in Emma Rooksby and Jean Hillier (eds), *Habitus: A Sense of Place* (Taylor & Francis, 2017) 43. See also Pierre Bourdieu and Jean-Claude Passeron, *Reproduction in Society, Education and Culture* (London, 1990).

coded as agents when the target was considered.[52] The decrease suggested that women were more likely to offer attributions in which peers were the targets rather than themselves. This thesis argued that it might reflect suggestions made in commentary and research that women tend to adopt a more collective approach in their thinking and a greater sense of empathy in their connections with others.[53]

Consequently, women were more likely to be aware of the effects of law teachers or law school on their peers. The absence of any significant difference between men and women in relation to attributions to evaluation suggests that women may consider the effects of evaluation differently. This is considered further below.

III PARTICIPANTS' ATTRIBUTIONS TO EVALUATION

Participants' attributions to evaluation tended to be limited to formal evaluation in the form of exams or essays. Participants tended to perceive what Jackson would call informal evaluation (e.g., verbal feedback in class) as attributable to law teachers. That is, participants tended to see informal evaluation as part of the relationship established (or perhaps not established) with individual law teachers rather than being relevant to their progression in the long term.

In the context of formal evaluation, which tended to preoccupy participants, the outcomes fell into two broad categories; short-term and long-term.

[52] See ch 3 II A and ch 4 II B 1
[53] See for example Gilligan (n 31).

Short-term outcomes tended to relate to what might be considered ‘tactical’ decisions to change the tone, structure or substance of an answer to an assessment task based on a perception of what would gain the highest mark. However, their focus was not on understanding explicit expectations but on attempting to divine the law teacher's technical, social or political position. Participants in this category tended to restrict their attribution to specific, individual assessment tasks. They had generally adopted a practice of seeking pre-emptive advice beyond the assessment instructions. The underpinning cause for adopting this approach was most commonly identified as improving the likelihood of finding employment after graduation because higher marks were perceived to improve the prospects for legal employment. None appeared to perceive that their approach had any application after graduation. None appeared to perceive that it was encouraged by law school or law teachers.

There were some common themes with those who identified long term outcomes. Most significantly, all participants appeared to construct evaluation as a standalone element of law school. None of the participants appeared to perceive any clear link between the substantive content of teaching and assessment tasks. For example, none discussed the content of lectures or tutorials being connected to evaluation. Good performance in evaluation did not appear to be perceived as being connected to good teaching practices. Evaluation appeared to be constructed as the central most important aspect of their learning experience.

Although tactical decision making and the divorcing of evaluation from substantive teaching may be concerning, their short-term outcome and unclear

causes make it difficult to assert that they constitute part of a hidden or implicit curriculum. Instead, the adoption of tactical approaches to evaluation tends to reinforce the influence of the role of employment.

The majority of participants perceived that evaluation had long term outcomes. The outcomes identified were diverse, although there was some correlation between academic success or failure and outcome. For example, participants were more likely to attribute a sense of 'fitting in' at law school if they reported doing well in evaluation. They also tended to conclude that their decision to pursue law was the right one. Those who discussed their perception that they did not fit in, or may have made the wrong decision about choosing law as a discipline, tended to attribute the cause to performing poorly in evaluation. Interestingly, those who reported doing well were more likely to attribute the cause of their success to some inherent characteristic and not to law school. Those who did poorly were more likely to attribute their lack of success to a lack of support by law school, although not to teaching.

The other theme, which was common between participants who had performed well academically and those who did not, was a strong sense of individualism. Those who had performed well tended to attribute their success to individual effort. Those who performed poorly tended to discuss how they would need to overcome a perceived deficit independently. Even those participants who attributed their poor performance to aspects of law school also tended to discuss how, to overcome that barrier, they would need to do so without law school's support.

A *Short term outcomes attributed to evaluation*

The number of attributions that related to short term outcomes was smaller than those related to long term outcomes. Attributions within this group tended to reflect changes in participants' approaches to evaluation expressly. Participants attributed a decision to change the tone, approach or structure they used to answer questions based on what they perceived would achieve a better grade. To be clear, the changes that participants described were not always those expected by the TLOs. Instead, they reflected what might be considered a tactical decision to alter an approach or perspective in light of the conditions set by an individual law teacher. Participants saw the change in behaviours as necessary to succeed in law school, but did not perceive them as applicable in other contexts.

For example, one older participant explained, with some candour, how they attempted to establish the 'political position' of the law teacher in order to judge how best to approach an assessment task.

> I always make sure that in class one, I establish my tutors' political position very quickly every time. And that has helped greatly. They're very candid. They don't even realise how quickly they put their political views through.
>
> Female, 55, Undergraduate, Canberra Law School

When asked why they adopted this approach, the participant attributed their perception to what she perceived was a biased perspective:

> We always have to appear to be agreeing with the mainstream views, whether these are the minority one, but is the loudest. Because otherwise, you might be victimised, you know, be the focus of some retaliation whether it's warranted or not.
>
> Female, 55, Undergraduate, Canberra Law School

After referring to the weight they placed on how a law teacher viewed a particular issue, another participant made the connection between attempting to divine a law teacher's preferred approach and higher marks much more directly:

> I attended a consultation with the lecturer because I know, based on their look and based on how they responded to the arguments I was proposing, whether they liked that idea or not. And sometimes I wanted to get an easy mark, and so I would do that.
>
> Female, 22, Undergraduate, ANU

In the interview context, 'that' was interpreted to mean following the argument the law teacher preferred.

It should be remembered that these are the participants' *perceptions* of their experiences at law school. Their perceptions would appear to have been reinforced by achieving high marks for their work. Both participants referred to achieving distinction marks or above. Their work may have been marked on its own merits, regardless of the political perspective adopted. Nevertheless, it reflected a perception shared by others that to do well in an assessment task, the tone or even substance of assignments needed to be adjusted to meet what they perceived were hidden or implicit expectations of a marker. What they perceived

was expected was not the abilities expressed in the TLOs but, instead, a particular social or political perspective.

It was difficult to identify the *original* cause for these participants' perception that adopting an approach or tone that matched the expectations of particular law teachers would achieve a better result. The perception would appear to have been adopted, applied, and a *post facto* justification adopted. For one of the participants quoted above, it may have been the outcome of an experience of 'victimisation'.

However, what was noteworthy about other participants' attributions associated with adopting a perspective to an assessment task inconsistent with their own beliefs or values was that they tended to be directed at peers rather than themselves. That is, participants perceived their *peers* were more inclined to adopt an inauthentic perspective in order to improve their grades. For example, one explained their peers' approach as attempting to find out what a law teacher wanted to hear, rather than independently demonstrating the abilities expected in the TLOs:

> Students will ask 'How can I achieve the marks at the highest possible marks?' and 'What were the requirements?', 'What do you want to hear from us?' That kind of thing.
>
> Male, 21, Undergraduate, Canberra Law School

Another suggested that their peers adopted a much more direct approach.

> I know that some of my friends would just follow whatever the lecturer said to them in their consultation with them.
>
> Female, 22, Undergraduate, ANU

Interestingly, some of those participants who assigned a more tactical motivation to their peers tended also to suggest that they might not, or would not, alter their opinions to achieve a higher grade.

> If the lecturer doesn't feel that my opinion is valid or it doesn't match with their own, and I get lower marks for it, I'm willing to take the lower mark because that is my opinion. And if I've argued it well, give me marks on that basis. And if I feel like they've not given me marks on that basis, I will challenge them.
>
> Male, 21, Undergraduate, Canberra Law School

It was not clear from the interview whether the participant had challenged a law teacher.

The construction of peers' motivations as being different from the participants' motivations suggests that some caution should be exercised over the weight given to the attributions. Nevertheless, the attributions cited emphasise the perceived short-term influence of evaluation as an agent. Whether the attribution is associated with outcomes affecting the participant or peers, there is a narrow temporal focus on specific pieces of assessment rather than a long-term change in values or perspectives. Where the attribution is associated with the participant, it is perceived as having no long-term outcome or the outcome lasting only until graduation. The process of attempting to divine the law teacher's 'political

perspective' or preferred argument would appear to be repeated for each assessment task.

It should be acknowledged that in categorising these outcomes as short term, this thesis has no longitudinal element. The absence of any explicit attribution of tactical decisions to either pre-law school or early law school experiences makes it difficult to conclude that it was an existing perception that law school did not change. It cannot be concluded that participants who perceive the outcomes as short-term do not demonstrate the same approach to work after graduation. The short-term categorisation adopted in this discussion is as far as this thesis and the qualitative data can reach. There is substantial scope for longitudinal research with law students to examine whether the 'tactical' skills they deploy in evaluation are already embedded approaches or become embedded in the long term.

What is apparent from this small group of participants is the value they place on achieving high marks. Notably, there were no attributions to law school as the sole agent for encouraging the pursuit of those marks. Consistent with Australian commentary and research,[54] participants tended to attribute the motivation to achieve high marks to the prospect of employment. As one participant explained:

> But I think that's not all law school's fault. It's also the jobs you apply for. If you think about the bigger picture, the only reason students are going out of their way to make friends with only people who've got high GPAs, or are

[54] See the discussion above and ch 2

> aiming to get higher GPAs by talking and behaving in certain ways, is because they want a job.[55]
>
> Male, 21, Undergraduate, Canberra Law School

The underpinning motivation of employment, and participants' experiences with employers, are discussed in more detail below.

B *Long term outcomes of evaluation*

Attributions within this category tended to be associated with themes identified in research and commentary on 'fitting in'.[56] As the literature also suggests, student responses are diverse[57] but fall broadly into two categories; participants who reported doing well in evaluation and those who reported doing poorly.

1 *Participants who reported doing well in evaluation*

Participants attributed a sense of confidence to receiving high marks for assessment tasks. This is unsurprising. However, they often attributed an additional outcome. Some attributed a perception that there was a 'fit' between how law school asked them to think or write and their natural abilities. For example, one participant noted they 'feel like [they] *must have a good legal brain* because [they] do quite well.[58] Another referred to the perception that

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[55] The references to making friends with high performing law students is examined in more detail in chapter 6.

[56] Andrew Watson, 'The Quest for Professional Competence: Psychological Aspects of Legal Education Symposium: The Teaching Process in Legal Education' (1968) 37 *University of Cincinnati Law Review* 91, 128. See also Granfield's discussion of law students from lower socio-economic backgrounds and 'faking it'; Robert Granfield, *Making Elite Lawyers* (Routledge, 1992) ch 7.

[57] Watson (n 56); Duncan Kennedy, 'How the Law School Fails: A Polemic' (1970) 1 *Yale Review of Law and Social Action* 71; Robert Nagel, 'Invisible Teachers: A Comment on Perceptions in the Classroom' (1982) 32 *Journal of Legal Education* 357.

[58] Female, 21, LLB, Canberra Law School.

‘*apparently, I'm pretty good at it*. I've been getting fairly good grades and other stuff.’[59] These participants appeared to attribute their performance to innate ability rather than any direct instruction or intervention by a law teacher or law school.

Participants who did not attribute their success to an innate ability tended to attribute outcomes to other personal qualities. For some, it was a particular interest or passion for the subject. Alternatively, their success was attributed to a willingness to work hard to overcome an absence of interest in the subject matter.

> I think getting a good mark has definitely motivated me. But I found *if I do more on a subject*, even if it's not something I'm particularly interested in, I enjoy it more.
>
> Female, 23, LLB, ANU

These types of attributions are broadly consistent with empirical research with first-year Australian law students. Those who had been academically successful tended to attribute their success to a willingness to work hard or exert individual effort to achieve success.[60]

An alternative perspective, although still related to personal qualities, was presented by yet another participant. They attributed their success to trying to circumvent what they perceived was law school’s narrow focus to fit their interests.

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[59] Male, 31, LLB, Canberra Law School.
[60] Melissa Castan et al, 'Early Optimism - First-Year Law Students' Work Expectations and Aspirations' (2010) 20(1/2) *Legal Education Review* 1.

> I was increasingly trying to bring in my other interests like art theory and spatial architecture into my law degree. *So, I was capitalising on the ability to use the theory elective subjects.* I chose all the ones that were like law in the humanities and feminist legal theory and law literature and human rights. So, a lot of ones with [a specific member of the academic staff] particularly. And then I guess I kind of felt like it was more of a fluid space to be able to combine other disciplines.
>
> Female, 24, LLB, ANU

By being able to 'capitalis[e] on the elective subjects', the participant had subsequently received awards for their undergraduate research. Consequently, they perceived that they fit in, albeit in a niche they had created for themselves by adapting law school to their interests.

It is arguable at this point that these types of attributions do not fit neatly within an analysis of law school's outcomes. Instead, they would be better considered in an analysis of other influences, specifically the role of the participant themselves. However, as noted earlier, many participants attributed a sense of fitting in at law school, a greater sense of confidence, or a motivation to continue *as a result of evaluation*. For all of these participants, their efforts had been rewarded with high grades or other prizes. As a result, as one participant phrased it, 'It has made me more confident and part of that, I think, is just doing something well and getting a reinforcement on that.'[61]

Consequently, many participants' attributions became circular; they did well because of some personal skill or attribute; law school praised their performance; as a result, the inherent characteristic was perceived as 'fitting'

[61] Female, 38, JD, ANU.

with the law. Again, this result may be unsurprising. It is trite that success in any endeavour will boost confidence. However, it provides empirical evidence of the outcome of evaluation on law students in their own words.

2 *Participants who reported doing poorly in evaluation*

The other broad category of attributions was associated with self-reported poor performance in evaluation. Attributions within this category tended to represent the obverse of successful participants; participants attributed doubt about ability and choice of career due to a lack of academic success.[62] However, there was also a much greater diversity in participants' attributions and responses to poor performance than participants who reported performing well.

Most participants attributed demotivation, disappointment or reconsideration of their decision to enrol in law school to receiving poor grades or failing a unit. One participant explained the causal link between failing a unit and reconsidering law in the following way:

> I think it just sort of brought doubt whether or not I could do uni. I feel like it's the longest four years of your life. I feel like failing just one unit or failing an assignment kind of rocks you and makes you really rethink whether or not you're doing the right thing, if this really is the right degree.
>
> Female, 23, LLB, Canberra Law School

This participant's attribution also reflects another consistent theme across other attributions in this category. Unlike participants who reported performing well,

[62] Stewart (n 22); Barbara Hong, Peter Shull and Leigh Haefner, 'Impact of Perceptions of Faculty on Student Outcomes of Self-Efficacy, Locus of Control, Persistence, and Commitment' (2011) 13 *Journal of College Student Retention: Research, Theory & Practice* 289.

the causal link between evaluation as the agent and a loss of confidence was much more direct for participants who had performed poorly. Law school, and the absence of feedback more specifically, was perceived as the principal cause of disappointment or discouragement. Loss of confidence was directly attributable to evaluation rather than a cyclical process of personal strength reinforced by praise. It also introduced a slightly different perspective on 'fitting in', also discussed by peers who performed well. Unlike those in the previous category, attributions in this category reflected a perception that not fitting in at law school or with the law was directly attributable to law school and, more specifically, evaluation. For example, after discussing how they had performed poorly in a first-year unit, one participant explained the outcome as 'mis-fitting':

> I didn't do very well. And so I felt very sad about it for a while because I felt like I was looking forward to something that will make a difference and invest my talent. But the law that actually was provided, the courses, *showed me my talent was a bit mis-fitted*.
>
> Female, 21, LLB, ANU

Although participants commonly attributed a sense of disappointment or discouragement to evaluation, their perceptions of the underlying cause differed significantly. For some, like the participant above, it was perceived as a deficit between what they were able to do and what law school expected. For example, one participant attributed their poor performance in legal problem-solving to the absence of a natural ability that law school had revealed to them.

> I came to uni and really flourished and did really well throughout everything else I've done at uni. And it just felt like it really flowed and just came quite naturally to

> me. I mean, the law, *I just feel like I just don't have that kind of natural competence to do it.* And so yeah, I guess I just find it harder. It just doesn't come very intuitively to me.
>
> Female, 24, LLB, ANU

These participants attributed to evaluation a perception that they did not possess a skill, attribute, or ability. Again, suggesting a perception that evaluation is standalone or distinct from instruction, there was no perception among these participants that it was a deficit that law school had created or could assist with addressing. Consequently, the deficit was something that they perceived that they would need to overcome alone. Alternatively, they perceived that they had overcome the deficit through their efforts. For example, one of the participants quoted above who discussed being 'rocked' by failing a unit referred to having to find the motivation to overcome their perception that failure would prevent achieving their 'dream'.

> Because [subject] is a core unit and I failed it, I think I sort of went into that mode where 'Oh, it's all over. My dream out the window.' And then I spent a week looking at different uni courses. *Obviously, in the end, I was like, 'No, I gotta stick this.'*
>
> Female, 23, LLB, Canberra Law School

This particular participant had found motivation through support from friends. Another perceived that their lack of proficiency with language was a disadvantage that they would have to overcome.

> For me, if my disadvantage is real, then I can just sit there and do nothing, or I have to find some way to go out and overcome that. *And I feel like to do it I just have to work really hard.*

This particular participant expressed the view that, as a result, they had worked 'twice as hard as everyone else'. They also discussed finding support among friends.

It should be noted that these participants' attributions cannot be cynically devalued as 'sour grapes.' All had stayed in law school, and all perceived that their abilities and confidence had continued to grow. For example, across the course of their interview, one participants' attributions moved from those common to the poor performance category to the good performance category.

