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Editorial: Brexit and the Law School: From Vacillating between Despair and Hope to Building Responsibility and Community

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Putting together this special issue of *The Law Teacher*, and writing this editorial, has been an intense and in some ways enjoyable experience, but also a highly emotional and personally resonant one. Working on *Brexit and the Law School* has meant reflecting on our past experiences, present lives and future plans. We want to be transparent about our own positions, because they obviously influence our knowledge and understanding, the agendas we set and research questions we ask,[1] including those that informed the discussions in the workshops that preceded it[2] and the papers in this special issue. Hence, we begin this editorial by writing about ourselves and our experiences of UK Law Schools, before turning to the stories that we believe that this project on *Brexit and the Law School* is telling.

We are both mid-career women working in Northern English law schools; pre-1992, civic institutions with global perspectives and ambitions. Those law schools are roughly similar in terms of staff and student numbers. Sheffield has a high proportion of undergraduate students from the 'Northern corridor' from Liverpool to Hull. Leeds also draws large numbers from this area, but has perhaps more from the Midlands, London and the South, and more overseas undergraduate students. Sheffield sends roughly a third of its undergraduate students on a year abroad, many to Europe under the Erasmus+ scheme.[3] Leeds sends fewer (over 10% every year) with more going to

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[1] David Takacs, 'How does your positionality bias your epistemology?' [2003] 19(1) NEA Higher Education Journal 27.

[2] In addition to our workshop, discussed below, the Society of Legal Scholars funded 6 workshops during summer 2017, including one co-organised by Dougan, Hervey and O'Brien in Liverpool, and one attended by Hervey in Keele. For accounts of the workshops see: <https://www.legalscholars.ac.uk/brexit-law-school-seminars/>.

[3] Paul Cardwell, 'Does studying abroad help academic achievement?' [2019], European Journal of Higher Education <https://doi.org/10.1080/21568235.2019.1573695> accessed 20 February 2019.

destinations outside the EU. Both Schools have LLM programmes that recruit predominantly non-EU overseas students, and not much EU law is taught within those programmes. Both of us have experience of leadership of and/or within those Law Schools (in Hervey's case also within others in the North of England and Midlands), and are thus particularly conscious of the make-up and aspirations of our student bodies. We also both have experience as external examiners, through periodic review or other QA processes, and as 'REF critical friend', of a number of other UK-based Law Schools, including in the south of England, Scotland, Northern Ireland and in both the pre- and post-92 sector. We have research collaborations with people in Law Schools across the UK, and beyond. We are life-long members of our professional associations,[4] and have undertaken or are undertaking various leadership roles therein. Hence we know parts of the environment in which UK Law Schools operate very well, and from the inside, and other parts less well, and more as outsiders.

We both identify to some extent as EU lawyers, although Wallace has more of a comparative law focus and Hervey works on (comparative and transnational) health law. Latterly, we have both become legal education specialists as well. Hervey is Scottish by education, including her undergraduate law degree at Glasgow, and has extensive experience of short-form teaching outside of the UK, especially in EU and former EU-candidate countries, such as Slovenia and Croatia. Wallace was an Erasmus student in the early years of the programme, studying at the Université Jean Moulin Lyon III, and maintains links with that institution, currently as a visiting lecturer. In thinking about *Brexit and the Law School*, then, we are deeply conscious of the potentially conflicted relationship between our own identities, which are heavily implicated within the EU, and the future security and ambition of our Law Schools, which will need to be pragmatic in seeking financial viability and future opportunities for their staff and students, whether within, close to, or far outside the EU.

The papers in this edition were first prepared for a workshop, held on 15th October 2018 at the Institute of Advanced Legal Studies in London. We issued an open call for papers, and

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[4] In particular the Society of Legal Scholars and the Socio-Legal Studies Association.

commissioned some papers as well. We were open to (and even hoping for) papers that argued for an end to EU law's relatively protected place in UK schools, but sadly none of the requisite standard were forthcoming. The people who have contributed papers seem to us to be coming out of a particular experience of the EU referendum and the unfolding Brexit process, and the workshop gave a sense of a commonality of subjective experience. Notwithstanding that commonality, however, as early as the design stage of the special issue and at the workshop, the different experiences of Scotland and Northern Ireland were apparent and important to recognise.[5]

The workshop also brought an element of catharsis. It gave people the opportunity to get together, share experiences in a safe environment of sympathetic peers, talk about how momentous the issues we are facing feel, and recognise the increasing instability of our own positions (or at least our growing awareness of a lack of stability that had already been there). The recognition, particularly within Dougan and O'Brien's paper, of the extent to which everyone's experience of professional life had been transformed, and the extent to which emotional and personal factors influence our scholarly debates and judgments, was apparent.

