By what authority can Professor Nygh (or the Supreme Court for that matter) assert the right to structure the law school curriculum in such a way as to deliberately seek to repress or quieten whatever critical impulses might receive expression among staff and students? As members of a public institution, as intellectuals, and as specialists in some sense in the problem of human rights, all of us, staff and students alike, have both a human need and a public responsibility to think as deeply and as seriously as we possibly can about the social and cultural crises confronting this society. The fact that the Supreme Court might prefer to have the legal profession trained by intellectual eunuchs who would be prepared to avoid such questions in the interests of short-term harmony cannot relieve us of that responsibility.

DRIFT OR MASTERY?
Drew Fraser, 4 October 1977.

The following paper represents an attempt to articulate a growing sense of personal disquiet over the aimlessness and drift which I believe is developing in the public life of this institution. Because it seems to have become impossible to engage in any effective and sustained public discussion and debate concerning the present and future role of this institution, the Law School stands in imminent danger of losing altogether any sense of collective purpose or conscious direction. In the absence of any such publicly formed collective purpose, is there anything left for any of us but to lapse resignedly back into the managed routine of everyday life within an educational bureaucracy, fully absorbed by the pursuit of our privatistic career aspirations?

But perhaps there is nothing to be done. It seems to be our collective fate to live in a managed, administered world. As our common life has become subjected to the general system of [social] production, public life has become dominated by the search for a "continually expanded technical control over nature and a continually refined administration of human being". That general systemic drive to subject social experience to the imperatives of effective administration is also working to shape the structure of our everyday life in this institution as well. The fundamental question facing us, both as citizens and as law teachers, is whether the logic of instrumental rationality wedded to the process of social production will constrain us in our effort to develop our individual and collective understanding of the proper role and responsibilities of the law school and of our place in it.

In a fundamental sense, the logic of instrumental rationality precludes the possibility of questioning the sort of world we live in. Questions of values, of the nature of the good life and the good society, are placed by that logic beyond the limits of legitimate scientific inquiry. Values, as distinguished from facts, are essentially individual, arbitrary and irrational. With

the spread of instrumental rationality, intellectual life which, as with the classical natural law tradition, was once oriented to the conditions of right action, has become reduced to the production of technical recommendations useful in the processes of material production and social control. Law schools, given their traditional self-understanding as "professional" schools and their ties to a practising profession deeply immersed in the tasks of servicing the most powerful interests within the social order, are particularly vulnerable to the inroads of an instrumental rationality which studiously avoids the fundamental questions concerning the meaning and worth of the ends which it serves.

That process has become so far advanced in legal education that a progressive, socially relevant law school has come to signify an institution committed to the development of better (i.e. socially effective) techniques of social management. As our civilization becomes more scientific, our lives become more "rationalized" so that the administrative control of increasingly objectified social processes has become an end in itself. The subordination of public life to the imperatives of socialized production generates a vast interlocking administrative system which needs to produce an ordered and predictable pattern of social interaction. That need is utterly antagonistic to a view of society as "a system of action by human beings who communicate through speech and thus must realise social intercourse within the context of conscious communication". In contrast to the manipulative norms of the administrative system, this latter conception of society requires forms of public discourse oriented to the attainment of a rational consensus concerning the values and goals shaping the common life of society. Civilization then, in that conception, becomes rooted in the knowledge and conscience of its citizens and not, as is the case with us, in the objective imperatives of the processes of capital realization.

In our public life (e.g. in our roles as law teachers) the logic of administration enforces upon us a definition of society as merely "a nexus of behavioural modes" within which rationality comes to signify nothing more than an understanding of the socio-technical means of behavioural ordering and control. In this context, theory, insofar as it is socially relevant, "is no longer directed towards the consciousness of human beings who live together and discuss matters with each other", but rather towards the "behaviour" of human beings whose role it is to manage and manipulate other actors within the social system (e.g. police, judges etc.).