There was no evidence of 'the Valedictorian Syndrome'—a mismatch between students' belief that they will be academically successful and their poor results at law school[63]—to which some responsibility has been assigned for distress among American law students. There was no evidence in interviews of participants self-assessing as being high performers independently of other agents, even among JDs who might be expected to be more confident based on the experience they bring to their studies.[64]

Remarkably, all of the participants in the small group who perceived evaluation to have demonstrated that they lacked an inherent attribute were female. It is difficult to draw any firm conclusions associated with gender from this group's

[63] Peter Kutulakis, 'Stress and Competence: From Law Student to Professional' (1992) 21 *Capital University Law Review* 835.

[64] In research with law students at Melbourne University, JD students were more likely to rate their 'readiness' more highly than LLB students. That outcome was not replicated here, although interviews with JD students for this research did not set out to test this finding; Wendy Larcombe, Pip Nicholson and Ian Malkin, 'Commencing Law Students: Expectations of Undergraduate and Graduate Cohorts' (2008) 1 *Journal of the Australasian Law Teachers Association* 227.

attributions, given that they constitute a small sample. Nevertheless, it is arguable that it provides some supporting empirical evidence to the assertion that some aspects of law school have an alienating outcome for women.[65] Here, there is evidence of a causal link between evaluation, more specifically, and 'mis-fitting'. The interrelationship between gender and evaluation is discussed in more detail in section IV B below.

Consistent with existing Australian research,[66] other participants did perceive the difference between their performance and what was expected was directly attributable to law school rather than an intersection between an inherent deficit on their part and evaluation. The consistent theme among this group of participants was feedback on evaluation. The primary cause was not the quality of feedback but what they perceived as its absence. For example, one participant attributed a perception of their studies as a production line to their experience of receiving little or no feedback.

> But most of my law courses it's been: This is the law, and then this is the problem, and then you solve it. And then you get a mark, and often you don't get feedback at the end, and then you move on to the next subject.
>
> Female, 23, LLB, ANU

Another perceived that there was little opportunity to learn when there was no feedback.

[65] See for example Thornton's interviews with female law students; Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 31).
[66] Castan et al (n 60).

> I've done some electives where I only get a mark. I don't get any kind of written feedback. And I think if that is generally what happens in courses, I would be sceptical about how people can actually improve their problem solving because I don't think that feedback and critique are available to people.
>
> Female, 38, JD, ANU

It should be remembered that these are participants' perceptions. Whether feedback was received is not examined in this thesis. Nevertheless, attributions like these that emphasise the connection between feedback and evaluation also reinforced the perception that assessment tasks were somehow disconnected or distinct from the substance of courses.

Notably, there appeared to be no causal links perceived between feedback and law teachers, despite law teachers presumably being the feedback authors. On the one hand, this is potentially a positive outcome; there would appear to be no perception that law teachers are directly responsible for some of the outcomes discussed above. On the other hand, it is arguably consistent with some of the tentative conclusions drawn in chapter 3. Participants attributed far fewer outcomes to law teachers than to other influences.

C *Discussion: Fitting in and individualism*

Two significant long-term outcomes emerged from participants' attributions that, when taken together, constitute a significant hidden or implicit outcome in legal education; a focus on individualism.

Participants' attributions would suggest that success, or the lack of it, significantly affects perceptions of whether they are suited to studying law or

legal practice, that is, whether they fit in. For participants who performed well or performed poorly, there is a common perception that law school is partially responsible for demonstrating that some inherent characteristic is either valued or absent. The focus of participants' attributions is not some skill or knowledge identified in the explicit curriculum. It is far more personal and, for some, potentially immutable. While fitting in, or a sense of belonging, is the subject of commentary on law school[67] and tertiary education more broadly,[68] suggested causal links are often missing. Existing commentary on law school also tends to focus on the experiences of American students.[69] Participants attributions suggest that formal evaluation, more specifically, may play a substantial role in promoting or damaging a sense of belonging at law school and, by extension, the legal profession.

It might be argued that this is an appropriate outcome. To the extent that evaluation is perceived to reveal that a student is not suited to law, it may serve a long-term benefit in encouraging that student to consider other careers. Consequently, it may also serve to support their physical and mental health by discouraging them from a career with which they are ultimately dissatisfied. Conversely, the implicit discouragement without additional support from law school raises serious questions about the outcomes for law students' overall confidence and wellbeing. Notably, one participant explicitly identified the outcome of the absence of any support from law school, evaluation and welfare.

[67] See for example Watson (n 56).
[68] See for example Ruth Lefever, 'Exploring student understandings of belonging on campus' (2012) 4(2) *Journal of Applied Research in Higher Education* 126-141.
[69] See for example the discussion of law teachers in ch 3.

> I think a general barrier of law school itself is that *there's not much value placed on managing people's welfare throughout law school* or checking up on people and saying, 'Look, you're about five marks off where we expect you to be. How can we help you to raise that?'
>
> Male, 23, LLB, Canberra Law School

Regardless of whether a participant perceived that the primary deficit was themselves or the absence of feedback, law school was generally not perceived as providing a source of support or guidance. Consequently, they perceived responsibility for addressing shortcomings in characteristics or performance as a burden they would have to overcome alone.

Even for participants who reported performing well, there was a perception that their success derived primarily from their characteristics or effort and not law school. One participant explicitly drew a causal link between evaluation, feedback and the concept of individual effort:

> When I see high achieving students getting consistently higher marks, and I approach professors for how do I improve, how do I get to where they are from here, I don't really get any feedback whatsoever. *So in a way, you're left to work by yourself.* So support facilities are something that's lacking, I would say. *And I think that's what reinforces the individualistic aspect.* Where, instead of asking someone for help, if a professor doesn't give you that positive support, then you're just left with saying, 'OK, if the professor is not giving me any positive support, I can't expect another student to.' Because who knows, they might have done it by luck or, even if they want to help, how helpful can they be because they're not that experienced. *So then you're left teaching yourself how to do things.*

Male, 21, LLB, Canberra Law School

Although not generally as explicit in others' attributions, participants placed a substantial emphasis on the need for individual effort. Their attributions are specific to evaluation, suggesting that it is specifically evaluation that reinforces the importance of individual effort.

The focus on individual effort is significant. It has been argued that reforms to tertiary education in the United States and Australia are driven by neoliberalist values of *laissez-faire* economics through de-regulation and the promotion of education as a marketplace, clothed in concepts of freedom of choice and equal participation.[70] The consequences of regulatory reforms for legal education and Australian law schools have been to promote a focus on individual success and individual effort:[71]

[70] There is an exceptionally large body of literature on neo-liberalism, its definition and its interpretation. However, these two fundamental concepts are generally consistently identified by both critics and supporters of economic liberalisation or neo-liberalist reforms. See for example; Pierre Bourdieu, 'The essence of neoliberalism', *Le Monde diplomatique* (online, 8 December 1998) <https://mondediplo.com/1998/12/08bourdieu>; Margaret Thornton, 'Among the Ruins: Law in the Neo-Liberal Academy' (2001) 20 *Windsor Yearbook of Access to Justice* 3; Taylor C. Boas and Jordan Gans-Morse, 'Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan' (2009) 44(2) *Studies in Comparative International Development* 137-161; Paula Baron, 'A Dangerous Cult: Response to 'the Effect of the Market on Legal Education" (2013) 23(1/2) *Legal Education Review* 273; Dieter Plehwe, 'Neoliberal Hegemony' in Simon Springer, Kean Birch and Julie MacLeavy (eds), *The Handbook of Neoliberalism* (Taylor and Francis, 2016) 121. It was also at the heart of Thornton's comprehensive analysis of the effects of reform on Australian law schools; Thornton, *Privatising the Public University: The Case of Law* (n 22). However, it has also been argued that the policies pursued by successive Australian governments are not 'neo-liberalist' but a hybrid based on local conditions; Sally Weller and Phillip O'Neill, 'An argument with neoliberalism: Australia's place in a global imaginary' (2014) 4(2) *Dialogues in Human Geography* 105. Nevertheless, attempting to settle a definition of neoliberalism is outside the scope of this thesis.

[71] Richard Collier, ''Love Law, Love Life': Neoliberalism, Wellbeing and Gender in the Legal Profession—The Case of Law School' (2014) 17(2) *Legal Ethics* 202; Christine Parker, 'The 'Moral Panic' over Psychological Wellbeing in the Legal Profession' (2014) 37 *University of New South Wales Law Review* 1103.

> A key message of neo-liberalism is that all individuals must take personal responsibility for their lives, a message that school leavers have quickly absorbed.[72]

Participants' attributions would indeed appear to suggest this is a message they have received. They would also tend to suggest that evaluation, coupled with or reinforced by a lack of feedback and support by law school, plays a central role in disseminating that message.

However, can law school be held centrally responsible for hidden or implicit outcomes about fitting in and individualism through evaluation? As discussed earlier in this chapter, one might argue that law students are already programmed to pursue external rewards and draw conclusions from their success or failure. Constructivists would argue that every student is a product of their broader social and educational experiences. Participants' attributions suggest that law school is perceived to be partially responsible for either encouraging or reinforcing a focus on evaluation as a measure of personal success, fitting in and the importance of individual effort. Although not solely responsible, individualism would appear to be perceived as an outcome attributable to a hidden curriculum in law school.

IV THE ROLE OF OTHER INFLUENCES

In the same way as other agents influenced participants' perceptions of law teachers and law school, other agents also affected how participants interpreted evaluation. As the discussion above suggests, what participants perceived as personal characteristics formed their perceptions of fitting in and individualism.

[72] Thornton, *Privatising the Public University: The Case of Law* (n 22) 28.

However, participants identified other influences, the most significant of which was the relationship between evaluation and employment.

A *Legal employment*

Attributions concerning evaluation and legal employment tended to relate to two issues; the relevance of evaluation to employment and the connection between grades and the likelihood of employment.

1 *The relevance of evaluation to employment*

The relevance of the explicit curriculum to employment, and perceptions of the importance of practical skills, was discussed in Chapter 4. However, a small number of participants also drew a connection between assessment tasks, evaluation and employment. For some, it was because they could not see the connection between assessment, the learning outcomes on which they might be focused, and the connection to employment.

> I think the difficulty with law school per se is that it focuses on nothing more than your final grades. And there is these sort of learning outcomes. But I have no idea as a law student how those learning outcomes actually translate to what's required in the legal sector.
>
> Male 23, LLB, Canberra Law School

For others, it was the narrow emphasis placed on evaluation to the exclusion of other areas.

> When it was on the test, we practised the whole problem scenarios a million times. I did not feel like it really got to the core of either how to make a difference in criminal law or what is even going on in criminal law.
>
> Female, 41, JD, ANU

How the perception of a disconnection between evaluation tasks and employment arose was often unclear. Not all of the participants who raised the issue made a clear attribution. One or two attributed their perception to what employers wanted in graduates. However, those participants generally did not attribute that perception to a particular experience or conversation with an employer.

Arguably, the perception is indirectly attributable to law school. Perhaps a better explanation of how an evaluation task reflected learning outcomes or legal practice would have resolved participants' concerns. However, it is difficult to draw a firm conclusion since the number of attributions was too small.

2 *Grades and the likelihood of employment*

A more common perception among participants is that academic success would increase the likelihood of employment. However, at no point did any participant attribute that perception to law school. Very few participants were able to attribute the perception. One attributed the perception to a parent who worked in the legal industry.

> From my dad's experience, he says that they will literally get thousands of applicants, and then their first point of culling is 'What was their GPA?'
>
> Female, 20, LLB, ANU

Another attributed the perception to a peer's experience in applying for a role with an international organisation.[73] Others attributed it to their discussion with potential employers at careers fairs.[74]

Participants were more likely to attribute the belief that they needed to be academically successful to a perception that employment in the law was challenging to find. However, when pressed on where that information came from, few could identify a source other than from the direct experience of, for example, seeing groups of applicants preparing for interviews[75] or information they received in interviews. For example, after discussing the importance of academic ranking against peers, one participant explained their experience this way:

> Some of the firms I applied for in Sydney were very blunt. I was asked in an interview, 'What's your backup plan if we don't make you an offer?' And when I looked at them a bit strangely, they elaborated to say that they had 500 applicants for three positions. So, objectively, it is very hard to get into these firms. That was not a big six firm. That was a mid-tier in Sydney. One of the big six firms that I applied to, the ones that told me how many applicants they had, had between 850 and 950 applicants. The big six firm that took the most clerks has 53 going in. So, we're talking 53 out of about 950. So about 5 per cent. And most of the people applying are coming from high performing universities.
>
> Male, 23, LLB, ANU

[73] Male, 23, LLB, ANU.
[74] Female, 22, LLB, Canberra Law School; Female, 55, LLB, Canberra Law School.
[75] Female, 22, LLB, ANU.

Notably, attributions like these appeared to interpret what they saw as the competition for employment as emphasising the importance of achieving high grades, even though none of the attributions to personal experience in interviews included an employer referencing grades as a basis for excluding applicants.

Whether there are too many applicants for too few positions is a vexed question,[76] and is outside the scope of this thesis. However, as discussed earlier in this thesis, surveys with potential employers do not generally emphasise academic success as a basis for selecting employees.[77] Nevertheless, the perception that it is necessary to be more academically successful than one's peers in the 'race' for employment is strong, despite attempts to discourage the belief.[78] From a social learning perspective, messages from law schools appeared to lack the weight or authority to overcome pre-determined perceptions.

However, a very small number of participants had changed their minds about the importance of achieving high grades, most commonly after a discussion with someone in the legal profession. For example, one participant attributed a

[76] For example, Thornton (n 31) notes that Australian data from the early 2000s indicates that the increased number of graduates had not appeared to affect salaries. However, data from the UK indicated that there had been a rapid expansion in the size of the legal profession (46). More recently, CALD has argued that the number of law graduates is about half as many reported in the media and almost three-quarters are employed within 12 months of graduation; Council of Australian Law Deans, 'Data Regarding Law School Graduate Numbers and Outcomes', *Education* (Web Page, November 2017) <https://cald.asn.au/wp-content/uploads/2017/11/Factsheet-Law_Students_in_Australia-1.pdf>. Even more recent data suggests that as many as one half to one quarter of law graduates do not intend to practise as lawyers; see Nick James, "Australian law schools are producing too many law graduates'. Oh, really?', *LinkedIn* (Blog Post, 2 March 2018) <https://www.linkedin.com/pulse/australian-law-schools-producing-too-many-graduates-oh-nickolas-james>; Law School Survey of Student Engagement, 'The Changing Landscape of Legal Education: A 15-Year LSSSE Retrospective', *Annual Results*, Winter 2020) <https://lssse.indiana.edu/annual-results/>.

[77] Elisabeth Peden and Joellen Riley, 'Law Graduates' Skills - A Pilot Study into Employers' Perspectives' (2005) 15 *Legal Education Review* 87. See also ch 2 II C 3.

[78] Council of Australian Law Deans (n 76).

perception that marks were not important to a conversation in which her clerkship supervisor disclosed that she had not performed well at law school.[79] Another found that her concerns about the overemphasis on marks appeared to be shared by lawyers with whom she had spoken:

> Later on in my degree, I've heard from other lawyers, and I realise that I'm not the only one who feels this way that plenty of other people recognise that it desperately needs to be changed.
>
> Female, 22, LLB, Canberra Law School

Attributions like these tended to reinforce the substantial influence of employers on the perceptions of participants compared to law school. Despite attempts by law deans to disseminate information about competition for employment, participants tended to place greater weight on their conversations with members of the profession. There are parallels here with the discussion of the importance of workplace experience in chapter 4. In those instances, some participants had taken the advice of potential employers that work experience was necessary. Here, they were more inclined to take their advice on marks and grades.

B *Other influences*

There was considerable diversity among participants in the range of other agents that had affected their approach to evaluation. That diversity tends to reinforce the extent to which evaluation, and the responses to it, are not a direct binary between efforts and reward. Participants' responses suggested a range of

[79] Female, 22, LLB, ANU.

intervening agents other than law school that either motivated academic performance or encouraged a more relaxed approach.

For example, Thornton has noted the increasing prevalence of working law students.[80] That is, taking into account fees and the cost of living, more students are compelled to take on part-time or even full-time work to support their studies. Data on the number of Australian law students who are also in employment is difficult to identify. The Australian Bureau of Statistics' workforce data indicates that between 45% and 55% of 15–24-year-olds (which would include university-age students) are both in full-time education and employed since at least mid-2000. As of June 2021, 8.5% were in full-time employment, with the balance (91.5%) in part-time employment.[81]

Some employed participants referred to a tactical decision-making process to determine how much work was necessary to succeed at an assessment or an exam. Some participants attributed what one participant referred to as 'efficiency' in their studies by assessing what was necessary to read, research or do.

> I'm all about study efficiency and stuff. I don't really care enough to do everything that they want you to do. I just figure out what's important and what will maximise my engagement in the subject but also my marks in the end, I guess. So if there's a

[80] See for example Thornton, *Privatising the Public University: The Case of Law* (n 22) and the discussion of the effects of time-poor students' demands on assessment design (95).

[81] Australian Bureau of Statistics, 'Labour Force, Australia, Detailed', Australian Bureau of Statistics, 22/07/2021) Table 03. Labour force status for 15-24 year olds by age, educational attendance (full-time) and sex and by state, territory and educational attendance (full-time). If those proportions were applied to enrolments at the two law schools the subject of this research, 959 of the students enrolled in 2019 would be employed (789 at ANU and 170 at Canberra Law School). Eight hundred and seventy-seven would be in part-time employment (721 at ANU and 155 at Canberra Law School).

> reading that I'm not interested in and won't contribute to my getting better marks or whatever, I won't do it.
>
> Female, 20, LLB, ANU

Another had simply found that they did not need to do all the assigned reading to pass.