The context of Dougan and O'Brien's paper is the significant challenge that engaging in impact work presents within the polarised and highly charged atmosphere of Brexit debates, and many of us had had, and continue to have, similar experiences. A different form of impact of our work, albeit one not recognised within the REF, is student education, and that is another area where the life of the Law School is infused with personal engagement and emotion. Students are, at least when they arrive, part of the 'general public', influenced in the same way by media coverage and social media campaigning, and they have the potential to be or become hostile audiences. At Leeds and Sheffield, large numbers of our students come from Leave-voting areas, a context which influences their perceptions and attitudes, even if they themselves, like the majority of 18-24 year olds, would prefer to remain in the EU. As academics and educators, we are not overtly seeing or

[5] We were, sadly, unable to source a paper on the specific Welsh experience, and we recognise that this is a deficiency in our account.

experiencing in our students the four tactics to which Dougan and O'Brien refer: big lies; selling fantasies; suppressing and abusing opposition; and blaming scapegoats. However, this may be because our relatively powerful status within the community of the Law Schools we inhabit means that we find it easier to silence those tropes within the learning environments we control. It may be that we have managed to set the terms of engagement and of intellectual encounters in ways that are less damaging than those experienced in other environments. We are conscious of the clear, but often difficult, line between setting those terms of engagement and appearing to silence pro-Brexit views.[6] Whilst university staff as well as students voted heavily to remain in the EU, we know, not least from the events in which we were involved in the run-up to the EU referendum, that pro-Brexit voices exist within our Law Schools.

Furthermore, we are extremely aware that much of what goes on amongst students is not visible to us, particularly as so much student community now exists in the digital realm. We think it highly likely that things are being said outside the classroom, both in real space and virtual space, away from our influence and the predominantly respectful intellectual culture of which we are to a large extent gatekeepers, and we have some indications from our own experience that this might be happening, not only on issues concerning Brexit, but also wider debates of equality, diversity and inclusion.[7] Insofar as we encounter these situations, our position of hierarchical power makes us mostly immune from direct abuse, but not from anonymous comments in student evaluations and we are conscious of the risks which this poses in the context of TEF and NSS narratives about student experience and student choice. These interconnected aspects of the contemporary HE environment in which we work in turn add to our sense of insecurity about the future, if we are teaching subjects and issues which might be unappealing to some parts of the student body.

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[6] E.g. see BBC report from 2.11.2017: 'Brexit Supporting Students Getting Abuse on Campus' < https://www.bbc.co.uk/news/av/education-41837205/brexit-supporting-students-getting-abuse-on-campus> accessed 20 February 2019.

[7] E.g. see the account in Tina McKee, Rachel Nir, Jill Alexander, Elisabeth Griffiths, Tamara Hervey, '*The Fairness Project*: Doing what we can, where we are' (2018) 5 *Journal of International and Comparative Law* 181, ftn 95 of a white, male student bringing a complaint to the Head of School, to the effect that he did not see why he should be made to "waste so much time" on learning about equality and diversity.

Barnard and Craig's short piece, which begins this special issue, is a compelling manifesto for the continued importance of EU law in the context of UK Law Schools. The authors speak from the relatively privileged position of Chairs in Cambridge and Oxford Universities respectively. But, as Guth and Hervey have argued elsewhere,[8] we are not necessarily all in this together. In particular, in England and Wales, the paucity of the engagement with Brexit within both the SRA's statement of legal knowledge[9] and the current version of the Assessment Specification for the Stage 1 Pilot of the Solicitors Qualifying Examination (SQE)[10] is dispiriting. Institutions that are likely to want or need to align more closely with the SQE in the future are not being given any good reason to maintain much, if any, EU law within the curriculum, and are being given no guidance as to what to include. The Bar's Professional Statement for Barristers[11] is much less detailed in terms of content knowledge than the SRA's statements, and is thus unlikely to be of much use in terms of influencing curricula. It merely requires an understanding of the 'implications of EU law'; a phrase which poses more questions than answers.