The erosion of a rational public discourse is, of course, most evident on the societal level. But the process has its local manifestations as well. One can closely observe, for example, that important decisions within this law school tend to be made in accordance with the dictates of an administrative rationality which permeates our lives and poses a fundamental threat to the creation and maintenance of the conditions for the formation of a democratic and rational consensus on all those basic questions affecting our practical

destiny as a school. The formal structure of the school as an administrative hierarchy linked and subordinate to a complex university structure of political-administrative authority external to itself, can be seen as a constant, ever-present threat to the ideal of establishing here a mode of legal education which differs in significantly valuable ways from that available elsewhere. The example of the University of New South Wales should be sufficiently present to remind us that the realization of such an ideal will not be an automatic process. It will be realized only through a conscious and deliberate commitment to a collective resistance to all those pressures which emerge "naturally" from the structure of our situation and which guide us effortlessly in the direction of a mindless, routinized conformity to the patterns of life and thought which seem least inconsistent with an instrumental rationality which conceals beneath a public declaration of value-free objectivity an inbuilt preference for order and predictability. Without such a willingness to act to cut across the grain of established practices, the ideal of a progressive law school at Macquarie can never hope to become more than a well-intentioned cliche.

If that interpretation of our situation seems an unjustifiably bleak one, just recall to mind the profound sense of unease and apprehension that surfaced when it was proposed that we come together in a regular and public fashion to discuss our common situation. One might naively imagine, as I did at the time, that such an enterprise would be both unremarkable and necessary to the staff of a new institution which makes a claim to be involved in the creation of an alternative mode of legal education. But judging from the deafening silence which has so far greeted the proposal, most of us find the idea either altogether uninteresting or perhaps even positively threatening, if not actually subversive. In either case, it would seem that the staff no longer understands itself as a group of human beings with the capacity and need to engage in a sustained process of public discussion aimed at the formation of a rational and democratic consensus concerning the meaning and direction of our common activity.

If the notion of public life implies the existence of forms of public discourse constitutive of a democratic and rational public opinion, then this law school can no longer be said to possess a meaningful public life. Discussion of the fundamental issues arising out of our common life takes place, to the limited degree that discussion takes place at all, in mainly private contexts. The habitual clustering of knots of two or three individuals in various offices down the length of the corridor is antithetical to any genuine public life in which it must be a central concern of citizens to talk to each other about matters of common concern. These private groupings provide us with a shelter, but they also subordinate the logic of a free and rational discourse to our individual needs for friendship and emotional support. Public life demands a merciless exposure, a willingness to abandon a primary concern with our own life and survival. The risks inherent in public life probably account at least in part for the collusive tendency

observable at almost all our staff and school meetings to behave as if we were just one big happy family - the paradigmatic private shelter from the rigours of public life.

The fact that the structure of formal authority within the school is bureaucratically rather than democratically organized markedly increases the risks and tensions involved in its internal public life. Clearly, the professors who are held responsible by their administrative superiors for the conduct of the school's affairs will be loath to have effective control of the school escape from their grasp. That being so, one can hardly expect them to be sympathetic to the argument that important decisions within the school should be made according to the outcome of the process of rational and democratic discussion among the entire staff. One can certainly understand that lack of sympathy. At the same time a compelling argument can be made to support the special status of the need for a rational and democratic process as the prerequisite for any important decision within the school, however administratively convenient it may be to reach decisions by traditional managerial means.

All of us, particularly at this critical moment in the history of our society, have a very real and very definite responsibility to the intellectual community and to the public at large to engage ourselves and each other as deeply and as seriously as possible in an ongoing inquiry and debate into the nature of the legal process generally and of this law school in particular. Any such process is an essentially rational activity which, if it is to be successful or worthwhile, must be conducted in as open and as public a manner as possible. To produce a critical awareness of the world within ourselves and our students it will not be sufficient to subject all the other institutions in the legal process to critical scrutiny while exempting ourselves from such examination.

The urgent need for such a critical self-examination was impressed upon me by my recent experience with the selection committee. Once again, rather naively, I expected that the conduct of the committee would be governed by the norms of democratic and rational consensus formation. That expectation had its roots in the thoughtless belief that committee members were expected to be in some sense representative of, and responsible to the rest of the staff. And, of course, nothing could be further from the truth. Membership on the committee is an essentially administrative rather than representative responsibility. One's function is essentially limited to helping the professorial chairman of the committee make *his* choice. Discussion within the committee, such as it is, tends to be dominated by the preferences and preoccupations of the professorial members who bear the responsibility of appearing before the University selection committee to defend their choices. For a variety of reasons, not excluding simple fear, it is extremely difficult for any junior member of the committee to voice reservations, much less outright opposition, concerning a known profes-

sorial preference without feeling that one runs the serious risk of being regarded thereafter as an irresponsible troublemaker. And that apprehension is a perfectly sensible one. After all, if it is one's duty to assist the professor in making his choice, persistent opposition can only be understood as a form of insubordination.