> I read just the required reading book, and then I passed. And I was like, 'I guess I don't need to do all of this.' And then, I started doing it for other classes, and it worked. And I tended to notice that the extra reading does help, but not enough to warrant reading like a whole chapter or a whole book.
>
> Male, 23, LLB, Canberra Law School

This sample is exceptionally small. Nevertheless, it provides some insight into what Thornton refers to as the 'dumbing down' of law degrees to meet the demands of employed law students. It also suggests that 'dumbing down' is a two-way process. Thornton suggests that law teachers have reduced the demands of law courses to make them easier for employed students to complete.[82] Students themselves might be dumbing down the content even further to fit around their other commitments. This presents something of a warning for law teachers in terms of the design of law courses. Reduced demands by law teachers do not represent the floor of the substantive content. For at least these participants, there is a process of interrogating the material to identify a minimum acceptable level.

[82] Thornton, *Privatising the Public University: The Case of Law* (n 22).

For some older female participants, family provided an underpinning motivation to perform well in evaluation. These participants still attributed academic success to the likelihood of employment, but it was not the sole or even dominant cause. Some female participants attributed their perception of the need to succeed and find employment to aspects of their domestic lives. Generally, younger female students with children attributed a sense of support and motivation to recover from disappointing results to their families. One referred to the effect she perceived it would have on her young daughter to see her mother succeed.[83] Generally, female participants who referred to family as an agent also often referred to underpinning social justice motivations for enrolling in law school in the first instance.[84] All perceived that rather than a barrier to academic success, family had been integral to that success.

However, participants still had an underlying perception that family obligations also produced a sense of guilt or needed to be concealed from law school. For example, one participant attributed a self-imposed pressure to perform well in evaluation to what she perceived were the sacrifices her family had made.

> It's been a huge impost on my family, to my husband, for me to go back and do this. He has sacrificed many, most, nights and weekends to my law degree in the interim. And for a period of time, I took time off work which is a financial burden. *And so I felt like I really needed to perform really well in order to come out and get a job.*
>
> Female, 35, JD, ANU

[83] Female, 22, LLB, Canberra Law School.
[84] This is consistent with Thornton's findings in interviews with female law students; Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 34) 96.

This participant did not attribute her perception to the words or actions of her spouse or any other agent. On the other hand, some attributed it directly to law school. For example, another discussed how she had not sought extensions on assignments if her young child was ill because:

> [I]f I want an extension for something you look at what the criteria are. Having children isn't a reason to get an extension or something. I've had sick kids, or my kids are just sitting around with snotty noses, or my 2-year old's too hyped up or whatever it may be. It isn't relevant. I didn't get my assignment done in time because my child had her sporting thing or whatever. It's not relevant. It's completely irrelevant. This is what you need to do. These are your deadlines. It's what you need to meet. I think I have considered it irrelevant because it doesn't apply to anything.
>
> Female, 30, LLB, Canberra Law School

Female law students at both ANU and Canberra Law School now outnumber men.[85] The profession also celebrates equal participation in the legal profession.[86] Nevertheless, the constructs that Thornton argues kept women from law school — domestic responsibilities, child-rearing[87] — would still appear to present sources of guilt to female students, especially in the context of evaluation.

V SUMMARY

Even though Jackson rejects a behaviouralist model, much of his discussion is predicated on the idea that students inherently value the reward from academic

[85] See ch 1.
[86] See for example 'Gender Statistics', *Law Society of New South Wales* (Web Page) <https://www.lawsociety.com.au/advocacy-and-resources/advancement-of-women/gender-statistics>.
[87] Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 34).

success. Coding and analysis of interviews with participants suggest that reward plays a role in producing different outcomes, some within the control of law school as a distinct or concurrent agent. However, the relationship between evaluation and outcomes is more complex. Similar to constructivist models of learning, other influences intervene in the binary model of stimulus and reward.

Coding interviews for outcomes attributed to evaluation suggests that it plays a less significant role than the curriculum but a more significant role than law teachers. The total and average numbers of attributions to evaluation as a distinct or concurrent agent for all participants were consistently smaller than other agents.

As noted in the introduction to this chapter, one explanation for the smaller number of attributions to evaluation is the methodology adopted. As discussed earlier, to maintain the spontaneity of responses participants were not asked about evaluation directly. However, it should also be noted that they were also not asked about law teachers directly either, which tends to affirm a suggestion that law teachers play a smaller role in participants' perceptions than evaluation.

One possible explanation revealed in the analysis of participants' interviews, was the perception that evaluation was a distinct or standalone agent. Participants' interviews tended to suggest that they did not perceive a clear connection between evaluation and the substance of their classroom experiences. That is, evaluation appeared to be almost entirely divorced from what they had learned or were learning. If this is correct, then it may explain why evaluation appears less frequently in attributions. Participants would spend proportionally more time in teaching activities than on evaluation. It would be

reasonable to expect that participants would be more likely to make more attributions to law school or the curriculum simply as a result of proportionate exposure. Alternatively, participants may be so accustomed to the evaluation process embedded within secondary education that they are consciously unaware of evaluation's influence or outcomes. As a result, one might expect a smaller number of explicit attributions to evaluation.

Unlike other agents to whom participants attributed outcomes for their peers, participants were more likely to perceive the outcomes as having a direct personal impact. When coding for the participant as the target was considered in relation to the roles of law teachers and the explicit curriculum, there was a notable decline in the number and averages of attributions. The decline suggested that participants were more likely to make observations about the outcomes for peers. When coding for the participant as the target was considered in relation to evaluation, the decline was much smaller. Arguably, the perception of evaluation as having a more significant number of outcomes directly on participants correlates with themes of individualism that appeared through analysis of interviews.

Analysis of participants' interviews indicates that short-term and long-term outcomes are perceived to be associated with evaluation. Some participants discussed short-term tactical decisions about adapting the tone or substance of assignments to what they perceived was the political or social perspective of markers. For some of those participants, the outcome was attributable to law school. For one participant, it was to avoid what they perceived as victimisation for advancing unpopular opinions. For others, it was a *post facto* justification

that, by doing so, they had improved their marks. Nevertheless, participants appeared to suggest that tactical decision-making was only applicable to evaluation and had no application after graduation. It is difficult to conclude that it represents part of a hidden or implicit curriculum insofar as it was not perceived to change behaviour in the long-term in the same way as other explicit or implicit learning outcomes based solely on participants' attributions.

Despite evaluation appearing to have a less significant influence than other agents, the long-term outcomes attributable to evaluation appeared to be much more keenly felt. The attribution of those outcomes appeared to depend on whether participants had performed well in evaluation or performed poorly. Participants who reported performing well did not directly attribute their performance to law school or law teachers. Instead, they perceived that they already possessed some innate ability or value that suited them to law school or ensured their success; that is, they 'fit in'. Success in evaluation appeared to be affirmatory rather than entirely unexpected or even attributable to teaching. Personal attributes also appeared to be perceived as an intervening factor in a binary stimulus-reward model; reward would not be attainable but for the personal attribute.

Law school was not entirely divorced from the process. Evaluation played a role in reinforcing the perception of fitting in. Consequently, one of the hidden outcomes from evaluation, at least for participants who performed well, was that success in evaluation affirmed participants' decisions to pursue law.

Conversely, some participants attributed doubt about their abilities or their decision to pursue law to poor performance in evaluation. The outcome did not

apply to learned skills but to a deficit of an attribute participants perceived law school expected. A personal deficit was more likely to be identified by female participants than males, potentially affirming women's alienation as a result of some inherent aspect of law school. There was often a much clearer attribution to evaluation as revealing a personal deficit, rather than the participant perceiving they were simply not suited to law school. An even more explicit attribution to evaluation was made by others who perceived that their poor performance was attributable to the absence of feedback.

Although participants here tended to draw a more explicit link between evaluation and outcome, neither personal deficit nor the absence of feedback fits into a behaviourist model. For those who perceived a personal deficit, there was a perception that they simply could not reproduce the expected behaviour in order to achieve the reward. Those who perceived that their lack of success was attributable to lack of feedback appeared to expect some additional support to reproduce the expected behaviour.

When the attributions of successful and unsuccessful participants were taken together, it began to reveal a consistent theme that success in evaluation, or overcoming a lack of success, was the responsibility of individuals, not law school. Consistent with the construction of evaluation as separate from teaching, there generally was no perception that law school or law teachers could help overcome barriers to success. Even for those participants who perceived they received no feedback, there appeared to be an acceptance of the *status quo*.

Whether individualism is a hidden outcome attributable to law school, or evaluation more specifically, is a complex question. As Thornton suggests, it is

a message that school students receive.[88] Perceptions that success or failure is down to individual effort may simply be giving voice to a pre-existing belief. However, when considering the outcomes that participants attribute specifically to law school evaluation, it is arguable that evaluation is perceived to sustain or even reinforce the focus on individual effort.

Responses to evaluation were not driven entirely by evaluation itself. Consistent with constructivist models of learning, influences external to evaluation also played a role for many participants. The most significant of those influences was the likelihood of employment. Many participants drew a direct relationship between performing well in evaluation and a greater likelihood of gaining employment after graduation. However, very few attributed that perception to employers themselves. Most importantly, none attributed the perception to law school. To the extent that law school is accused of promoting competition because of its connection to employment, that link was not apparent in participants' attributions.

One notable additional influence that appeared to have greater significance for women was the role of family. That agent could have positive or negative outcomes. It could provide support and encouragement to perform well in evaluation or to overcome poor results. For others, it was more closely associated with a sense of guilt. This is a very small sample, but law school may also play a role in encouraging women to conceal or downplay their family commitments. For example, one participant pointed specifically to policies for extension and their perception that family commitments were not 'relevant' to

[88] Thornton, *Privatising the Public University: The Case of Law* (n 34).

extension requests. Female participants' attributions suggest that, despite claims to success in encouraging greater participation by women in law school and the legal profession, existing social constructs of women as homemakers and carers are still keenly felt and affect their responses to evaluation in law school.

CHAPTER 6 - THE ROLE OF PEERS

I INTRODUCTION

Jackson's model of evaluation addresses formal or informal evaluation by teachers or institutions against learning outcomes. However, it also encompasses students' informal assessment, weighing up or judging of one another.[1] Jackson's model is unique in that regard. Evaluation and assessment are generally perceived as being entirely within the control of teachers and schools. Jackson argues that students judgment of one another has an equally significant role in hidden learning outcomes.[2]

Jackson does not define assessment by students of one another. However, what Jackson incorporates in his discussion is akin to informal judgment or a sizing up. It also extends to competition with other students insofar as students evaluate their performance against peers. For Jackson, the judgment of peers prompts different responses in students, similar to the concept of peer influence or peer pressure.

Although expressed simply, Jackson's model encompasses two overlapping elements of sociological and psychological studies of peer pressure. On the one hand is students' response to actions or statements of others. That is, the willingness of a student to respond or bend to the actions of their peers.[3] Research in psychology suggests the extent to which a student conforms with peers might depend on a complex array of factors, including how they and others define the 'íngroup'; their perception of the ingroup's authority; whether the student identifies with the ingroup; and where on a

[1] Phillip W Jackson, *Life in Classrooms* (Holt, Reinhart and Winston, 1968) 24.
[2] Ibid.
[3] See for example Margo Gardner and Laurence Steinberg, 'Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study' (2005) 41 *Developmental Psychology* 625.

spectrum of conservative to rebellious behaviour the ingroup is perceived to sit.[4] On the other hand are students' roles as directors or arbiters of behaviour, that is, the extent to which they can influence the behaviour of others. Social and psychological research again suggests a complex array of factors that affect why individuals choose to include or exclude others, including improving cohesiveness within a group; a sense of belonging; or the rejection of an individual who is perceived as a threat to group harmony.[5] Jackson's construction of the relationships between students does not examine these psychological influences or motivators in depth. Consistent with his phenomenological method, Jackson focuses on how, rather than why, students learn to deal with criticism through their relationships with peers and how it affects friendships and rivalries in the classroom.[6]

From a learning theory perspective, Jackson's model mirrors constructivist models of learning. For example, Vygotsky argued that one learns by observing the modelled behaviour of others.[7] Through rehearsing that behaviour, one can communicate concepts and ideas in a recognised way, understood by others in the same social group. His particular focus was on language but is equally applicable to other behaviours.[8]

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[4] Michael Hogg, John Turner and Barbara Davidson, 'Polarized Norms and Social Frames of Reference: A Test of the Self-Categorization Theory of Group Polarization' (1990) 11 *Basic and Applied Social Psychology* 77; Julian Oldmeadow et al, 'Self-Categorization, Status, and Social Influence' (2003) 66 *Social Psychology Quarterly* 138; Ulrich Wagner, Robert Wicklund and Sigrid Shaigan, 'Open Devaluation and Rejection of a Fellow Student: The Impact of Threat To a Self-Definition' (1990) 11 *Basic & Applied Social Psychology* 61.

[5] Kristin Sommer et al, 'When Silence Speaks Louder Than Words: Explorations Into the Intrapsychic and Interpersonal Consequences of Social Ostracism' (2001) 23 *Basic and Applied Social Psychology* 225; Lisa Zadro, Kipling Williams and Rick Richardson, 'Riding the 'O' Train: Comparing the Effects of Ostracism and Verbal Dispute on Targets and Sources' (2005) 8 *Group Processes & Intergroup Relations* 125. See especially the comprehensive review of the history and study of ostracism in Kipling Williams, *Ostracism: The Power of Silence* (Guilford Publications, 2002) 8-15.

[6] Jackson (n 1).

[7] Lev Vygotsky, *Mind in Society*, tr Alexander Luria (Harvard University Press, 1978).

[8] Lev Vygotsky, *Educational Psychology*, tr Robert Silverman (CRC Press, 1997); Rene van der Veer, 'Some Major Themes in Vygotsky's Theoretical Work: An Introduction' in Robert Reiber and Geoffrey Woolock (eds), *The collected works of L. S. Vygotsky: Vol. 3. Problems of the theory and history of psychology* (Plenum Press, 1997) 1.

For example, by watching the actions or conduct of peers regarding a person, thing or attribute, a student learns what behaviours, attitudes and qualities peers value. Consistent with psychological models of peer influence, they may adopt peers' values or reject them depending on the authority they perceive peers hold. Consequently, students learn to judge others according to the normative standards applied by others.

Social learning models attempt to explain why some modelled behaviours are adopted and others are rejected, especially in peer groups. Bandura, in particular, looked at what promoted anti-social or rebellious behaviour in youth.[9] According to Bandura, the model's authority is the influential factor in whether a student adopts a behaviour or attribute. For example; Does the student know the model (e.g., a law teacher), have a relationship with them or perceive them as someone of authority? Are there other models on which the student places greater value (e.g. peers)?[10]

This chapter adopts Jackson's phenomenological perspective on peer judgment to identify causal links between the actions or statements of peers and the resultant perceptions of participants. It does not attempt to identify deeper psychological elements that might make some participants more suggestible than others. However, it draws on the two schools of learning theory that underpin the thesis as a whole to assess participants' attributions of how they might arrive at the perceptions they have of peers and why they respond in the manner they describe.

Arguably, peer judgment fits awkwardly into a discussion of a hidden curriculum as defined in this thesis. This thesis adopted the analytical approach of assessing which

[9] Albert Bandura, Joan Grusec and Frances Menlove, 'Observational Learning as a Function of Symbolization and Incentive Set' (1966) 37(3) *Child Development* 499; Albert Bandura and Carol Kupers, 'Transmission of patterns of self-reinforcement through modeling' (1964) 69(1) *The Journal of Abnormal and Social Psychology* 1.
[10] Albert Bandura, *Social Learning Theory* (General Learning Press, 1977) 24.

hidden outcomes commonly associated with legal education are within law teachers' or law schools' control. However, judgment by and of peers is relevant for several reasons.

As we have already seen in other chapters, some participants are inclined to attribute perceptions to interactions with peers. For example, in chapter 4, many participants attributed the perception that work experience was almost a pre-requisite for employment[11] to peers. Suppose peers do influence each other through modelling and judgment. In that case, one can gain additional insight into participants' perceptions and how they have created them by examining how they perceive peers have judged them or how they have judged their peers.

Secondly, Jackson argues that teachers' evaluations might provide a model for students. For example, whether a student is 'smart or dumb, teacher's pet or a regular guy'[12] in their peers' assessment may depend on the teacher's public evaluation of a student's conduct.[13] In the context of this thesis, an examination of the attributions associated with peers might provide additional information on the influential role (or its absence) of law teachers.

Thirdly, Jackson argues that students may find themselves trying to 'win the approval of two audiences [the teacher and peers]. The problem is how to become a good student while remaining a good guy (sic).'[14] Consequently, choosing sides between audiences who potentially have opposing views mitigates or negates the influence of one, the other or perhaps even both. In the context of this thesis, students' judgment of

[11] See ch 4 IV B 3.
[12] Jackson (n 1).
[13] Ibid.
[14] Ibid 25-6.

one another might serve to reinforce or undermine explicit outcomes. For example, TLO 2 encompasses 'service to the community', which the commentary suggests incorporates a commitment to *pro bono* work.[15] However, if a student were to find themselves aligned with peers who denigrated the concept of not-for-profit work[16] and that student subsequently expressed an interest in the *pro bono* or community sector, they would likely attract the approbation of their peers. Depending on the authority they grant their peers, a student might choose to separate themselves from their peers or abandon the objective of pursuing community practice.

Fourthly, the judgment *of* peers by participants provides a unique perspective on some of the influences and values that may operate in legal education. Examining the observations that participants make about their peers offers further evidence of those values. It allows some examination of the source of the values a participant has applied. Looking at what they have applied in their judgment of others might also reveal which beliefs or values a participant has drawn from their experience at law school. For example, if a participant were to perceive their peers as competitive, a closer examination of that perception might reveal that the participant perceives competition as a value encouraged by the law school environment and, consequently, a hidden or implicit outcome.