Taken together, all of the above might suggest that this special issue is telling a story of despair. The anecdote at the start of Stychin's piece is illustrative and will probably have resonance with many within Law Schools: every year since the EU referendum, Wallace, who teaches mainly first year students, has had to quash rumours that they will not be studying EU law in their second year. Along with fearing that we might lose our core teaching, we see threats to career opportunities and funding, as Cremona and Dimopoulos argue, as well as the emotions associated with identity loss, existential angst and having our expertise demanded and then ignored. As Shaw has

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[8] Jessica Guth, Tamara Hervey, 'Threats to internationalised legal education in the twenty-first century UK' (2018) 52(3) The Law Teacher 350

[9] Available at: <http://www.sra.org.uk/solicitors/competence-statement/statement-legal-knowledge.page> accessed 24 February 2019.

[10] Available at: <https://www.sra.org.uk/sra/policy/sqe/pilot/sqe-assessment-specification.page> accessed 24 February 2019.

[11] Available at : <https://www.barstandardsboard.org.uk/media/1787559/bsb_professional_statement_and_competences_2016.pdf> accessed 24 February 2019.

commented recently, this is particularly painful for those academics who have built a career defined by EU membership, citizenship and scholarship.[12]

Whilst the issues of funding, career development and loss are faced across the academy, there are perhaps particular challenges within Law Schools as opposed to disciplines where skills and knowledge are more easily transferrable, such as the hard sciences. Maiani, Pozdnakova and Progin-Theuerkauf provide evidence that postgraduate legal education in EU law will be a particular casualty, affecting some Law Schools more than others. The impact here may again be particularly felt in England, rather than Scotland or Northern Ireland, as the papers by Da Lomba, Fletcher and Zahn, and Flear and Mac Sithigh, respectively, show. The Republic of Ireland, as well as some parts of northern Europe such as the Netherlands and Scandinavia, are poised to take up capacity. The despair may be particularly deep for EU law specialists not trained in English & Welsh/Scottish/Northern Irish law, who may fear that, if they are no longer able to teach EU law, they have more limited opportunities to 're-invent themselves' than their locally-trained colleagues do. Therefore, some UK law schools, and some staff within those law schools, are significantly more likely to be badly affected by Brexit, and concerned that curricular and staffing conversations which implicate them deeply may be happening without having a place at the table or being able to contribute their expertise.

In counterpoint though, we also discern the threads of a story of hope – perhaps of hope against the odds – running through this special issue and the workshop which preceded it. As many of our papers and especially Dougan and O'Brien's paper and Maiani, Pozdnakova and Progin-Theuerkauf's paper attest, the specialist knowledge of EU lawyers is perhaps more valued than ever across a range of UK-based audiences. Many of us have experienced interactions in both professional and personal life in which it is assumed that – far from being cause for despair – the post-EU referendum context is nothing short of a glorious time for EU lawyers in the UK. Brexit is

[12]Jo Shaw 'Academics and the Media' (31st Jan 2019) <https://medium.com/@userjoshaw/academics-and-the-media-some-reflections-e588f9571756.> accessed 24 February 2019.

'the only game in town', and we are the legal experts in that game. Indeed, we are experts not only in the law of the EU, but also, increasingly, in the law of the Withdrawal Agreement (if it is agreed).[13] In addition, many of us are rapidly developing expertise on the emerging law of the 'special relationship' that is the UK government's hoped-for future[14] in terms of EU-UK relations.

With repatriation of EU competences not only to Westminster, but also to the 'devolveds', it has also become clearer that the *UK's* emerging post-Brexit internal market will need legal expertise, in terms of how to manage free movement of factors of production between England, Wales, Scotland and Northern Ireland, while respecting devolved powers to determine a range of policy questions, which could result in unjustified restrictions on movement *within* the UK.[15] What better than the modalities and disciplines of EU law as expertise in that regard? It would appear that, at least in terms of what is available in the public domain, thinking through what this means for English legal education and the capacities and knowledge needed into the future is embryonic at most.

