EXPOSING THE TRUE ARGUMENT, A STUDENT'S RESPONSE TO DR WILLEM GRAVETT: 'PERICLES SHOULD LEARN TO FIX A LEAKY PIPE'*

> 'The difficulty, my friends, is not to avoid death, but to avoid unrighteousness … If you think by killing men you can prevent someone from censuring your evil lives, you are mistaken; that is a way of escape which is neither possible or honourable; the easiest and the noblest way is not to be disabling to others, but to be improving yourselves.'**

*by Antonie Klopper****

1 Introduction

The purpose of this article is to respond to Gravett as a way to ask what he is really criticising. Gravett proposes in his article that he wishes to address the critiques of a practical course or trial advocacy

* The purpose of this article is not to come to the defence of the individual academics that Gravett has decided to criticise, for they can surely defend themselves. I wish only to make clear the importance of the work they are doing as a way to point critics of the current system away from their colleagues and onto the legal education system at large, which is the real obstacle standing in the way of Trial Advocacy. This article superficially only argues that the there is no real threat to a destruction of the antithesis between theory and practice and that few oppose this position. Subsequent articles will hopefully answer to the underlying concerns Gravett poses to the critical thinking, constitutionalism and transformative constitutionalism are possibly breaking down the rule of law etc; WH Gravett 'Pericles should learn to fix a leaky pipe — Why trial advocacy should become part of the LLB curriculum (Part 1)' (2018) 21 *Potchefstroom Electronic Law Journal (PER/PELJ)* at 4.

** 'The death of Socrates' in Plato's *Apology*.

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course in South African law schools, which he sees as the *Pretoria Crits*.[1] He sees the *Pretoria Crits* as being the main antagonist. The reason for this is that he believes that the best way to cure the South African law curriculum is to add a course in trial advocacy. What I, however, fail to see is how the transformation of existing legal education and the way in which it is taught to a more critical approach has any effect on the addition of a trial advocacy course. The main concern of the *Pretoria Crits* would be to advise Gravett to not fall slave to the demands of practice, but to implement the course in a manner that also appreciates the transformative agenda that the Constitution has put forward. In the words of previous Chief Justice of the Constitutional Court Pius Langa: 'We can no longer teach the lawyers of tomorrow that they must blindly accept legal principles because of authority'.[2] The *Pretoria Crits* wish to make clear that lawyers should be educated in a manner that does not make them complicit in repeating the mistakes of the past.[3] The *Pretoria Crits*, when advocating for critical thinking are not advocating for less practice but the way in which it is practiced. Gravett, therefore, sees this questioning of the manner of practice as an attack on practice. The truth, however, is that the formalist approach to law is not reconcilable with what is expected of lawyers by the Constitution. In the days of apartheid, lawyers were held accountable only to their conscience and the law, their conscience sometimes negated by an over-reliance on parliament. Today the Constitution has created a new moral yardstick.[4] Practice might have continued with its machine-like resoluteness after 1994, but that does not mean it is correct in doing so. This line of questioning is what Gravett is opposed to. He is opposed to the disturbance of the machine-like resoluteness, the *status quo*.[5] The *status quo*, fortunately, was changed with the approval of the 'new' legal order by Act 108 of 1996, more properly known as the Constitution of the Republic of South Africa, 1996. Any discussion wishing to limit the influence of humanities or the influence of politics on the law risks complicity in possible future

1 Gravett (n 1); The *Pretoria Crits*, Gravett names as those scholars in the Department of Jurisprudence at the University of Pretoria's Faculty of Law.

2 P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* at 351.

3 K van Marle 'Reflections on legacy, complicity, and legal education' (2014) 3 *Acta Academia* at 197.

4 *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 140-141; The Constitutional Court showed that the sphere of Private Law must also look at the values enshrined in the Constitution, even the sanctity of contract and the once holy maxim *pacta sunt servanda*.