Lastly, peer judgment and its effects on identity formation might affect one's perceptions of fitting in both in a law school classroom or the wider profession. For example, if a participant perceived they had been assessed and ostracised by peers for

[15] Sally Kift, Mark Israel and Rachel Field, *Learning and Teaching Academic Standards Project - Bachelor of Laws - Learning and Teaching Academic Standards Statement* (Department of Education, Employment and Workplace Relations, 2010) 16.

[16] See for example the discussion of students perceived to favour corporate practice and their views on public-type practice in John Bliss, 'Divided Selves: Professional Role Distancing Among Law Students and New Lawyers in a Period of Market Crisis' (2017) 42(3) *Law & Social Inquiry* 855.

not sharing an attitude or value, they may consequently perceive that they do not fit in as a law student or perhaps even a lawyer. Alternatively, finding a group of peers who share values might encourage a greater sense of belonging.

Consequently, this chapter explicitly focuses on how law students might interpret their interactions with peers and how it might affect their law school experience and perceptions of their professional careers.

A *Law school and peers*

Despite the potentially influential nature of relationships with peers, research with law students about peer judgment in the way Jackson engages with it is exceptionally difficult to identify. Competition and the comparison of self against others are assumed to be endemic in law school in American research. However, it has generally been linked to formal evaluation and mark standardisation.[17] It is also assumed.[18] There is very little empirical research to suggest that it is true.

Competition for grades is generally perceived in American literature as a 'bad thing' and likely to promote anti-social behaviours.[19] Again, there is very little empirical research on Australian students. Where it is available, it tends to suggest that students perceive competition for grades has both negative and positive influences.[20]

Where more detailed empirical research is available, it tends to focus on women's experiences in law school classrooms. It is linked to a broader discussion of the

[17] Suzanne Segerstrom, 'Perceptions of Stress and Control in the First Semester of Law School' (1996) 32 *Willamette Law Review* 593; Phyllis Beck and David Burns, 'Anxiety and Depression in Law Students: Cognitive Intervention' (1979) 30 *Journal of Legal Education* 270.
[18] See ch 2 II C 3 (iii).
[19] Segerstrom (n 17); Beck and Burns (n 17).
[20] See for example Law School Reform, *Breaking the Frozen Sea: The case for reforming legal education at the Australian National University* (ANU Law Students Society, 2010) 53.

alienating effect of the law and law school. For example, in Weiss and Melling's account of establishing a group for first-year female law students, several participants discuss their desire to join the group as a means of overcoming loneliness, disconnection and disaffection at law school.[21] Stewart's interviews with women at Sydney University Law School suggested a similar sense of disconnection among women due to law school's environment.[22]

A further theme in American research, albeit very small, is the development of a sense of 'tribalism' within law school cohorts. For example, Bliss interviewed students at 'a top-tier law school with a liberal and public-interest oriented reputation'.[23] He found that personal values and post-graduation career intentions filtered students into 'corporate' and 'public interest law' groups, with both groups judging the values and motivations of the other.[24] Bliss suggested that:

> peer judgment may weigh on students' job-path decisions, but they may also influence how drifting respondents experience and describe their views of professional identity.[25]

However, his research had no longitudinal element to identify whether the conflict between peer groups or the peer group's values with which students identified practically affected employment decisions.

Some American and Australian researchers have also highlighted the interrelationship between class, identity and peer acceptance. For example, in his interviews with Harvard law students, Granfield found that students who had come from working-class

[21] Catherine Weiss and Louise Melling, 'The Legal Education of Twenty Women' (1987) 40 *Stanford Law Review* 1299, 1312.
[22] Miranda Stewart, 'Conflict and Connection at Sydney University Law School: Twelve Women Speak of Our Legal Education Feminist Symposium' (1991) 18 *Melbourne University Law Review* 828, 838.
[23] Bliss (n 16).
[24] Ibid 884.
[25] Ibid.

backgrounds tended to feel excluded and out of place in Harvard's privileged setting.[26] The students he interviewed tended to adopt one of two paths in response. Some chose to maintain their difference and consciously demonstrate that they were not the same as their peers, that is, to ignore or shun peer judgment. Others consciously adopted the 'values, dispositions and manners' associated with Harvard as a means of fitting in with informal peer networks.[27] That meant mimicking the dress and behaviours of their peers.[28] Conversely, in her interviews with older Australian female students, Thornton found that those who did not come from privileged backgrounds were less likely to adopt peers' values and manners. They were, instead, likely to challenge legal cultural norms, despite the risk of being assessed as 'weird' by peers.[29]

In addition to evaluations by peers about groups, there is also some evidence of groups assessing and ostracising individual students. For example, some research with American law students[30] refers to the hated 'gunner'—enthusiastic, over-bearing or aggressively competitive students. American law student websites share 'gunner stories' or host posts asking whether the poster might be a gunner.[31] There is even a post by a law teacher deriding certain types of gunners.[32] Inherent in these discussions is that a gunner is to be excluded, avoided and mocked because they do not share some undefined and implicit laid-back, relaxed or possibly passive approach.[33]

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[26] Robert Granfield, *Making Elite Lawyers* (Routledge, 1992) ch 7.
[27] Ibid 114.
[28] Ibid 116.
[29] Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996) 96.
[30] Bliss (n 16).
[31] See 'Reddit', *r/LawSchool* (Web Forum, 2020) <https://www.reddit.com/r/LawSchool/>.
[32] LAWPROFBLAWG, 'What's a gunner?', *Above the Law* (Blog, 4 December 2018) <https://abovethelaw.com/2018/12/whats-a-gunner/>. Lawprofblawg is a pseudonym used by a law teacher at 'top 100 law school' under which the user also posts to social media.
[33] For example, Lawprofblawg discusses the 'annoying AF gunner' who 'sit[s] in the front of the class, hand up all the time, asking questions and throwing hypotheticals at the professor'; LAWPROFBLAWG (n 32). An Australian social media discussion defines it as 'guys who talk incessantly about which clerkships they've applied for, care exclusively about their marks, sit at the

Despite the incredibly stressful and alienating effect that one might assume being labelled a gunner would have on a student, there would appear to be no empirical research on what could be termed ‘gunners’ experiences’. Conversely, there appears to be an assumption that gunners are bound to be successful at law school and in their post-graduation careers, despite the bullying to which they may have been subjected.[34] According to social media, there are similar experiences in Australian law schools, but there is no consistent use of ‘gunner’.[35]

Arguably, the broader absence of empirical research on the relationship between law students and their peers, especially in Australia, reflects law school's central and dominant role in discussions of both explicit and hidden learning outcomes. It also reflects the general assumption of passivity in law student cohorts, despite some research suggesting they are active stakeholders in legal education.[36]

This thesis has also begun to reveal that relationships with peers are influential in producing outcomes. For example, in chapter 4, participants attributed the pressure to find clerkships while still at law school principally to conversations with peers. In chapter 5, in participants' perception, competition for employment also appeared to be driven in part by observing peers go through the application process. Neither is directly related to the assessment of the qualities or attributes of peers. Nevertheless, they

front of lectures, and argue/“discuss” with the lecturer all the way through lectures’; 'The ongoing Jacob Reichman saga - what constitutes "engaging in legal practice"?', *Reddit r/auslaw* (Blog, 14 June 2017) <https://www.reddit.com/r/auslaw/comments/6h3yx8/the_ongoing_jacob_reichman_saga_what_constitutes/>.

[34] For example, see one student’s observations on the overlap between gunners and those destined to be successful in corporate law; Bliss (n 16) 884.

[35] See the posts associated with the discussion of a clerk convicted of engaging in legal practice in Queensland and posters’ evaluation of his motivation; 'The ongoing Jacob Reichman saga - what constitutes "engaging in legal practice"?' (n 33). The posts suggest that gunners in Australia are more likely to be labelled with more derogatory terms.

[36] See for example Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012).

indicate how influential peers may be in affecting participants' experiences of law school.

B *Purpose*

The intention of this chapter is twofold. First, by identifying instances in which participants perceive they are judged by peers and their perceptions of the criteria used, one can examine in further detail some of the results of earlier chapters, including the role of law teachers and the causes of competition for employment. In doing so, one can further refine the extent to which some of the outcomes discussed earlier in this thesis are, in fact, the result of things within or outside law school's control. Secondly, there is a substantial omission in commentary and research on Australian legal education concerning the role or influence of law students on one another. The omission is surprising given the amount of time law students spend with their peers in and out of classrooms and the significant outcomes that may arguably flow from those relationships in terms of competition, bullying and beliefs about fitting in.

C *Method*

This chapter applies the LACS to identify attributions to judgment by peers. It focuses on two categories of attributions by participants.

- Attributions in which 'peer-law' is coded as a discrete or concurrent *agent* and the participant as the *target*. This category encompasses perceived judgment *by peers* of the participant.
- Attributions in which 'peer-law' is coded as the *target* and the participant as the *agent*. This category encompasses participants' judgment *of peers*.

‘Peer-law’ is defined in the coding to mean another student or groups of students at the participants’ law school. It also encompasses general statements made by participants about law students (e.g., ‘law students are like that’) without being associated with a specific peer, group of peers or law school.

D *Results*

Coding suggests that peers at law school are perceived to play a role in outcomes equivalent to that of law teachers but substantially less significant than the explicit curriculum. The significance of the role of peers is broadly the same regardless of gender, university or program. However, the coding suggests that younger participants are more inclined to attribute outcomes to perceptions of being judged by peers. This result is consistent with research into peer influence that suggests sensitivity to peer pressure increases to the age of 18 and thereafter plateaus or declines.[37]

When participants’ attributions were considered in detail, there was no strong evidence of female participants perceiving that they were being judged or ostracised based on their gender. The chapter notes that result may be unsurprising in an environment in which women constitute a majority of law students and overt sexism or misogyny is unlikely to be as readily tolerated as it may have been in the past. Perceptions of being judged or alienated were more complex and appeared to be mediated by other factors, including the *support* of peers. However, perceptions of being excluded were aggravated by other criteria that participants perceived the legal profession, rather than law school or peers, adopted to exclude them.

[37] Two American psychologists undertook a metanalysis of various psychological experiments encompassing more than 3,600 individuals. The collected data suggests that peer influence increases linearly between 14 and 18 years; Laurence Steinberg and Kathryn Monahan, 'Age differences in resistance to peer influence' (2007) 43(6) *Developmental Psychology* 1531.

Although American literature suggests that competition is endemic to law school, participants' attributions to their relationships with peers suggest that it is much more complex. While participants tended to affirm that competition with, and evaluation against, peers was a feature of their experience, they did not perceive that it was attributable to law school. For some it was a sense of general competition. For others (consistent with the outcomes in chapter 5) it was about competition for employment. Notably, for ANU participants, it may also be attributable to the residence in which a student lives. Ultimately, participants' attributions tend to align with those in chapter 5 and affirm that competition *is* endemic. However, it is either not a hidden outcome of law school (according to participants) or is so deeply entrenched participants are not explicitly aware of its role.

II CODING FOR PEERS

As discussed above, this chapter deals with perceived judgment *by* peers of participants and the outcomes and judgment *by* participants of peers and the resultant perceptions of them. The former encompasses those instances in which participants have attributed an outcome to what they perceive as peers' judgment or evaluation. The latter encompasses those instances that suggest the participant has offered an evaluation of peers. The coding for each is discussed below.

A *Peers as agents*

There were 101 attributions in which peers were coded as a distinct or concurrent agent and the participant as the target. The number of attributions represents less than 5% of all attributions (n=2082) and 6% of all attributions in which the participant was coded as the target (n=1661). If one accepts that the number of attributions provides a broad measure of the significance of an agent in producing outcomes, law school has a much

greater significance for participants than peers. For example, attributions to law school (including evaluation) represented 30% (502) of all attributions in which the participant was coded as the target. However, as noted previously in this thesis, participants may attribute outcomes to law school based on collective experiences. Some attributions to law school may include experiences with peers.

Coding suggests that the role of peers in producing outcomes was perceived to be similar to that of law teachers. Attributions to law teachers were a distinct or concurrent agent in 7% (123) of attributions in which the participant was coded as the target compared to 6% for peers. This result reinforces the disappointing dearth of research on relationships with peers in Australian legal education research compared to the discussion of the role of law teachers, even though they have a broadly similar level of significance in participants' perceptions.

Arguably, the influential, although small, role of peers is unsurprising. Participants spend more time with peers across successive courses and years than with law teachers with whom they may have little or no personal contact. For example, a law student may only see a law teacher for between one and three hours each week at the front of a lecture theatre (depending on how a course is structured). However, while they sit in the theatre, they are surrounded by peers with whom they are more likely to share conversations and commentary. Perhaps the surprising aspect is that the role of peers is not perceived to be more influential than the coding suggests.

1 *Attributions by participants' characteristics*

Again, and as discussed in chapter 2, some care needs to be taken in using the total number of attributions to an agent to draw conclusions given the over-representation

of some cohorts in the data. However, we can draw some tentative comparisons by looking at the average number of attributions coded to peers within particular groups.

On average, the number of attributions in which peers were coded as a distinct or concurrent agent for all participants was one and a half times per interview (1.5 times per interview). On average, law school (excluding evaluation) was coded as an agent and the participant as the target 10.6 times per interview. By comparison, law school was coded as a distinct or concurrent agent far more frequently,[38] suggesting the explicit curriculum plays a far more significant role in producing outcomes.

A law teacher was coded as an agent and the participant as the target 1.8 times per interview on average. When the average number of instances in which peers were coded as an agent (1.5) is compared to coding for law teachers, it again reinforces the comparative significance of law teachers and peers.

When interviews were sorted according to participants' characteristics, the average number of attributions to peers was broadly similar across genders, programs and law schools. However, one significant difference was the average number of attributions among participants in the 18-21 age group. On average, peers were coded almost three times per interview (2.9) for participants aged 18-21, in which they were also coded as the target compared to the next highest average of 1.9 times per interview.[39]

There is no clear explanation in participants' attributions in this group for the higher average number of attributions to peers. One possible explanation may be that participants' perception of judgment by peers is associated with age and sensitivity to peer influence. Psychological models suggest that peer influence increases through

[38] On average almost 23 times per interview, regardless of the target; see ch 4 II A.
[39] Canberra Law School participants.

early adolescence into early adulthood.[40] There are competing theories for the increase in peer influence or greater sensitivity to it. One posits it is the effect of social settings on establishing normative behaviour. The other is that it is driven by an individual's desire to fit in with peers.[41] Peer influence has generally been found to either decline or plateau after the age of 18.[42] Consequently, it may explain why the coding suggests younger participants attribute more outcomes to peers than other participants. If sensitivity to peer judgment declines after 18, it would explain the decline in the average numbers of attributions to peers for other age groups.

B *Peers as targets*

Compared to perceptions of being judged by peers, there were substantially fewer attributions that might suggest participants judged their peers. There were 51 attributions in which the participant was coded as the agent and peers as the target, representing less than three per cent (2.4%) of all coded attributions. When sorted according to characteristics, the average number of attributions per interview was less than one across most cohorts regardless of gender, age, university or program.

The coding suggests that participants were unlikely to evaluate their peers in interviews. An alternative explanation is that they were more reluctant to do so. Insofar as evaluation suggests an element of judgment and the appearance of being judgmental, many participants may have been reluctant to cast themselves in that light. As noted elsewhere in this thesis, one of the weaknesses in face-to-face empirical research is that interviewees may change their behaviours based on what they perceive

[40] Steinberg and Monahan (n 37).
[41] B. Bradford Brown, Donna Clasen and Sue Eicher, 'Perceptions of peer pressure, peer conformity dispositions, and self-reported behavior among adolescents' (1986) 22 *Developmental Psychology* 521.
[42] Ibid.

as acceptable or expected behaviour in that context. For example, in psychological research concerning decisions that might be considered selfish or self-motivated, interviewees tended to adopt a more morally correct stance in response to questions than might have been ordinarily expected.[43]

However, one difference between cohorts was that in interviews with participants in the age group 26-29 there were, on average, 1.6 attributions in which the participant was coded as an agent and peers as the target per interview, compared to less than one for most other cohorts. There is no clear explanation for why this cohort appeared to be more inclined to judge their peers. Arguably, age may again be a factor. Although age does not correlate directly with the number of years participants spent at law school,[44] participants in this age group were more likely to have spent longer at law school than their younger peers. The extended experience of being at law school might have provided this group of participants with more experiences in which they had the opportunity to observe their peers and form a perception of them. However, as noted above, that is not immediately apparent from their interviews.

III PARTICIPANTS' ATTRIBUTIONS

As discussed above, attributions concerning peer judgment can provide some insight into hidden outcomes of legal education insofar as those attributions suggest that the criteria used to make those judgments are drawn from law school or law teachers. At the same time, there will be attributions that disclose a set of criteria that are entirely beyond law school's control and would not form part of a hidden curriculum.

[43] Se ch 1 IV F 5 and Ryan Carlson et al, 'Motivated misremembering of selfish decisions' (2020) 11(1) *Nature Communications* 2100.
[44] See ch 4 II A 2.

There were very few attributions in which participants suggested that, although perceiving peers were judging them, the things against which they were being judged were within law school's control. As a general observation, participants' interviews tended to suggest that, as far as relationships between law students were concerned, law teachers or law school had very little influence other than as a common site or location within which those relationships were formed. As discussed in chapter 3, some participants perceived unhealthy aspects of relationships between peers were often disguised or hidden from law teachers. One participant went so far as to suggest that law teachers 'see happy faces in front of them in classes and people getting along. But outside, it's not the same culture.'[45] According to participants, neither law teachers nor law school played any role or were, at best, a backdrop to temporary student relationships passing through law school.