Further, questions of which relevant aspects of the UK's connectedness with the EU will continue can also be told as stories of hope – although hope can easily swing to despair as the politics of the Brexit process unfolds. Surely, for instance, as Cremona and Dimopoulos discuss, even as a 'third country', the UK will want to secure continued access into EU-based research networks, Erasmus+, and the European University Institute? As we were finalising this special issue, however, the latter hope was thrown into sharp relief, as it emerged that the UK intends to withdraw from

[13] Available at: <https://ec.europa.eu/commission/publications/withdrawal-agreement-and-political-declaration-official-journal-european-union-19-february-2019_en> accessed 24 February 2019.
[14] Theresa May's Lancaster House Speech on 17.1.2017, available at: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> accessed 20 February 2019.
[15] E.g. Michael Dougan 'How the UK's 'internal market' depends on EU rules – and jeopardizes relations within the UK' (The Foundation for Law, Justice and Society, 23 March 2018) < https://www.fljs.org/content/how-uk's-'internal-market'-depends-eu-rules-–-and-jeopardizes-relations-within-uk> accessed 24 February 2019; Jo Hunt, Hedydd Phylip 'Partners no more? Scotland, Wales and the Withdrawal Bill in the House of Lords' (The UK in a Changing Europe, 8 May 2018) < https://ukandeu.ac.uk/partners-no-more-scotland-wales-and-the-withdrawal-bill-in-the-house-of-lords/> accessed 24 February 2019; Jo Hunt 'Brexit, Devolution and the UK Internal Market' (Centre on Constitutional Change, 19 February 2019) <https://www.centreonconstitutionalchange.ac.uk/blog/brexit-devolution-and-uk-internal-market> accessed 24 February 2019.

obligations under the EUI Convention, should the UK leave the EU without securing a Withdrawal Agreement.[16]

We do recognise, however, that any story of hope that can be told about *Brexit and the Law School* is a conditional story. The situation in Norwegian and Swiss Law Schools teaches us that hope for EU law and EU lawyers in UK Law Schools into the future is only really convincing if the UK continues to enjoy a close trade relationship, and other legally determined relationships, with the EU. Such continued legal integration between the UK and the EU is also an explicit assumption of Barnard and Craig's paper.

Moreover, one of the most important messages of our special issue is that *Brexit and the Law School* is not a simple story applicable across the whole of the UK. It is critical to recognise that the UK is multi-jurisdictional space, and that this is reflected also in legal education. We must eschew Anglo-centric accounts. Da Lomba, Fletcher and Zahn's account of post-Brexit futures for EU legal education in Scottish Law Schools, and Flear and Mac Síthigh's account for Northern Ireland, have significantly stronger notes of hope than accounts focusing on England only. The differences can be explained by different histories, economic and professional connections, and cultures. We should therefore expect different trajectories, replete with possibilities for learning from each other into the future.

To summarise, *Brexit and the Law School* can be told as a tale of despair, with a counterpoint narrative of (conditional) hope.

However, like all stories based on dyads, this one is oversimplified. In particular, the conditional nature of the hope risks painting us as dependent on the decisions of others. We think, however, that a different, more empowering narrative is possible: one of responsibility and of community. One of the more interesting themes to emerge from the papers is that those who

[16] Available at: <https://www.gov.uk/eu-withdrawal-act-2018-statutory-instruments/the-european-university-institute-eu-exit-regulations-2019> accessed 24 February 2019.

research and teach EU law in UK Law Schools are not mere passive victims in the Brexit process. As Stychin's paper powerfully argues, we have a responsibility to share with our colleagues for the failure – after nearly 50 years of EU membership – to come to terms with the fact that EU law is part of our jurisdictions. Instead, in the main, we have cast EU law as a separate legal order which, implicitly, only EU lawyers can really understand. While this may be understandable in terms of defending a set of professional competences and legal methodologies, putting EU law in a box marked 'different from English&Welsh/Scottish/Northern Irish law'[17] has practical consequences. In some contexts, it may even have meant that the fact that EU lawyers are not at the table when curricular matters are discussed is a result of our choices.