5 T Madlingozi 'Legal academics and progressive politics in South Africa: Moving beyond the ivory tower' (2006) *Pulp Fictions* at 5. Madlingozi refers to it as 'legal vending machines that chuck out a solution when one inserts a case'.

atrocities.[6] The main argument made in the articles referenced by Gravett is not an attack on practice as Gravett would make it seem. They are more a warning against teaching and educating students who are complicit in atrocities, such as our recent history proves to be close to home. Gravett removes the context of the articles and proclaims them to be enemies of practice.[7] The main argument by Gravett, rather, is a broader attack on a seeming agenda of the *Pretoria Crits*. He conflates this agenda as an attack on his idea to include a course in trial advocacy. Instead of arguing directly on the issues of constitutionalism, the Constitution as monument or memorial, transformative constitutionalism or any other concepts regarding the 'new' legal order, he superficially discusses and quotes the *Pretoria Crits* by antagonising them in an arena they never entered in the first place.[8]

2 Department or individual academics?

Each part of the Faculty of Law at the University of Pretoria must play their part and so too Critical Legal Studies (CLS) has its part to play.[9] It would be strange and irregular for a department to not support and encourage their field of research in the said discussion. This is the main point I try to make. There remains the question if Gravett is improving or disabling? My contention, respectfully, is that Gravett is misrepresenting the articles,[10] and is thereby purely disabling others and not improving himself or the Law Faculty as a whole. The articles do not pose a threat to his goal of more practical training, but rather the way in which it might happen or is already happening. The discussion by the *Pretoria Crits* is focused around the effect the power dynamic in the law has toward freedom of thought and intellectual discovery.[11] I contend that if Gravett's intentions of improving

6 K van Marle & J Modiri 'What does changing the world entail? Law Critique and Legal education in the time of post-Apartheid' (2012) 129 *South African Law Journal* at 217. The machine-like resoluteness that Gravett is advocating for is dangerous. 'It was his lack of the imaginative capacities that would have made the human and moral dimension of his activities tangible for him that was the problem'.

7 Gravett (n 1) 7.

8 It is important to note that the main arguments, that are absent in the *PER*/*PELJ* article (n 1) can be found in the *SALJ* article written also by Gravett (n 11). It is in that article that Gravett truly argues against the *Pretoria Crits* and I would advise that all arguments made against the *Pretoria Crits* be ignored in the *PER*/*PELJ* article (n 1) and that readers rather refer to the *SALJ* article (n 11) which is a much better article for read regarding the *Pretoria Crits*.

9 WH Gravett 'Of "Deconstruction" and "Destruction" — why critical legal theory cannot be the cornerstone of the LLB curriculum' (2018) *South African Law Journal* at 295.

10 I state once again that this phenomenon seems to be restricted to Gravett's *PER*/*PELJ* article.

11 K van Marle 'Jurisprudence, Friendship and the University as heterogeneous public space' (2010) *South African Law Journal* at 643.

practice are true, the *Pretoria Crits* are not his enemy but rather a valuable asset in the development of a truly post-apartheid law practice where attorneys, in their work, are never complicit with injustice and are skilled at writing, not just by reading the law, but beyond the law. As will be seen in this article, the use of quotes by Gravett are taken out of context and are used in a superficial way and upon closer inspection are not antagonising toward practice as a lawyer or elitist for that matter. Gravett states in his abstract that the legal academics, later branded 'the *Pretoria Crits*' agree with the antithesis that is proposed by Twinning.[12] I find Gravett's argument toward this point uncompelling. My contention in this article is that the *Pretoria Crits* do not support the antithesis, but rather have little opinion on the matter at all and are more concerned with the discussion of the way in which both theoretical and practical legal professionals are complicit by way of not understanding their responsibilities toward humanity, morality and justice.[13] Van Marle's discussion, for example, focusses on the changes that are necessary to not only correct the mistakes of the past, but to prevent them from ever happening again.[14] The discussion surrounding constitutionalism, transformative constitutionalism, complicity in atrocities and responsibilities toward justice are made to sound like discussions surrounding theory vs practice. If Gravett wishes to argue that the principles mentioned above are detrimental to 'legal certainty' or the efficiency of practice he must do so rather than beat around the bush by funnelling all the discussion of the theories as support for the antithesis proposed by Twinning. Therefore, by saying in the abstract and introduction that the legal academics see the law school not as a 'trade school' he is losing sight of the forest for the trees.[15]