However, insofar as law school is a common site for all participants in their attributions, arguably it implicitly affects perceptions and relationships. By virtue of the location in which evaluation occurs, it is likely to affect that process. As discussed further below, competition based on marks and the size of law school cohorts lends some credence to that argument. If law school did not assess or law school introduced small class sizes, it might reduce competition. By maintaining assessment and large class sizes, it promotes it.

As is also discussed below, participants were inclined to attribute outcomes to characteristics that they perceived they and their peers *already* possessed. However, in doing so, they highlighted characteristics that law school or legal education would appear to implicitly value insofar as they guaranteed success at law school.

[45] Male, 21, LLB, Canberra Law School.

Alternatively, they were more inclined to see the cause as being more closely related to the competition for employment both during and after law school.

A *Gender and age*

Attributions by female participants suggested a more complex picture of alienation or ostracism by peers based on gender than is perhaps suggested in some American and Australian accounts of women's experiences in law school.[46] No participant attributed a sense of alienation to being judged by peers based on their gender or age. On the one hand, this may appear surprising given the more detailed body of literature on women in law school. However, on the other hand, women constitute a majority of law students in the law schools the subject of this research. Arguably, outcomes of alienation or exclusion are inherently likely to be more complex given that overt exclusion based on gender is likely to affect a large part of the student cohort and less likely to be tolerated. Therefore, alienation or exclusion is more likely to be subtle or insidious and inherently more complex to identify.

However, age and gender were common themes in participants' perceptions of 'the perfect law student'. Participants' construction of the perfect or above average student hinted at a sense of difference, distinction, or deficit. They also suggested an embedded disadvantage that weighed against some law students and effectively prevented them from being professionally successful.

1 *Alienation*

Female participants did not perceive peers judged and alienated them based on their gender. However, that does not suggest it does not occur. There are some possible

[46] See Weiss and Melling (n 21) and Stewart (n 22).

explanations for absence of the perception in interviews. For example, the interviewer was an older male. Younger female participants may have been uncomfortable with making those sorts of attributions to the interviewer. At the same time, and as discussed in chapter 5, female participants often referred to the support they had received from other women, friends and family when faced with poor assessment results or other barriers. If, as Weiss and Melling found,[47] the concern is with feelings of isolation, then female participants would appear to have been able to draw on a range of sources for support and connection.

Some older female participants referred to their perception of being judged by younger peers but attributed no outcome to it. That is, while there was a perception of being judged, these participants were unconcerned. For one participant, the absence of concern with the judgment of peers appeared to be associated with the participant's own assessment of their peers' lack of life experiences.

> I think it's partly where they're at in terms of their life. For most of them the only contract that they've ever been involved in, is a bus ticket. So, you know, putting it into some form of context they just don't have.
>
> Female, 47, JD, Canberra Law School

Attributions by older female students tended to affirm the findings of Thornton in her interviews with older female students.[48] In Thornton's research, older women were more inclined to ignore the judgment of younger peers in particular.

2 *Alienation, study groups and JD students*

[47] Weiss and Melling (n 21).
[48] Thornton, *Dissonance and Distrust: Women in the Legal Profession* (n 29) 97.

Female participants in the JD program appeared to have found that their respective JD cohorts had provided a sense of community and belonging, which was missing in LLB or mixed LLB/JD classes that appeared to either mitigate or negate outcomes that might be associated with judgment by peers. Some female JD students referred to their cohorts as working closely together, sharing information, and even using social media to create informal networks to engage with geographically separated students.

Arguably, the nature of Australian JD programs that generally attract older students with work experience and who are often taught in JD-exclusive tutorials serves to mitigate the sense of isolation. It is also arguable that the sense of isolation or alienation reported in other research is, in fact, partially addressed by law school through JD-exclusive teaching. Put another way, some measures put in place by the two law schools the subject of this research might mitigate hidden outcomes rather than promoting them.

Female JD students at ANU often discussed forming study groups and how their study group had provided a sense of community and collaboration. Although the JD participants who discussed study groups and informal networks were women, the groups were not exclusive to women. Some participants discussed how their group included men. Interestingly, male JD participants did not generally discuss study groups or informal networks, instead reflecting on individual effort. Arguably, the reflections on study groups predominantly by women tend to reinforce those groups' role in overcoming isolation or alienation discussed in other research.[49]

What is noteworthy is that, although the establishment of informal JD groupings appeared to mitigate or protect from the outcomes for women assumed to occur in law

[49] See especially Stewart (n 22 and Weiss and Melling (n 21).

schools, they nevertheless incorporated elements of participants judging peers. Peers were excluded or included based on an assessment of particular strengths or attributes. Participants assessed their peers to determine who 'fit' within their group and who did not. Common reasons for exclusion were that a participant had judged a peer as egotistical, vocal in class or competitive with peers. Notably, the criteria adopted by these participants tended to suggest that competition was not tolerable behaviour. The ability to cooperate, at least among JD participants, was assessed as a desirable characteristic.

This outcome is somewhat surprising given that competition is assumed to be endemic in law school. If it is endemic, and modelled behaviour is liable to be adopted by others, then one might assume that it would be adopted as a value by students. Arguably, the reality is more complex, especially for JD students. As discussed earlier, preventing disharmony and promoting cohesion are thought to play a role in an ingroup's decision to ostracise others. Competition within a group is likely to create disharmony. Logically, students might seek to prevent that from occurring. However, participants tended to attribute forming study groups to the need to improve their academic performance. That is, to compete with others in the larger cohort. Consequently, individualised competition—which chapter 4 suggested was an implicit value adopted by students—potentially remains, but as competition with individuals who are not part of the ingroup.

Another reason participants gave for establishing study groups within the JD cohort was to respond to perceived shortcomings or failings in law school. The same themes of overcoming isolation and competition with others outside the group were present. Participants tended to reflect on their membership of study groups to clarify

instructions for assessment, share resources, or lament the poor instruction quality. Cooperation within the group was valued over competition. However, the creation of informal networks was, again, appeared to be perceived a necessary part of improving performance.

When taken together with the discussion of evaluation in chapter 5, JD participants' reflections on alienation and the formation of study groups or informal networks paints a more complex picture than suggested by predominantly American literature on competition. As discussed earlier, American literature, in particular, assumes competition is endemic in law school. Attributions in chapter 5 tended to affirm that participants also saw *individual* competition as being part of their law school experience, although not all perceived it to have been an outcome of law school. Ultimately, the formation of study groups or informal networks might also be about improving one's position to compete against peers. However, when forming groups, a willingness to compete with others was a criterion used to judge peers as *not* fitting into a group, at least among female JD students. The attributions of female JD students tend to suggest that, although competition is perceived to be a feature of law school, it is competition with peers *outside* the groups they have formed. Competition within a group is a criterion on which a peer might be judged and excluded from that group. Arguably this is consistent with the role of groups in addressing alienation. Competitive group members are likely to create disharmony and conflict. Cooperative groups are more likely to promote a sense of belonging and cohesion. Ultimately, competition might still be considered endemic, but who competitors are, at least for JD students, may depend on whether they are part of an ingroup.

3 *'The perfect law student'*

Although female participants did not perceive peers actively made them feel like outsiders based on gender, it was a common element in a recurring theme of 'the perfect law student'. The perfect law student was not a persona that participants appeared to perceive the law school as promoting, but one that the *legal profession* valued, encouraged or promoted. Some participants, predominantly women, judged themselves against the perfect law student. Sometimes that was explained in terms of features that were not attainable (e.g., gender). Other times it was described as characteristics that they thought they would find difficult to achieve (e.g., academic success).

The concept first emerged in one interview with a mature-age female participant who described the difference between 'average' and 'above-average' students. When asked what criteria they had applied to determine whether a student was above-average, the participant explained that such a student was male with 'photographic memories or the specialist academic brain'.[50] When asked how or why they had built this set of criteria, the participant explained that 'they'll tell you that they have [a photographic memory or specialist academic brain]. Or you'll observe them sitting in their seats like this [puts a foot on the table and puts hands behind head].'[51] In the context of the participant's statements and the interview, the physical position adopted by the participant was interpreted by the interviewer as one communicating confidence or arrogance.

For this participant, the above-average student 'is what an average law student is competing against'[52] for positions in firms, the bar or the judiciary. The perception

[50] Female, 47, LLB, Canberra Law School.
[51] Ibid.
[52] Ibid

was not based solely on gender, but there was a consistent theme that the above-average student was likely to be male.[53] Another added that they were the type of student that the law firms hired on TV.[54] Yet another added that they have:

> a lot of time. I definitely think just the sheer amount of content we have to go through. High achieving people don't have part-time jobs or other commitments that they need to attend to so they do have that little bit of extra time. Asks a lot of questions, especially of lecturers and tutors. Whether it's in the lecture or the tute or actually by email. I find people that I know who are very high achieving do take that effort.
>
> Female, 21, LLB, ANU

For older participants, the description reached the point of suggesting that, by not meeting the criteria necessary to be a perfect law student, career success was placed beyond their reach or something from which they were excluded. For example, the participant who initially described the above-average student referred to a 'concrete ceiling with a glass window' in the profession,[55] especially for older female graduates. Another perceived that they would never run their own firm because they were 'barely passing'.[56]

For these participants, there was a perception that there was a set of criteria against which the legal profession judged them to determine who would gain prestigious positions and those who would not. The criteria appeared to be a conglomerate of observations—male, academically successful, 'TV lawyers' with time to spend on their studies. It was not consistently clear how participants had established this set of

[53] Female, 51, LLB, Canberra Law School.
[54] Ibid.
[55] See (n 50).
[56] See (n 53).

criteria against which they judged themselves and their career prospects other than by working backward from observations of who they perceived as being successful in their careers.

The identification of a criterion of some form of success, in turn, raises another issue—what constitutes 'success' in the perception of at least these participants? Implicitly it appeared to be success in the form of prestigious employment. None attributed that perception or criterion to any particular agent. Arguably, it may be a criterion or standard set by legal education. However, this is a conclusion that is impossible to draw based on the data collected here. Further, as was discussed in chapters 4 and 5, law school was generally not perceived as having a role in employment decisions. Nevertheless, there is a perception that a successful law student fits a particular mould and that, either due to or concurrently with those characteristics, is academically successful.

Other than being academically successful, none of the participants attributed the criteria they identified directly to law school. However, in identifying a set of criteria that they perceived makes a student more likely to be professionally successful, they also identified those things that they perceived law school implicitly valued; gender, academic ability, the absence of commitments outside law school. The outcome, as noted above, is the perception that there are opportunities automatically closed to some students because they do not possess the attributes associated with professional success.

B *'Tribalism' and career objectives*

Although there is some evidence in the United States[57] of students forming groups based on career objectives and then judging one another based on perceived shared values, it is difficult to identify any similar research in Australia.

In interviews with participants, some observations were made about a perceived divide between law students who had elected to pursue careers in commercial practice and those who had not. The divide was not corporate versus public interest identified by Bliss[58] but corporate vs anything else. It was not uniformly presented as a conflict of interests or characteristics between peer groups, as it was by Bliss' interviewees. Participants who had decided not to pursue a career in commercial practice had not formed ingroups according to career objectives and then judged and ostracised others who did not share similar values. Instead, participants tended to assign their career intentions to the type of work, rather than the types of people. For example, those who intended to work other than in commercial practice tended to highlight the difficult personal demands they perceived commercial practice placed on practitioners.

> And everyone just starts talking about what it's like, joking about corporate law. Because they have siblings or they know people who are a few years ahead. Very soon that nice shiny suit that I'd seen in year 10 [on work experience], thinking that was the life that I wanted to lead, I realised that it was possibly a facade for long hours, everything else in your life just taking a backseat and being treated like a doormat for a period of times before

[57] Bliss (n 21).
[58] Ibid.

> being promoted and perhaps some of that balance restoring itself, maybe. So, I was like, 'So why am I doing this?'
>
> Female, 27, JD, ANU

Consistent with the absence of tribalism, participants who had chosen to pursue a career in commercial practice, or had even taken a clerkship in a commercial firm but wanted to work in some other field after graduation, did not denigrate community or public interest work. Instead, they tended to highlight the advantages of commercial practice, such as doing work they were interested in, aligning with a particular motivation (e.g., assisting small business), or receiving better or more diverse training.

Where there was some evidence of peer judgment and tribalism, it was generally expressed as a perception by participants who did not want to enter commercial practice of being ostracised by their commercially-oriented peers. For example, one participant referred to avoiding some commercially-oriented peers because they perceived being judged by them.

> I interact with these people, but I don't like spending time with them as much because they also make lots of comments that are a bit dismissive and stuff about things.
>
> Female, 24, LLB, ANU

There is some overlap between those participants who perceived they were judged for their career choice and those who perceived that law teachers emphasised commercial practice.[59] Put another way, those participants who had expressed dissatisfaction with the use of commercial law examples by law teachers also tended to comment on the perceived judgment of peers they thought were destined to practice in those areas.

[59] See ch 3 IV A 1.

Participants with no desire to join commercial practice perceived that the law school environment—peers and teachers alike—were oriented to private practice. Whether these participants assessed their peers as influenced by law school is unclear. However, as the participant quoted above indicates, they tended to perceive themselves as different or distinct according to the dominant law school environment. However, there was no evidence akin to that found by Bliss that participants who did not intend to join commercial practice had changed their intentions as a result of peer judgment.

C *Competition*

4 *Causes of competition in law school*

As discussed in chapter 5 and earlier in this chapter, participants' attributions suggested that there was a sense of competition in law school, although not explicitly attributable to law school itself. In the context of the role of peers, some participants also referred to a perception of being judged by peers (as distinct from law school) on their academic ability and their relative performance. That is, their peers were involved in judging one another and evaluating their comparative performance. The criteria used by students to evaluate their performance against others was not consistent across participants' interviews. Some participants generally referred to a sense of competition or competitiveness between peers.[60] Some referred to explicit exchanges with peers about issues as diverse as marks, school backgrounds or clerkship prospects[61] to which they attributed their perception of competition. However, what was common to participants' attributions was that, although law school was a common site in which peers judged one another and jockeyed for position, none of the participants appeared

[60] Female, 24, LLB, Canberra Law School.
[61] Male, 21, LLB, Canberra Law School; Female, 23, LLB, Canberra Law School; Female, 35, JD, ANU; Female, 24, JD, ANU.

to perceive that it was attributable to law school. For example, after reflecting on mark standardisation and the bell curve—which is almost entirely a creature of the law school—one participant explicitly rejected the idea that the law school promoted competition to the extent that it altered students' behaviour.

> I mean the law school's competitive, but I don't think it is so competitive that it actually encourages changes in behaviour in and of itself. Conversely, I think that the way that the clerkship recruitment process is structured really brings out a competitive aspect of most of the people that are going through.

Male, 23, LLB, ANU

Another saw it as a concurrence of the size of law classes—also entirely within the control of the law school—and the academic ability of law students generally but still not attributable to law school itself.

> I was sitting in classes of you know 100, 200, 300 kids that had all been smart enough and got the marks to get there just as I had. And in a lot of classes seemed to me anyway, my perception, was that they were more on top of what they were doing, they understood things more quickly than I did. Or they worked harder than I did, achieved better results than I did, all those kinds of things.

Female, 24, LLB, ANU

Arguably, and perhaps surprisingly, participants saw competition as endemic to law school, but not *of* law school. Despite a common theme of competition running through many interviews, the agents to which competition was attributed were diverse. For example, one participant suggested that it was perhaps just a function of the types of students who successfully gained entry to law school.

> We're all high achievers. We all have been at some point, enough to get into the law degree. We're probably used to being on top, at least academically. And probably all a little bit competitive to some extent.
>
> Female, 27, JD, ANU

There were similar attributions to what appeared to be assumed was a notorious fact that law students were 'type-A personalities'; 'enhanced aggressiveness and competitive drive, preoccupation with deadlines, chronic impatience, and sense of time urgency'.[62]

An additional factor in the sources of competition that appeared to be specific to ANU was the role of student residences. Both universities have on-campus accommodation for students. There is a larger number of residences on the ANU campus than at the University of Canberra.[63] In the perception of some ANU participants, residences on that campus encouraged a competitive culture or identity.

Some participants at ANU discussed how law students tended to be overrepresented in one residence in particular. It was not clear why there was perceived to be an overrepresentation of law students in a specific residence. However, one participant suggested it may be associated with an affiliation with some secondary schools in Sydney.[64]

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[62] The theory of personality types is attributed to a study of male coronary patients and increased risk of heart disease, not to personality or career types; Richard Brand et al, 'Multivariate Prediction of Coronary Heart Disease in the Western Collaborative Group Study Compared to the Findings of the Framingham Study' (1976) 53 *Circulation* 348, 349. However, studies with women have found that the theory is not universally applicable; Andrew Billings and Rudolf Moos, 'The role of coping responses and social resources in attenuating the stress of life events' (1981) 4 *Journal of Behavioral Medicine* 139.

[63] The University of Canberra list four student residences while the ANU lists 18 'Accommodation', *University of Canberra* (Web Page) <https://www.canberra.edu.au/future-students/life-at-uc/accommodation>; 'Our Residences', *Australian National University* (Web Page) <https://www.anu.edu.au/study/accommodation/student-residences>.

[64] Female, 20, LLB, ANU.

Three participants from ANU attributed a sense of competition extending to high levels of stress to students living in a specific college. One participant who had lived in the residence explained it as 'a high pressure, intense, stressed environment to be in, especially amongst law students. Everyone was just so stressed all the time.'[65] They went on to attribute the pressure to the academic origins of some its residents:

> [The residence] is full of a lot of people who put a lot of pressure on themselves and did well in school. And so I think a lot of people, when they got into the law school environment and saw how different that was from school, it was a real challenge and you weren't necessarily going to just like immediately thrive and be totally in your element. I think very quickly that pushed people into a lot of stress.
>
> Female, 21, LLB, ANU

The shared identity negatively affected at least two of these participants, who had also lived in the residence. One referred to avoiding students from the residence in classes because of the stressful environment they embodied. The other referred to consciously 'stepping back from this really stressful, competitive kind of thing and just step out of it and just be like, "This is why I'm doing this, this is why I'm here."'[66] The third, who had not lived in the residence, referred to their experience in classes dominated by students who did. They attributed a sense of being an outsider or being excluded by what they perceived as a homogenous, competitive group.