Brexit therefore offers a chance to regroup and rethink, to re-justify what we are doing when teaching and researching EU law, how we are doing it, and why. In that there will be safety (and richness) in numbers, but in our view we must resist a defensive 'call to the barricades'. What is needed, above all, is an open-minded and self-reflective approach, which does justice to the values of scholarship we respect.

If we recognise we are far from mere passive victims in *Brexit and the Law School*, what might we now do? Stychin's paper offers a model for an evolving reflective approach to (English) legal system/legal method education. We wonder whether what is suggested there could potentially go further, not only into constitutional law teaching, to which he refers, but also into private law. Contract law; company law; employment law; consumer protection law – all stalwarts of undergraduate UK legal education – and a host of other areas of law such as environmental and financial services law – are of course based heavily on EU Directives, which will become 'retained EU law' following the entry into force of the European Union (Withdrawal) Act 2018.[18] These subjects can be, and sometimes are, approached without any reference to the EU law provenance of the legal rules being studied. As a result, students are not exposed to the idea that the law in the common law

[17] And, as we have argued above, especially more different in the case of English law.
[18] European Union (Withdrawal) Act 2018, s 2-s 7.

jurisdictions of England, Wales and (perhaps to a lesser extent) Northern Ireland is infused with the assumptions of EU law, some of which are derived from the civil law traditions of continental Europe (the experience in the 'mixed legal system' of Scotland may well be quite different). The result is an unarticulated position that the common law as we experience it in England is untouched and unsullied by other legal methods or traditions, and indeed, going further, that Diceyan constitutionalism is somehow a-contextual. This is not a good basis for legal education, and falls short of the critical and analytical obligations inherent in the QA Benchmark Statement for Law,[19] as a minimum criteria for University legal education in the UK. Of course, this creates a more complex picture which poses pedagogical challenges, particularly given the types of examination-focused learning at A-level, driven by a series of governments, which value content over critical thinking or analysis that many of our students have experienced. But those challenges should not deter us from the opportunity that the post-EU referendum environment brings, of engaging in the necessary critical reflection about how we teach our core curriculum.

Whatever happens on 29th March 2019 (and as we write, it is impossible to tell whether this is to be a 'No Deal' Brexit, the Withdrawal Agreement with some 'face-saving tweaks', a request for an extension to Article 50 TEU's timeline, or even remaining in the EU (although this now seems a highly remote possibility)), it is evident that it would be irresponsible simply to return to pre-referendum thinking. All the complex phenomena that led to the EU referendum vote were present before, hidden in plain sight. The seeds of the referendum result were sown long before the European Union Referendum Act 2015. As in other aspects of public life, Law Schools now need to pay attention to that environment. Here, our responsibility is not only to resist defensiveness, but to seek to be actively transformative. As Cotter and Dewhurst remind us, if we look at the longer sweep of legal education, Law Schools and legal scholars are constantly reinventing themselves, in

[19] Available at: <https://www.qaa.ac.uk/docs/qaa/subject-benchmark-statements/sbs-law-15.pdf?sfvrsn=ff99f781_10> accessed 20 February 2019.

response to the environments in which they find themselves. This generation should therefore take heart that we have the capacity (and the energy and courage) to do so again.

What kind of a responsibility is this and whose? Here we want to suggest that – despite all we have said above, which we stand by – we *could* all be 'in this together'. *Brexit and the Law School* has the potential to be a story about us as a legal education community spanning the UK and all its jurisdictions.

We are conscious that we must be careful not to overclaim here. We have already noted that one of our key points from the special issue is that legal education in the UK is already fragmented and may become even more so. From where we sit, and acknowledging what it means to say that, English Law Schools outside of Oxbridge and London, but particularly those in post-1992 institutions, seem to us to be the most vulnerable. English Law Schools are already less international and European-focused than their Scottish and Northern Irish counterparts, where it is neither possible nor desirable to be insular about cross border practice and where relations with legal regulators are easier (as evidenced, by contrast, in the SQE process). Within post-92 Law Schools in particular, student populations and aspirations may be more localised and civic-focused, and many of them embody a particularly close and productive relationship with local communities. Pre-1992 English Law Schools are more likely to aspire to prepare students for global legal practice and have international student bodies, but equally many will have a strong local/civic focus and less of a global reach than Oxbridge and the pre-1992 London-based Law Schools.