Obviously, these pressures are not openly acknowledged by anyone on the committee - certainly not by the junior members. But that does not mean that they are any less real for that reason. In fact, the impossibility of openly acknowledging those pressures and constraints intensifies the discomfort one feels. It is an acutely uncomfortable, perhaps even degrading, experience to sit on a committee when one feels constrained to suppress one's own feelings and judgement on the issues facing the committee. This is especially so when one feels that basic and fundamental issues which should be fully and freely discussed are not even raised.

The most basic of the issues which tend to remain undiscussed in the meetings of the selection committee has to do with the basic conflict of interest, which might be said to exist with respect to staff appointments, between professors on the one hand and the lecturing staff on the other. Because that conflict is not acknowledged the particular needs of the lecturing staff tend not to be considered. What I have in mind here has to do with the different milieux within which professors and lecturers move. When staff appointments are being considered, the professors must be moved on some level by the fact that the appointment of a new lecturer means, for them, the appearance of another subordinate within the administrative hierarchy. That new lecturer will never in any meaningful sense be a colleague. Accordingly, the professor will tend, all other things being equal, to favour the appointment of persons who are orderly and predictable in their behaviour. Appointment of new lecturing staff means something quite different to a lecturer however. At a minimum it means the appearance of a new colleague. Whether that new colleague is stimulating or dull, spontaneous or controlled, predictable or innovative can mean a great deal to one's own future potential for growth and development. In selecting our colleagues, the professors have an enormous influence upon the shape and nature of future social and intellectual interaction among the staff. To the degree that interaction of that sort has the potential to affect the sort of people we might become, individually and collectively, the professors have the power to shape our very social identity.

What possible justification can there be for depriving junior staff members of an autonomous voice in the making of decisions which are obviously of greater personal significance to them than to the professors? One must also ask how one can hope to construct a law school sensitive to a broad spectrum of social needs and interests when the selection of new staff is effectively controlled by professors responsible to a professional and profes-

sorial constituency drawn from the most privileged strata within this society.

Because the processes of communication and consensus formation within the committee have become systematically distorted in the ways which I have outlined, the selection committee can at present play no useful role in any ongoing debate concerning the future of this law school. In fact, to the degree that the committee continues to act as a device to legitimise the will of the professors on questions of new appointments, it will inevitably work only to shape the law school according to the professors' desired image. Given their links to the administrative and political structures within the university, the legal profession and society at large, one may be sure that the professorial image of the law school will give more than due attention to the need for order and predictability among future staff members. One must ask oneself whether the administrative and managerial desire for order and stability will ever produce a critical and progressive law school capable of recognizing and responding to the needs of the broader community. One is inclined to doubt it.

In the light of the foregoing I would very much like to be relieved of my membership on the staff selection committee so long as it retains its present form. My belief, foolish and naive though it may have been, was that the staff members were to be responsible to the school as a whole. The constraints upon free expression within the committee as it is presently constituted are too great to bear in good conscience.

KNOWING THE LAW: A DISCUSSION PAPER
Drew Fraser, 19 October 1977.

In the course of last Friday's discussion on the importance of analytical thought an issue was raised which, it seems to me, deserves a more considered and elaborate treatment than was possible in the circumstances then. It was argued by several staff members that it is the responsibility of the law teacher to ensure that students acquire a firm grasp of the basic black-letter rules and concepts which provide the legal system with its skeletal structure. Students in *Structure of Law* should, it was said, come through the course knowing at a minimum such things as the elements of the tort of negligence. The capacity of one's students to recite on demand the elements of the tort of negligence is, then, the acid test of one's professional competence as a law teacher.

I would like to suggest that it would be a serious mistake to look upon first-year courses such as *Structure of Law* as a means of drilling students in what one conceives to be a basic repertory of fundamental legal concepts and rules. Such a formalist, conceptualist approach would be misguided, not because it fails to give due weight to the claims of abstract theory, but