Again, the cause of competition perceived to exist within this cohort of students is not perceived to be something within law school's control or influence. It is predominantly

[65] Female, 21, LLB, ANU.
[66] Female, 21, LLB, ANU.

perceived to be something rooted in potentially pre-university experiences of secondary school.

Consistent with earlier research at ANU,[67] mark standardisation and the bell curve were often referred to another cause of competition between peers, albeit not the primary cause. One participant, for example, referred to student rankings in courses as being a subject of discussion with their high-performing friends to the point of informally attempting to determine where in the ranking they might appear. When one adds participants' perceptions of the need to prove oneself or to stand out in a large field of equally talented students, there is an implicit value placed on competition. As participants' attributions suggest, that implicit value is then applied in their evaluations of one another, with potentially harmful effects.

5 *The effects of competition*

Comparison and competition are assumed in American research to have generally negative effects. Some of the attributions noted above suggest that participants' often considered it something to be avoided or a reason to avoid some peers. One participant went so far as to identify being competitive as part of the changes to their personality that flowed from the clerkship process that they would not wish to keep.

> I think I still want the ambition and the drive. But I think I wouldn't want the outward competitiveness or even the inward competitiveness as much. I think that's the bit that's bad because I think you can be ambitious and driven without needing to beat people around you to feel good, I guess.
>
> Male, 23, LLB, ANU

[67] Law School Reform (n 20).

Fortunately, there was very little evidence in participants' attributions of evaluation and competition, leading to extremes like bullying and ostracism. However, it did exist. A small number of participants spoke about their experience with aggressive peers. For all participants in this group, aggressive exchanges with peers were directly connected to comparisons in academic outcomes and much sought-after clerkships.

The consequences for these participants were generally poor. Self-exclusion from some peers was common. However, one attributed a decision not to practise law to their experiences of competition with peers. Another discussed how the bullying by peers, which they perceived was based on the fact that they had performed better academically, had reached the point that peers had used anonymous social media to mock the participant. Nevertheless, this particular participant had chosen to continue their studies but altered their behaviour to become less visible to peers.

It is not suggested that bullying, ostracising or actively encouraging students to reconsider their career choice is an intentional outcome of legal education. However, what is suggested is that to the extent that law school would appear to implicitly value individual success, competition and the evaluation of peers based on comparative academic positions, it inadvertently encourages the negative outcomes identified by some participants.

However, consistent with empirical research among ANU students,[68] not all of the participants found that there were negative consequences to competition. For example, one participant referred to what they saw as both pros and cons.

[68] Ibid.

> Quite frankly the competitiveness within class. I think it can lower your self-esteem at some point so make you think 'Do I really have what it takes?' *I'd contest that there would also be pros to that.* It kind of pushes me harder to study, study harder, study more. Make yourself better, I guess.
>
> Female, 23, LLB, ANU

Several participants made similar attributions about the motivational effect of competition and the consequent effects in improving performance. It is not clear from interviews why some participants felt the effects of competition differently to others. Arguably, it tends to demonstrate that binary stimulus-reward models, supplemented by narrowing the availability of rewards in terms of either ranking or employment, are insufficient to explain student behaviours or perceptions. At the same time, it also reinforces that students' responses are complex, diverse and more likely to be influenced by other external factors and personal characteristics.

IV SUMMARY

Coding and analysis of participants' attributions indicate that the judgment of peers does affect their experience of law school. Coding would suggest that the measure of influence is comparable to that of law teachers but still considerably less than law school in its application of the explicit curriculum. It also appeared to be more influential from participants within specific age cohorts, specifically those aged between 18 and 21 years.

Although law school was the site for relationships with peers, there was no perceived causal link between law school and some of the outcomes assumed to flow from it including alienation or competition. What participants' attributions tend to suggest is that some of the hidden or implicit outcomes assumed to be endemic to law school,

like competition, are features of it, but law school would not appear to be perceived by participants as an agent for it.

The outcomes of participants' perceptions of being judged by peers are diverse and complex. Attributions suggest that participants did not perceive that they were explicitly or directly excluded by the evaluation of peers based on age or gender. However, in particular, female participants perceived that, based on their assessment of others, there was an image of a perfect or above-average law student who was commonly identified as male. Again, law school was not directly attributed, but academic success at law school was considered a criterion on which the perfect law student was identified. The image or concept of the perfect law student as a high-achieving male was identified by female participants as the benchmark against which other students were evaluated for employment and promotion by the legal profession. Consequently, they were also the reason why women were unlikely to achieve prestigious roles within the profession.

Although law school was not directly attributed, it is immediately apparent from participants' attributions that there is a perceived causal link between law school, academic success, and professional success. There are characteristics, derived from participants' own observations, that are perceived to pre-ordain certain students for academic and, consequently, professional success. Conversely, the lack of one or more of those characteristics would appear to have encouraged some participants to curb their expectations of professional success. If one accepts, as is discussed in chapter 5, that reward attaches to the reproduction of desirable attitudes or behaviours, then it is arguable that in the perception of some participants, being male, clever, attractive, and

free of other commitments are valued by law school insofar as those things bring reward.

The experience of JD participants also hints at some other values or attitudes that appear to be implicit within law school but that participants have sought to overcome. JD participants discussed the formation of informal networks to provide a conduit for cooperative work and address isolation, suggesting that, in comparison, law school favoured an individualistic approach—something that was also comprehensively reflected in undergraduate participants' attributions to formal evaluation.[69]

Unlike some American research, participants did not appear to form groups based on career trajectories and then judge one another based on their group identification. Decisions about an interest in private commercial practice or other careers appeared to be primarily attributed to an interest in a particular area of work or concerns about the pressures associated with another. Notably, participants were generally relaxed about the prospect of working in one area or another if it improved their prospects of finding employment. Arguably there is an overlap between the absence of sensitivity to peer judgment in terms of career selection and the drive, discussed in chapters 4 and 5, to find employment. Participants may have implicitly formed the view that to fixate narrowly on one stream of work over another limits opportunities for employment in an environment that is perceived to be highly competitive.

There was a general perception among participants that the process of evaluating oneself against others and the resultant competition for marks or employment was part of their law school experience. However, consistent with attributions concerning competition for clerkships or employment, law school was not perceived as the cause.

[69] See ch 5 III C.

Participants were much more inclined to attribute competition to some inherent quality of law students, often associated with their pre-law school secondary education experience. This is consistent with observations made in some research that competition is arguably inculcated in law students before they reach law school.[70] While it has also been suggested that standardisation and the bell curve may be a contributing or reinforcing factor, it was either not identified by participants or explicitly rejected. Again, what appeared to be the overwhelming driver was the perception that there is fierce competition for clerkships and employment. Marks were a step in the process of securing employment.

Despite the absence of direct attributions to law school in participants' attributions, it is arguable that competition between peers is still implicitly valued by law school, although law school is not the sole agent for its inculcation. Competition for marks is endemic in primary and secondary education. Marks constitute a significant part of the basis on which law students receive an invitation to enrol at law school. Students arrive at law school primed to compete with their peers based on marks. One might argue in that context that law school is merely the recipient of competitive students. However, no participant suggested that law school had done anything to reduce or discourage competition. Academic success, represented through marks, was still a primary measure of overall success at law school. In that regard, participants' attributions about competition with peers affirm evidence in chapter 5 about the value law school is perceived to place on individualised effort and success.

Drawing on Jackson's model, law school provides a model for students to evaluate and compare one another and rate peers' and one's own likelihood of success. Participants

[70] See ch 5.

perceived that success as adjudged by law school also appeared to be associated with other characteristics, including gender, appearance and the absence of commitments.

As participants' attributions attested, the consequences of this reinforced or perpetuated sense of competition can be dire. Some participants referred to the high pressure, stressful environment that exists in some settings to achieve academic success. Others referred to the aggressive or bullying conduct that encouraged them to reconsider their choice of discipline or alter their behaviour.

None of this suggests that law school or legal education intentionally sets out to encourage aggression or bullying. As discussed extensively in chapter 1, the use of 'hidden' in the hidden curriculum is used as an adjective and as a synonym for obscured or even unintended. What participants' attributions would tend to suggest is that the evaluation and comparison with others, especially with regard to marks, and the competition it engenders, are perceived to be valued, or at least passively allowed, within legal education. To that value, participants have attached personal responses and observations concerning the measures of academic and professional success, the characteristics of the perfect law students, and what behaviours are acceptable when dealing with peers. In doing so, they have amplified or aggravated some outcomes, including exclusion and aggression. Despite not being actively promoted by legal education, they are hidden or implicit outcomes that draw on legal education as, at the very least, a concurrent cause.

CHAPTER 7 – CONCLUSION

I INTRODUCTION

The purpose of this chapter is twofold. The first is to provide a traditional conclusion: drawing together the findings in previous chapters, summarising the key themes and outcomes, and identifying the extent to which the hidden outcomes perceived by participants to be directly attributable to law school. The second is more tentative and, arguably, a little outside the scope of the thesis. While reading this thesis, a reader may have begun to ask, 'Well, what can we do about that?' Some may have even begun to reflect on their teaching practices, or what they could do (or keep doing) to prevent some outcomes. In identifying hidden outcomes within either the direct or indirect control of law teachers or law school, this chapter also attempts to answer some of those questions.

The following section represents the more traditional approach to a conclusion. It restates the thesis question and summarises its findings according to Jackson's taxonomy and the relevant learning theory. In summary, it finds that the assumption that law school is the dominant player in the hidden curriculum assumed to lie within legal education is not uniformly valid. Some hidden outcomes do fall within the ambit of law teachers, the explicit curriculum and evaluation. Others appear to be co-constructed with law students. However, some appear to be entirely the creation of external agents, or even law students themselves. Ultimately, research into the perceived hidden outcomes of legal education needs to exercise more care in unpicking causes, agents and outcomes before accusing law schools of always being the villain.

Having now identified at least some causes and agents, section III provides some tentative suggestions on what could be done to mitigate or even negate some of the more serious hidden outcomes. For example, participants appear to place considerable pressure on themselves to find employment during law school based on the perception that it is a prerequisite for finding post-graduation employment. It is questionable whether that self-imposed pressure is beneficial from several different perspectives. Does law school have a role in addressing that, and what might that role be?

Section III also offers observations on where more research is necessary to understand the complex relationship between some causes and the outcomes perceived to be attributable to them. For example, the causes and agents that produce outcomes for women are more multifaceted than historically explicit exclusion and ostracism based on gender. Some, like age, commitments outside law school, or individualised competition perpetuate perceptions of alienation despite women now constituting the majority of law students and efforts to eradicate systemic or procedural barriers. However, other agents, including family and peer support, are perceived as mitigating some of those aspects of alienation and are deserving of closer research.

One might argue in reading section III, 'Well, why is this law school's problem? Some of this seems like someone else's concern.' That is, in part, true. However, despite claims to the contrary, our students are more than simply customers or clients. Law school is a common site for all law students. As this thesis has found, law students place considerable weight on at least some messages from law school. Law school plays a significant role in the production of outcomes.

The linking of competition or individualism to, for example, law students' distress and mental health[1] arguably increases law school's responsibility to mitigate some of those outcomes before they produce long-term effects.

Beyond the effects for individual law students, there is also law school's obligation to the wider community. In the absence of any bar examination or other post-graduation examination, law schools perform a *de facto* role in warranting to admission bodies and the community that their graduates demonstrate the qualities encompassed in the explicit curriculum. To the extent that law students graduate have achieved 'learning outcomes' that are inconsistent with the explicit curriculum, then law school has failed to perform its role in preparing them for post-graduation careers. Arguably, it has fallen short in its obligations to students, the legal profession and the wider community.

II THE HIDDEN CURRICULUM IN LEGAL EDUCATION

The primary aim of this thesis was to test the assumption in Australian theory and commentary that law school is the primary or dominant cause of the hidden outcomes perceived to flow from it. It argued that while law school may be wholly or partially the agent for some changes in some law students' thinking or identity, there is a myriad of agents beyond law school's direct control that have a similarly significant effect.

[1] See for example Kath Hall, Molly Townes O'Brien and Stephen Tang, 'Developing a Professional Identity in Law School: A View from Australia' (2010) 4 *Phoenix Law Review* 21; Richard Collier, ''Love Law, Love Life': Neoliberalism, Wellbeing and Gender in the Legal Profession—The Case of Law School' (2014) 17(2) *Legal Ethics* 202.

In order to identify which outcomes might be appropriately called a hidden curriculum, it defined the hidden curriculum as:

> implicit or unintentional learning outcomes caused by law teachers, the formal outcomes expressed in the explicit curriculum and how they are scheduled or administered, and formal and informal evaluation.[2]

Based on interviews with law students at the two universities the subject of this research, it sought to identify the extent to which those implicit or hidden outcomes were attributable to law school and to sort them using Philip Jackson's model of the hidden curriculum as a taxonomy.

As the interviews revealed, this thesis's central argument was demonstrated to be broadly accurate. The interrelationship between causes, agents and hidden outcomes is much more complex than assumed in some commentary. Some outcomes are attributable to law school. However, some would appear to be co-constructed between law school and law students, while others are attributable to primarily external agents or causes.

One can use these three broad groupings (attributable, co-construction and external) to summarise participants' perceptions about what is, and what is not, potentially within law school's capacity to control and therefore part of a hidden curriculum at law school. However, in doing so, one should be mindful of the warning offered at various points throughout the thesis. These are the participants' *perceptions.* They cannot be taken as the objective truth of causal links between agents and outcomes. They are inherently subjective. However,

[2] See ch 1 IV A 3.

this thesis has argued that, consistent with constructivist theories, learning is not passively received but is instead actively constructed by the learner. Consequently, participants' perceptions represent an accurate statement of how law students might understand their experiences in law school and what they may carry away from them.

A *Hidden outcomes perceived to be attributable*

1 *Law teachers*

Law teachers were perceived to be less significant than other agents in producing either explicit or hidden outcomes. That outcome is potentially surprising given the body of predominantly American literature on the perceived hidden effects of the Socratic method.[3]

Coding and analysis of participants' interviews suggest that law teachers' role was mitigated or even negated by external causes or agents. Among the most significant mitigating agents were the participants themselves. For example, coding suggested that participants enrolled at the ANU, rather than law teachers, were more likely to perceive that they controlled outcomes. Notably, this was consistent with some empirical research with first-year Australian law students. In that research, students who had been successful at secondary school were more likely to see their success or failure as the result of their efforts, rather than good or bad teaching.[4] However, this thesis did not examine participants' earlier

[3] See ch 2 III C 1 and ch 3 I A.
[4] Melissa Castan et al, 'Early Optimism - First-Year Law Students' Work Expectations and Aspirations' (2010) 20(1/2) *Legal Education Review* 1.

academic records, which prevents a conclusion that it is entirely consistent with earlier research.

In an outcome that would not appear to have been identified in other research on legal education, participants tended to attribute greater authority to law teachers with whom they identified in terms of career objectives or outlook. For example, students who indicated an intention to pursue a career in commercial practice attached greater authority to law teachers who shared their experiences in the same field. Consistent with a constructivist model,[5] these teachers appear to have been endowed with greater authority by participants and, consequently, participants were more likely to listen to them. Leaving these instances aside, participants appeared to generally perceive law teachers to be benign or neutral agents in their experience.

One notable exception directly attributable to law teachers was conduct or actions perceived by participants as hostile, aggressive or belittling, directed either at the participant themselves or at peers. Participants attributed significant outcomes to this type of conduct including, consistent with some American accounts,[6] questioning whether they fit in at law school or were 'cut out' to be lawyers. Of concern was that all the participants who attributed these outcomes to law teachers were women. Women constitute a majority of law students at the two law schools, the subject of this research. Consequently, one might

[55] See ch 2 III B and especially Albert Bandura, *Social Learning Theory* (General Learning Press, 1977).
[6] See Duncan Kennedy, 'How the Law School Fails: A Polemic' (1970) 1 *Yale Review of Law and Social Action* 71.

extrapolate that if similar conduct occurs even irregularly, the outcome is more widespread than the sample presented here.

To the extent that participants attributed an outcome of reconsidering their career choice if they perceived the behaviour of a law teacher represented that of the profession, it represents a serious hidden outcome. Arguably, the perception that is being created is that the profession is generally an aggressive or hostile environment. Not only is that perception inconsistent with the explicit curriculum, but it is also inconsistent with the expectations of professional conduct in the profession.[7] The obverse of this outcome is not one evident in participants' attributions but is a potential concern. If one accepts that students may adopt behaviour modelled by others, there is a very real risk that aggressive and belittling behaviour is considered by students to be appropriate, acceptable or tolerated.

2 *The explicit curriculum*

Compared to other agents, the explicit curriculum, and the required courses encompassed in the Priestley 11 more specifically, were perceived to play a significant role in producing explicit and hidden outcomes. However, just as with law teachers, some outcomes appeared to be mitigated or negated by external agents. Others appeared to be outcomes co-constructed between the curriculum and law students.

[77] See the commentary and references referred to in Law Council of Australia, *Australian Solicitors' Conduct Rules and Commentary* (Law Council of Australia, 2011) r 5.1.

In terms of hidden outcomes directly attributable to the explicit curriculum, they fell into two broad categories: what was taught and how it was taught.