Nevertheless, we think that these distinctions (admittedly painted with a broad brush here) should not prevent us from working in solidarity, building a coalition in particular around the need for serious discussion of the future of EU law in legal education, particularly in England and Wales. Here we should learn from our colleagues in Scotland and Northern Ireland. An obvious focus here for England and Wales is the vacuum around the place of EU law within the SQE. Does the 'day one' competence required of a new solicitor in England and Wales involve merely knowledge of the EU

institutions, grasp of internal market and citizenship law, or both? It is obviously impossible to answer the question fully now, but like it or not, the SRA's process and timeline is a crucial context for English Law Schools, and we suggest that developing discussions should involve EU and international trade law experts front and centre.

Beyond the narrow confines of professional regulation, we do need to be open to a reflective discussion of some hard questions. Does everyone with a law degree from a UK jurisdiction need EU law? If we want to make this claim, how will we justify it? Is a law degree that contains EU law in fact only, or particularly, useful for students who do not need or want the study of law to be closely tethered to a single jurisdiction: non-English students, and also students who are not planning to qualify as a lawyer at all? Even for students who do intend to practise, these conversations force us to think about English legal education in terms of equipping people to work across jurisdictions, rather than teaching law in a tight jurisdictional way. Cotter and Dewhurst's analogy with Roman law is particular apt. Placing Roman law at the centre of the law degree in continental Europe in particular meant historically that degrees were not closely connected with particular jurisdictions, but based instead on an assumption of transnational law. Zimmerman has argued that a historical understanding of this *ius commune* is essential to inform the development of a unified European private law in the present and future.[20] Is that model, when applied to legal education, however, one that is useful for all students in all types of institutions, with different types of post-law degree futures? And – being brutally practical – is it one that is understandable to people making decisions in market-driven HE institutions, who may not even be lawyers, let alone EU lawyers? Is it understandable to our current and future students, their parents and their employers? If it is not, we suggest here that we (at least in England) have an opportunity now to work together to make it so.

[20] Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law: The Civilian Tradition Today* (OUP 2001).

As we have emphasised, the answer to these questions is very different in the Scottish or Northern Irish contexts, which have different histories and traditions, very different relations with the legal professions and are responding to different drivers. Here there are learning opportunities for Law Schools across the UK. Could Scotland, in fact, be a model to help in problematizing the idea that it is unavoidable that England &Wales have to become more insular? Northern Ireland, too, draws to our attention the particular issues of cross-border practice and recognition of qualifications, as well as the need to understand the law of the border and the common travel area. Certainly, if we are now to take a role as protagonists rather than passive victims of the changes wrought by Brexit, there is a particular responsibility on those in English Law Schools that have not been especially open to international or European influences.

As a discipline there are things we, both staff and students, have in common that will help. The legal academy has always been a light-footed space. Within it, we are trained and experienced in responding to sometimes rapid and shifting contexts; all law teachers have had at some point to rewrite a lecture or a whole syllabus because the law has changed, and law students have to get used to the possibility of a new case, statute or report arriving at an inconvenient time in the academic year and having to be assimilated into notes. In being responsive to a rapidly changing external environment, we are also modelling behaviours our students will need in the national and global environments for legal practice, or graduate careers more generally. We might also take heart that we are much less divided professionally than we were 30 years ago.[21] Legal scholarship is more certain and becoming more confident of its disciplinary spaces and claims, both methodological and epistemological, than it used to be, and as a result we are more fitted than we might otherwise have been to take things forward together. For most of us, the future, for us as individuals, and for law schools and the academy as a whole, is less certain than it has been, and perhaps than we ever thought it would be. Nevertheless, from where we stand, and noting the limitations of that claim,

[21] See, eg, Fiona Cownie, *Legal Academics,Cultures and Identities* (Hart Publishing 2004); Richard Collier, 'We're All Socio-Legal Now?' Legal Education, Scholarship and the 'Global Knowledge Economy' Reflections on the UK Experience' (2004) 26(4) Sydney Law Review 503.

with which we began this editorial, we think that we have a real opportunity, and the ability, collectively to make a positive difference to that future, for ourselves and for (and with) our students. It won't be easy. There will doubtless be downs as well as ups. But we suggest that we might as well enjoy the rollercoaster!