Some participants' affirmed that the omission of some courses from the Priestley 11 created the perception that the omitted courses were generally considered less important to the law. In particular, some participants attributed a perception that family law was less important since it was omitted from the list of required subjects. Notably, and despite concerns expressed about the exclusion of alternative dispute resolution (ADR) methods,[8] participants did not appear to perceive a greater emphasis on adversarial problem-solving as a result. This perception does not mean there is no emphasis on litigation over ADR in legal education. It is instead arguable that the concerns expressed elsewhere[9] have merit: by not being exposed to ADR, participants may have been generally unaware of its role or importance.

This emphasis on an adversarial approach to conflict resolution is arguably reinforced by another outcome perceived to be attributable to law school; a focus on a rules-based, structured approach to problem-solving. Participants commonly associated the adoption of a rules-based approach with how the required courses were taught. Many referred to a structured process of identifying the rule, applying it to the problem and obtaining an answer. Participants perceived that this approach encouraged a hidden outcome of devaluing of social context and emotion and a narrowing of the focus of conflict

[8] Productivity Commission, *Access to Justice Arrangements* (Report No 72, 5 September 2014) vol 1; Australian Law Reform Commission, *Review of the adversarial system of litigation: Rethinking legal education and training* (Issues Paper No 21, 1997).
[9] David Moss, 'The Hidden Curriculum of Legal Education: Toward a Holistic Model for Reform' (2013)(1) *Journal of Dispute Resolution* 20.

resolution to a 'winning' argument. On the one hand, it is arguable that the explicit curriculum dictates a rules-based approach.[10] On the other, it is inconsistent with other learning outcomes in the explicit curriculum that require graduates to demonstrate an awareness of the broader context within which legal issues arise.[11]

Participants were more inclined to see emotion and social context as factors emphasised in elective courses. Alternatively, emotional and social factors were perceived as being identified by participants themselves as a result of engagement with some of the materials in compulsory courses. For example, some participants referred to having gained a better appreciation of the social context of criminal defendants from reading criminal law cases. One might argue that an awareness of social context might be attributable to law school because it exposed students to that type of material. However, that was not how participants perceived it. They perceived that their deeper appreciation for the material was *despite* law school's focus on doctrine.

The emphasis on doctrine and structure in problem-solving was also perceived to cause another previously unexplored hidden outcome—applying a similar problem-solving approach to conflict and decision-making in participants' personal lives and relationships.[12] Some participants reflected on how this

[10] See ch 4 III B and Sally Kift, Mark Israel and Rachel Field, *Learning and Teaching Academic Standards Project - Bachelor of Laws - Learning and Teaching Academic Standards Statement* (Department of Education, Employment and Workplace Relations, 2010) TLO 3.; Council of Australian Law Deans, *Juris Doctor Threshold Learning Outcomes* (Council of Australian Law Deans, 2012) TLO 3.

[11] Ibid.

[12] This outcome had been hinted at in discussions with law students at the ANU in Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law StudentWellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 150. However, it was not explicitly explored.

structured or rational approach had affected their relationships with friends and family. This hidden outcome is worrying in the context of law students' wellbeing.

Predominantly American research has examined law students' and lawyers' wellbeing from the perspective of self-determination theory (SDT).[13] SDT posits that intrinsic motivation and wellbeing is supported by a combination of an individual's perception of their autonomy (ability to control and direct their own work), competence, and relatedness (connection to others).[14] SDT research has found a correlation between a decline in one or more of these factors, a decline in overall wellness, and increased stress. To the extent that law students are adopting a rational and emotionally detached approach to their relationships, it raises concerns about the effects that it may eventually have on their relatedness to others.

3 *Evaluation*

[13] Kennon Sheldon and Lawrence Krieger, 'Does Legal Education have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being' (2004) 22 *Behavioral Sciences and the Law* 261; Kennon Sheldon and Lawrence Krieger, 'Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory' (2007) 33(6) *Personality and Social Psychology Bulletin* 883; Lawrence Krieger and Kennon Sheldon, 'What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success' (2015) 83(2) *George Washington Law Review* 554. It has begun to be used as a tool to assess the wellbeing of Australian law students; see the review of SDT in Australian legal education literature in Anneke Ferguson and Stephen Tang, 'Determined to be professional, ethical and well' in Caroline Stevens and Rachel Field (eds), *Educating for Well-Being in Law: Positive Professional Identities and Practice* (Taylor & Francis, 2019) 58. More recently, SDT has been used as a basis for the assessment of stress among Australian judicial officers; see Carly Schrever, Carol Hulbert and Tania Sourdin, 'The Psychological Impact of Judicial Work: Australia's First Empirical Research Measuring Judicial Stress and Wellbeing' (2019) 28 *Journal of Judicial Administration* 441.

[14] See for example Edward Deci, 'Effects of externally mediated rewards on intrinsic motivation' (1971) 18(1) *Journal of Personality and Social Psychology Bulletin* 105; Edward Deci et al, 'Facilitating internalization: The self-determination theory perspective' (1994) 62(1) *Journal of Personality* 119. Deci's work has been cited extensively as a basis for Sheldon and Krieger's work with American law students; ibid.

Participants' responses to evaluation suggested a complex relationship between participants' objectives and their perceptions of the levels of support offered (or not offered) by law school to do well or overcome failure. The outcomes participants perceived were attributable to evaluation fell into two broad categories; short and long-term. Long-term outcomes fell into two further categories; participants who performed well in evaluation and those who did not.

In terms of short-term outcomes, participants discussed having adopted a tactical approach to evaluation. Some participants discussed attempting to divine from law teachers what the expected or desired answer to a question was (especially in essay-style questions) regardless of whether the participant shared that opinion on the essay's subject. Some appeared to be prepared to adopt whatever position would attract the highest mark. This thesis does not have a longitudinal element, so it is difficult to determine whether this outcome has a longer-term effect. If so, it hints at the 'ethical flexibility' that some commentary has suggested may be evident in Australian law students.[15]

In terms of long-term outcomes, participants perceived that evaluation had revealed inherent values or abilities that they either had or did not have. Put another way, neither law school nor evaluation was perceived as having a role in creating or developing those abilities, only revealing abilities that participants perceived they had or did not have. Consequently, participants perceived that there were values, skills or abilities that law school valued in law students. They were values, skills or abilities that participants had either developed

[15] Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 3rd ed, 2018); Adrian Evans and Josephine Palermo, 'Zero Impact: Are Lawyers' Values Affected by Law School' (2005) 8 *Legal Ethics* 240.

independently of law school or, if they did not possess them, would have to be developed independently if the participant were to succeed.

Regardless of whether the outcomes were short or long-term, the hidden outcome was that evaluation valued or encouraged individual effort. One succeeds or fails individually. Participants did not discuss the macro-sociological factors that might promote a neoliberal focus on individual success. However, the outcome affirmed commentary elsewhere that argues legal education fosters an ethos of individualism.[16]

B *Co-constructed outcomes*

Participants' reflections on the problem-solving suggested that some outcomes consistent with the explicit curriculum, namely critical thinking or an awareness of context, were co-constructed between the explicit curriculum and law students. As noted above, some participants attributed an awareness of the context within which issues arose to an interrelationship between their exposure to material at law school and what they perceived as their increasing age or maturity.

Age and maturity appeared to be a persistent theme in mitigating outcomes, often for the better. For example, in addition to critical thinking, participants attributed to their age the declining significance in the role of law teachers in producing potentially negative outcomes. Some considered that they were better

[16] See for example Paula Baron, 'A Dangerous Cult: Response to 'the Effect of the Market on Legal Education'' (2013) 23(1/2) *Legal Education Review* 273; Christine Parker, 'The 'Moral Panic' over Psychological Wellbeing in the Legal Profession' (2014) 37 *University of New South Wales Law Review* 1103; Margaret Thornton, *Privatising the Public University: The Case of Law* (Routledge, 2012); Collier (n 1).

at handling criticism as a result of their age. Further, some perceived that they felt increasingly comfortable with seeing 'shades of grey' in the law and its application because they were becoming older and more mature. None of these outcomes are hidden. All are broadly consistent with the explicit curriculum. However, the co-construction of outcomes again reinforces the role and importance of other agents—especially the student themselves—in reinforcing or mitigating outcomes.

C *Outcomes not attributable to a hidden curriculum*

One of the persistent and overarching themes to come through all aspects of Jackson's taxonomy was participants' motivation to find post-graduation employment. It underpinned concerns about the perceived lack of vocational skills in the explicit curriculum,[17] the perception that pre-graduation employment was a necessity[18] and both short and long-term approaches to evaluation.[19] It also appeared to underpin perceptions of competition between law students for marks and other rewards.[20]

Perceptions of the scarcity of employment was not an outcome that participants attributed to law school at all. Neither was it an outcome that participants attributed to the need to repay their tuition fees. Analysis of participants' interviews indicated that the underpinning cause was a perception of the scarcity of employment. Participants attributed that perception to several agents, including friends, peers, legal employers, and occasionally media. However,

[17] See ch 4 IV.
[18] See ch 4 IV B.
[19] See ch 5 IV.
[20] See ch 6 III C.

there was also the suggestion that it was ‘the vibe’; almost a legacy or even hereditary perception passed from senior students to new students that competition for employment after graduation was fierce.

Participants’ reflections on finding employment tended to affirm research and commentary that it drove student pressure on law schools to adopt a greater vocational focus in the explicit curriculum.[21] However, participants did not perceive that law school itself had adopted a vocational orientation. As noted at various points in this thesis, some law schools—including Canberra Law School—have demonstrably attempted to position themselves as providing practical training and experiences to prepare graduates for legal employment. Nevertheless, participants did not perceive any significant practical or vocational orientation in their experience.

III WHAT CAN BE DONE?

Participants’ attributions also hint at opportunities to address or mitigate negative outcomes or to reinforce positive ones. Some of those opportunities relate to individual law teachers pedagogies while others speak to broader strategies associated with the delivery of the explicit curriculum. In making these suggestions, one should be mindful of the demands on law teachers and law schools in terms of the myriad demands on their time and resources. However, as discussed earlier in this chapter, there is a legal and civic imperative associated with ensuring that graduates are achieving outcomes consistent with the explicit curriculum.

[21] See ch 4 IV and especially the interviews with legal academics in Thornton (n 16).

A *'Good' teaching*

Although participants generally perceived law teachers to be benign or neutral agents, their attributions suggested that there were things that law teachers did that they perceived improved students' achievement against explicit curriculum outcomes. One might argue that collectively those things constitute at least part of 'good' teaching. In highlighting those things perceived to improve participants' performance, one should be mindful of the significant demands placed on academic staff generally. As discussed in an earlier chapter, some participants were already aware of the pressures on law teachers.[22] Bearing that in mind, the things that law teachers can do might be ordered from simple through to more demanding in terms of the commitment of time and energy.

Law teachers perceived to support achievement were often identified as being organised in their teaching and adopting a clear, transparent structure to the way they approached material. In some interviews, participants discussed their reflections on some law teachers they perceived as disorganised. In some cases, the issue was teachers were not across the material they were teaching. In others, it was simple administrative tasks like ensuring that outlines, reading lists and teaching management sites (e.g., WATTLE at ANU or Moodle at Canberra Law School) were easy to understand and navigate. Taking the time to organise one's teaching before the beginning of a course has advantages in managing one's own time. Participants' attributions would also suggest that it also pays a dividend in terms of students' overall academic performance.

[22] See ch 3 III B.

Law teachers perceived to support achievement were often identified as being willing to engage with students in class. Participants reflected on some law teachers willingness to ask questions, seek opinions and listen to students' ideas about the material being taught. In essence, participants were encouraged to perform better when law teachers looked up from their lecture notes to engage with them. Although being a potentially simple solution, one should be mindful of concerns expressed in predominantly American literature about adopting a traditional Socratic method and the outcomes of putting students 'on the spot'.[23] Both the literature and participants' attributions suggest that adopting a more flexible approach may improve performance. For example, allowing students to pass questions without judgment if they do not know, calling on men *and* women, or offering more frequent opportunities to ask open questions.

The third element discussed by participants is perhaps the most difficult to achieve because it is intangible. Law teachers perceived as encouraging academic performance were identified as passionate or enthusiastic about the material and their teaching. This is difficult to ask of teachers, especially when they are ensconced in research, writing, meetings, and the myriad of administrative tasks that demand law teachers' time. How one cultures enthusiasm, especially for the more arid reaches of some topics, is also a challenging question to answer. Nevertheless, it was a persistent theme in discussions about law teachers and one deserving of more attention and, potentially, research.

[23] See ch 2 III C 1.

B *Revisiting the Priestley 11*

In discussing the Priestley 11, one needs to be mindful of its seemingly unchangeable nature. As discussed earlier in this thesis, attempts to alter its content have been incremental. More substantive changes have met with significant opposition and eventual abandonment.[24] Nevertheless, participants' attributions suggest that law students themselves can see problems with both what is required to be taught and how it is being taught.

Participants' attributions suggest that serious consideration needs to be given to at least two elements in terms of what is to be taught. First is the exclusion of family law from the list of required courses. There is no perception that contract and equity, which initially justified its exclusion,[25] address the perceived gap in students' knowledge about marriage dissolution, assets and children.

The second element is not explicit in participants attributions but is hinted at in their adoption of doctrinal, structured approaches to problem-solving and perceived devaluing of context—the exclusion of ADR as a distinct area of study. As discussed earlier in this thesis, there is a consistent call for a greater focus on ADR in the explicit curriculum as a means of addressing the increasing cost of litigation.[26] There is also the perception in some literature that its exclusion feeds into the adoption of a competitive, adversarial approach to problem-solving.[27] Participants' preference for IRAC or ILAC structures

[24] See ch 4 I A 1.
[25] Law Admissions Consultative Committee, *Background Paper on Admission Requirements* (Law Council of Australia, 2010) [1.1]; Council of Legal Education Victoria, *Report of Academic Course Appraisal Committee on Legal Knowledge Required for Admission to Practise* (Council of Legal Education Victoria, 1990).
[26] Australian Law Reform Commission (n 8); Productivity Commission (n 8).
[27] See for example Molly Townes O'Brien, 'Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum' (2011) 37(1) *Monash University Law Review* 43.

suggests that there is some merit in those arguments. ADR's relegation to an elective, or even banishment from the choice of available subjects, arguably reinforces the dominance of doctrine, structure and the 'winning argument'.

C *Detailed case analysis – Narrative vs doctrine*

The focus on doctrine leads to a further suggestion hinted at in participants' attributions. As discussed earlier in this chapter and the thesis, there is a perception that critical thinking and an awareness of the social and emotional context in which legal issues arise are something that participants arrived at *despite* law school, rather than as a result of it. One might argue 'but for' law school, participants would not have been exposed to the types of materials referred to by participants. However, participants did not perceive that law school had actively encouraged critical thinking or a greater awareness of context.

Participants' attributions indicate an increased sensitivity or willingness to consider the broader issues in the material with which they are presented associated with age or maturity. Arguably, this presents an opportunity for law school to actively engage with students and adopt a more active role in moving beyond doctrine to expose students to broader issues.

Participants also hint at how this might be done. For many, exposure to cases in detail had encouraged them to consider the context within which the parties found themselves. That is, to consider issues beyond the *ratio* and the winning argument. One option that this presents is for law teachers to adopt an approach to working with cases that moves beyond a simple restatement of what a

particular judge or tribunal found to consider the positions of the parties and the arguments they advanced. Cases are no longer cases but case studies.

The challenge this approach presents is the exchange of breadth for depth in working with case law. However, and despite the prescriptive nature of the Priestley 11, there is no mandated list of cases that must be covered in any particular course. In most areas of the law, there is a leading case or handful of leading cases on any particular issue. Secondary sources and commentaries that are already prescribed reading could fill any perceived gaps exposed by omitting cases from reading lists.

It is not being suggested that any learning outcome is abandoned, only that all of the learning outcomes required by the explicit curriculum— knowledge *and* thinking skills—are engaged with at a point at which students are more open to engaging with them.

D *Embedded evaluation vs high stakes*

In their attributions to evaluation, participants tended to separate evaluation and assessment tasks from teaching. Evaluation was perceived as being something independent of or separate from the content being assessed. Arguably, this perception might be attributable to the tendency of law schools to adopt high stakes assessment in the form of heavily weighted assessment tasks.[28] Students may only have one or two chances to achieve the marks they perceive will improve the likelihood of being employed after law school.

[28] Penny Carruthers, Natalie Skead and Kate Galloway, 'Teaching Skills & Outcomes in Australian Property Law Units: A Survey of Current Approaches' (2012) 12 *Queensland University of Technology Law and Justice* 66.

Participants' separation of evaluation and content is concerning. For example, it tends to reinforce the individualised nature of assessment. Having regard to the perceptions of the lack of support from law school, participants might also perceive that they need to teach themselves the content that is being assessed. Alternatively, as discussed in chapter 4, perceiving evaluation as a standalone event might reinforce the perception that what is actually being assessed is whether a law student already possesses the inherent skills or abilities that law school values. The perceived individualised and independent nature of evaluation might also explain the tactical approach to assessment in which law students attempt to divine what is expected, rather than relying on what has already been discussed in class.

One approach to address this perception may be to adopt ongoing or embedded assessment, that is, smaller assessment tasks woven into classroom teaching. There are various models for how that might be achieved. For example, the common model is the use of regular quizzes.[29] It may also include more innovative assessment, for example, assessment through role play such as a mediation,[30] contract negotiation or a piece of litigation[31] that involve students submitting work based on the transaction step. The objective of adopting these

[29] See for example Friedland's review of high stakes and ongoing assessment; Steven Friedland, 'A Critical Inquiry into the Traditional Uses of Law School Evaluation' (2002-2003) 23 *Pace Law Review* 147.

[30] See for example Pauline Collins, 'The Benefits of an action reflective assessment using role-plays in teaching mediation' 5th International Conference on Higher Education Advances, 26-28 June 2019).

[31] See for example David Oppenheimer, 'Using a Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution' (2016) 65 *Journal of Legal Education* 817. For an Australian adaptation of the model see Andrew Henderson, 'Designing a semester-long assessment in law', *The Mermaid's Purse: Working with Law Students Before they Become Baby Sharks* (Blog Post, 11 August 2021) <https://the-mermaids-purse.blog/2021/08/11/designing-a-semester-long-assessment-in-law/>.

assessment types is to bring evaluation closer to the teaching process, rather than continuing to allow it to be a standalone or independent task.

E *Cooperation vs individualism*

One outcome on which American literature and some Australian literature has focused,[32] associated with both individualism and the drive to find employment, is competition. Competition is assumed to be endemic and encouraged by law school, especially through evaluation. However, participants were less sure about the causes and agents of competition. Most did not tend to attribute any sense of competition to law school. Instead, they attributed it to, again, perceptions of the scarcity of employment. Some also attributed it to the type of students law school attracted.[33]

Whether competition is entirely outside the control of law school is more complex. One of the causes perceived by the literature—evaluation— is endemic to education generally. On the one hand, law students are steeped in evaluation and competitive ranking as a result of their experiences before law school. Arguably, they are enculturated to compete with one another in evaluation. To the extent that competition is an inherent value that law students bring to law school, it is difficult to argue that law school could have a role in changing that value.

On the other hand, law school also reinforces or encourages competition through persisting with similar forms of evaluation to which law students are exposed at school. Participants' attributions, especially those of participants who had not

[32] See ch 2 III C 3 (iii) and the literature cited therein.
[33] See ch VI III C.

performed well, suggest that law school does little to address competition. Participants perceived that they were left to address outcomes independently.[34] The absence of support would appear to be perceived as encouraging individualism.

Law school's responsibility to assess law students' individual achievement against explicit learning outcomes as required by the broader regulatory framework within which it operates[35] means that evaluation cannot be abandoned. However, the reinforcement of success or failure being about individual efforts raises concerns about other long-term effects of individualism and isolation. For example, Collier has argued that law firms have also adopted an individualised focus on wellbeing, encouraging employees to consider their wellbeing to be something for which they have individual responsibility.[36] More recently, compelling employees to consider wellbeing as an individual responsibility has been likened to a form of Foucauldian power.[37]

Leaving aside the effects for individual law students and lawyers, the perceived individualised nature of effort arguably breaks down notions of cooperation, despite the explicit curriculum's expectation that law graduates will be able to work with one another.[38] Consequently, the hidden curriculum arguably

[34] See ch 5 III B.
[35] See ch 2 II.
[36] Richard Collier, 'Wellbeing in the legal profession: reflections on recent developments (or, what do we talk about, when we talk about wellbeing?)' (2016) 23(1) *International Journal of the Legal Profession* 41; Collier, ''Love Law, Love Life': Neoliberalism, Wellbeing and Gender in the Legal Profession—The Case of Law School' (n 1).
[37] Brendon Murphy, 'Against wellbeing: The problem of resources, metrics and care of the self' (2021) 46 *Alternative Law Journal* 108.
[38] Kift, Israel and Field (n 10) TLO 5; Council of Australian Law Deans (n 10) TLO 5.

contradicts the explicit curriculum, with the former appearing to have greater force.

Participants' responses suggest that there is an opportunity for law school to actively address and promote the importance of cooperation and collaboration. The obvious driver is that cooperation is an expected and explicit outcome of what law school does. At the same time, there are also potential benefits for students and the wider profession in fostering collaborative behaviours to inoculate students against poor mental health.

One approach may be the wider adoption of forms of collaborative assessment. Collaborative assessment in law school would appear to be uncommon, at least to the extent of any survey of assessment methods.[39] Nevertheless, models do exist.[40] Participants' attributions suggest that adopting more collaborative assessment methods may be valuable as a means of overcoming what is perceived as an overwhelming sense of individualism.

The substantial challenge is that, as noted above, law students arrive at law school with a lengthy experience in individualism. Anecdotally, proposals for group assignments or group work are often met with silent stares or groans of disappointment from students. Changing what would appear to be embedded preferences for individual assessment, despite the negative effects that participants themselves identified, is potentially an onerous task.

[39] Carruthers, Skead and Galloway (n 28).
[40] See for example the discussion of Australian assessment methods in Susanne Owen and Gary Davis, *Some Innovations in Legal Assessment* (Australian Learning and Teaching Council,, 2009).

Participants were not asked directly about their experiences of collaborative assessment. However, JD participants in particular discussed the value of finding study groups with peers that appeared to provide collaborative environments. How and why some students might choose collaborative working environments at law school is something deserving of further research to potentially develop tools and techniques to promote similar practices in the wider student cohort.

IV WHAT IS STILL MISSING?

The discussion in the previous chapters has highlighted various points where there is an absence of empirical data associated with different aspects of legal education. It has also discussed why empirical evidence may be rare in some instances.[41] There are some aspects of law students' experiences where there is a very real demand for more research, even as a building block to create a more comprehensive and actionable picture of Australian legal education.

A *Empirical research on socioeconomic background, motivation and expectation*

As a fundamental building block of empirical research, there is surprisingly little on the socioeconomic backgrounds of law students other than for some specific studies within law school cohorts.[42] In the past, there has been collected data published on a semi-regular basis about the demographics, academic

[41] See ch 2

[42] See for example Castan et al (n 4); Karen Nelson, Sally Kift and John Clarke, 'Expectations and realities for first year students at an Australian university' in Jason Thomas (ed), *Proceedings of the 11th Pacific Rim First Year in Higher Education Conference* (Queensland University of Technology Publications, 2008) 1.

backgrounds and career intentions of law students in NSW, Victoria and the ACT.[43] As discussed at various points in this chapter, law students' social and academic backgrounds may play a role in how they interpret their experiences at law school. From a constructivist perspective, this is essential information that would serve as a valuable foundation for analysing and assessing law school pedagogies in the future.

B *A comprehensive survey of evaluation methods*

Despite criticisms of the Pearce Committee's limited analysis of assessment and evaluation in Australian law schools,[44] there is still very little comprehensive data on exactly how law schools go about assessing law students. The omission is curious insofar as there is a requirement on law schools to ensure that there are assessment methods to provide robust evidence of student achievement against explicit outcomes. From the perspective of this thesis, evaluation is also a significant agent in producing hidden outcomes. How law schools actually assess students is a significant missing piece of the puzzle.

C *What do employers really want?*

The absence of any perception that law school had introduced more practical or vocational teaching might arguably correlate with the confusion or vagueness among participants about what were the skills that employers, in fact, wanted. Participants presented diverse perceptions about what employers wanted,

[43] See for example Livingston Armytage and Sumitra Vignaendra, *Career Intentions of Australian Law Students 1995* (Centre for Legal Education, 1995); Christopher Roper, *Career intentions of Australian law students* (Australian Government Publishing Service, 1995).
[44] See Craig McInnis and Simon Marginson, *Australian Law Schools after the 1987 Pearce Report* (Australian Government Printing Service, 1994).

including high marks, advocacy skills; client interview skills; evidence of extra-curricular activities; or public speaking.[45] Some attributed their perceptions to conversations with potential employers. Many appeared to rely on peers and friends, while some again attributed the perception to a generally held belief among law students. However, the types of skills that the small amount of research with employers indicates that they actually want are those already encompassed in the explicit curriculum, including reading, writing, and critical thinking. [46]

Despite criticisms of law schools as becoming increasingly aligned with the legal profession in terms of vocational skills, there is very little peer-reviewed data on what employers *really* want. Pilot research like that cited above suggests that what employers do want is much more closely aligned to skills and attributes encompassed in the existing explicit curriculum rather than, for example, the ability to conduct courtroom advocacy or how to write a brief. There is a real need for more comprehensive and considered research into the extent to which there is, in fact, a distinction between attributes associated with a liberal arts-styled law degree and an education preparing graduates for legal practice.

V SUMMARY

At its core, this thesis has attempted to respond to the challenge set by Carrie Menkel-Meadow in the passage that prefaced it. We should understand the effects of what we do as law teachers and as law schools. As this thesis has demonstrated, law school has significant hidden outcomes for the students with

[45] See ch 4 IV B.
[46] See Elisabeth Peden and Joellen Riley, 'Law Graduates' Skills - A Pilot Study into Employers' Perspectives' (2005) 15 *Legal Education Review* 87.

which we interact, for better and for worse. At the same time, it has also challenged the assumption that all of the outcomes that law school is alleged to produce are within its control. As this thesis has demonstrated, the picture is far more complex. Students' responses are almost as diverse as the number of students. While some outcomes would appear to be partially outside law school's direct control, developing an awareness of them better positions us as law teachers to understand the reverse effects—how those outcomes might affect law students' experiences with us and how their personal histories might influence the outcomes we set out to achieve.

APPENDIX A: CODE BOOK

Code	Description
Agent	The person, group, thing or entity identified in the attribution as responsible for the cause. An attribution can have more than one agent. For example, in 'I think knowing when to accept a difference of opinion. I don't know if that's a law school thing or just a growing up thing' there are two causes: 'law school' and 'growing up'. Each is coded for agent separately: 'law school' would be coded as agent for the first cause and 'participant' as agent for the second cause. Do not code if agent is unclear.
Agent - Employer - law firm	Child code of Agent. Refers to agents for which participants work, or have worked, in the legal profession whether as a paralegal or in some other capacity (e.g., an intern or volunteer) and representatives of legal employers with which participants interacted in other settings including career fairs or interviews. It does not include working in policy areas that may be associated with law-making or applying the law but are not areas of legal practice (e.g., immigration decisions in the Department of Home Affairs).
Agent - Employer - non-law	Child code of Agent. Refers to agents for which participants work, or have worked, that is not specifically associated with the law or legal profession. It includes working in policy areas that may be associated with law-making or applying the law but are not areas of legal practice (e.g., immigration decisions in the Department of Home Affairs). The Australian Government Solicitor (or State and Territory equivalents) should be coded as 'employer - law'.

Code	Description
Agent - Family	Child code of Agent. Refers to the participant's immediate and extended family as an agent. It includes parents, partners and children.
Agent - Friend - law	Child code of Agent. Refers to a person or group of people with the identifies as a friend or a person as an agent with whom they have established a friendship who is at law school or involved in the legal profession (but excludes employers). A participant will commonly refer to friends as 'a friend'. Coding should be based on the participant's characterisation, not inferred from the context. If unclear, it should be coded as 'peer - non-law'.
Agent - Friend - non-law	Child code of Agent. Refers to a person or group of people with the identifies as a friend or a person as an agent with whom they have established a friendship but who is not at law school or involved in the legal profession. A participant will commonly refer to friends as 'a friend'. Coding should be based on the participant's characterisation, not inferred from the context. If unclear, it should be coded as 'peer - non-law'.
Agent - Law school	Child code of Agent. This is intended to capture where the participant has not identified a specific agent in law school (e.g., a law teacher, peer-law or friend-law) as an agent but has identified influences from within law school more generally. It is most commonly identifiable as an explicit attribution to 'law school'. However, it includes references to the explicit curriculum (e.g., 'the Priestleys'). It can include a generalised or collective attribution where no agent has been specifically identified.

Code	Description
Agent - Evaluation	Child code of Agent. A child code to law school to differentiate different aspects of la school's agency. It is applied to denote law schools role as an agent specifically with regard to both formal (e.g., tests and exams) and informal (e.g., verbal) methods of evaluation. For example, in 'I failed the unit.', failing would be identified as the cause and 'law school' as the agent. The additional code 'assessment' would be applied to the agent since the cause is associated with assessment.
Agent - Media	Child code of Agent. Refers to all forms of popular media academic publications as an agent including print, television or film. This is most likely to appear in the form of an identified television program or publication. It may also include media collectively (e.g., 'I saw in the news').
Agent - Mentor	Child code of Agent. Refers to a person or entity that the participant indicates was an agent, but cannot be coded as a teacher, peer, friend, family, or employer.
Agent - Participant	Child code of Agent. This is the student/speaker/participant themselves as an agent. It includes beliefs or opinions about themselves or their ability. It is most commonly identifiable through the use of the personal pronoun (e.g., 'I have confidence', 'I have a strong work ethic').
Agent - Peer - law	Child code of Agent. Refers to a person or group of people with whom the participant associates as an agent but they have not identified as a friend and who is at law school. It may be a person that they have met once, or more than once, but with whom they have not established a friendship. The key difference will commonly be that a participant will refer to

Code	Description
	friends as 'a friend'. For example, 'a law student, 'students in my class', 'older students', 'other students' (which in context refers to other students in law).
Agent - Peer - non-law	Child code of Agent. Refers to a person or group of people with whom the participant associates as an agent but they have not identified as a friend and who is not at law school or involved in the legal profession. It may be a person that they have met once, or more than once, but with whom they have not established a friendship. The key difference will commonly be that a participant will refer to friends as 'a friend'.
Agent - School	Child code of Agent. Refers to primary or secondary school as an agent but excludes law teachers. This might include discussions with a specific primary or secondary teacher, studying law, participating in debating or participating in mock trial competitions.
Agent - Teacher	Child code of Agent. Refers to an agent who is a law teacher including a convenor, lecturer, guest lecturer or tutor. It excludes primary or secondary teachers that should be coded as 'School'.
Attribution	Any statement in which an outcome is indicated as having happened or being present, because of some identified event or condition and a stated or implied causal relationship is present. For example, in 'I think knowing when to accept a difference of opinion. I don't know if that's a law school thing or just a growing up thing', the speaker attributes 'knowing when to accept a difference of opinion' to 'law school' or 'growing up'. It

Code	Description
	is coded as a single attributional statement indicating one outcome.
Cause	The factor, or factors, identified by the speaker as causing an outcome. The speaker may identify more than one cause. For example, in 'I think knowing when to accept a difference of opinion. I don't know if that's a law school thing or just a growing up thing' the outcome is accepting a difference of opinion'. The causes are 'law school' and 'growing up'. Both are coded as ‘cause'. 'Cause' is then coded separately for agents and targets. Do not code if cause is unclear.
Outcome	Refers to the event or result in the attribution. For example, in 'I think knowing when to accept a difference of opinion. I don't know if that's a law school thing or just a growing up thing' the outcome is accepting a difference of opinion' the outcome is 'accept a difference of opinion'. Do not code if the outcome is unclear.
Target	The person, group, thing or entity identified in the outcome. For example, in 'I think knowing when to accept a difference of opinion. I don't know if that's a law school thing or just a growing up thing' the outcome is 'accept a difference of opinion'. The target is the participant - they accept a difference of opinion. Do not code if the target is unclear.
Target - Employer - law firm	Child code of Target. Refers to targets for which participants work, or have worked, in the legal profession whether as a paralegal or in some other capacity (e.g., an intern or volunteer) and representatives of legal employers with which participants interacted in other settings including career fairs or interviews.

Code	Description
	It does not include working in policy areas that may be associated with law-making or applying the law but are not areas of legal practice (e.g., immigration decisions in the Department of Home Affairs).
Target - Employer - non-law	Child code of Target. Refers to targets for which participants work, or have worked, that is not specifically associated with the law or legal profession. It includes working in policy areas that may be associated with law-making or applying the law but are not areas of legal practice (e.g., immigration decisions in the Department of Home Affairs). The Australian Government Solicitor (or State and Territory equivalents) should be coded as 'employer - law'.
Target - Family	Child code of Target. Refers to targets in participant's immediate and extended family as an agent. It includes parents, partners and children.
Target - Friend – law	Child code of Target. Refers to a person or group of people with the identifies as a friend or a person as a target with whom they have established a friendship who is at law school or involved in the legal profession (but excludes employers). A participant will commonly refer to friends as 'a friend'. Coding should be based on the participant's characterisation, not inferred from the context. If unclear, it should be coded as 'peer - non-law'.
Target - Friend - non-law	Child code of Target. Refers to a person or group of people with the identifies as a friend or a person as a target with whom they have established a friendship but who is not at law school or involved in the legal profession. A participant will

Code	Description
	commonly refer to friends as 'a friend'. Coding should be based on the participant's characterisation, not inferred from the context. If unclear, it should be coded as 'peer - non-law'.
Target - Law school	Child code of Target. This is intended to capture where the participant has not identified a specific target in law school (e.g., a law teacher, peer-law or friend-law) as a target but has identified institutional influences from within law school more generally. It is most commonly identifiable as an explicit attribution to 'law school'. However, it includes references to the explicit curriculum (e.g., 'the Priestleys'). It can include a generalised or collective attribution where no target has been specifically identified.
Target - Participant	Child code of Target. This is the student/speaker/participant themselves as a target. It is most commonly identifiable through the use of the personal pronoun (e.g., 'I felt', 'I decided').
Target - Peer - law	Child code of Target. Refers to a person or group of people with whom the participant associates but they have not identified as a friend and who is at law school. It may be a person that they have met once, or more than once, but with whom they have not established a friendship. The key difference will commonly be that a participant will refer to friends as 'a friend'. For example, 'a law student, 'students in my class', 'older students', 'other students' (which in context refers to other students in law).
Target - Peer - non-law	Child code of Target. Refers to a person or group of people with whom the participant associates but they have not

Code	Description
	identified as a friend and who is not at law school or involved in the legal profession. It may be a person that they have met once, or more than once, but with whom they have not established a friendship. The key difference will commonly be that a participant will refer to friends as 'a friend'.
Target - Teacher	Child code of Target. Refers to a target who is a law teacher including a convenor, lecturer, guest lecturer or tutor.

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