3 Are the proposals made by Gravett modern enough for South Africa practice?

The question that must be asked is what exactly Gravett is proposing when he argues that the LLB has already been shortened to four years but must also make space for a course that will 'gird' the graduates for practice?[16] What part of the now shortened four-year course must be taken away? This is the question on all of the students' minds. It is

12 Gravett (n 1) 1.
13 The same argument is made in Gravett's SALJ article (n 11). The true intention of the some of the *Pretoria Crits* are to deconstruct the law and practice along with it. Others like Van Marle only asks questions regarding the current construction and the question lies as Gravett's title suggests between 'deconstruction' and 'destruction'.
14 van Marle (n 5) 209; van Marle & Modiri(n 8) 211-213.
15 For a true discussion of the 'forest' instead of the trees please see Gravett's SALJ article (n 11).
16 Gravett (n 1) 7.

indisputable that theory is essential for practice. I will argue in this article that there is little dispute between Gravett and the *Pretoria Crits* as he wishes to call them, in this context. The fundamental change Gravett wishes to bring to the curriculum is not opposed. The three pillars that will form the LLB curriculum will be: first the theory, which is already present, second the discussion of the truth and the true world behind the theory, which is currently the department of jurisprudence, and thirdly a course in trial advocacy, which will be made available to those who need it, or it could be made available as mandatory if unnecessary or outdated theory can be replaced. The question therefore, arises where the conflict between Gravett and the *Pretoria Crits* comes from? I would argue that most of it stems from the misunderstanding of the philosophical arguments on both sides. The confusion and frustration arise from some in the Department of Jurisprudence adding too much politics to the discussion of philosophy. Each writer has his/her own opinion and it is therefore, also improper for Gravett to bundle them together as the *Pretoria Crits* or the *Crits*. I will argue that some of the arguments made by Gravett in 'deconstruction' and 'destruction' have merit.[17] My contention is that if he had not funnelled the *Crits* together, the solution might have presented itself. Van Marle's inaugural address also brings some light to the subject. Van Marle states that to remove philosophy, or critical legal theory in this case, might seem to encourage growth in practice, but the destruction of the truth will lead to the destruction of practice.[18] That is why van Marle argues for the truth and theory of law for she strives to be a true philosopher who does not wish to merely show jurists the light but let them know the truth as to protect the law from attacks to its foundation, whilst admitting the truth will always remain a façade.[19] Van Marle proposes a way in which to promote the lawyer as not complicit. If the discussion is truly regarding the curriculum than questions like the removal of outdated theory and promotion of critical thinking (within the context of the 'new' legal order), legal reasoning skills and modern practical training must be discussed. The interpretation of van Marle's words differently would entail that she supports the training of students, but by 'practitioners' not by 'academics' in practice. Whether they receive such education at university or in practice is not important. The academics, however, must stick to their field and teach their theory. It would be ludicrous for a professor who is not a practicing attorney, not just admitted but practicing, to teach students of the realities of practice.

17 Gravett (n 11).
18 van Marle (n 13) 645; Arendt is quoting Nietzsche.
19 'The true philosopher' in Plato's *Republic*, Plato differentiates between the True Philosopher, Socrates describes true philosophy as the ascend to the top, out of the Cave and into the true light. Therefore, the allegory of the cave is the questioning of truth.

As a student I look forward to that discussion. Unfortunately, as I contend, Gravett strayed from this discussion toward a superficial jurisprudential discussion criticising the need for a critical approach toward law, which is enshrined in the principles of transformative constitutionalism and the 'new' legal order. With the constitutional changes to the legal order and the Constitutional Court's recent way of writing judgements, how will the traditional trial advocacy course prepare students for the changes in the legal order that are to come trickling down from the Constitutional Court? Will the focus on legal skills incorporate the transformative constitutionalism as Langa proclaims? In other words, will Gravett's legal skills courses also take into account the developments and changes that need to take place in order to truly be a post-apartheid society? If these questions cannot be answered, then there is still a lot more to learn from the so-called *Pretoria Crit*s. Therefore, the advocation for legal skills without taking into account the constitution and its structural changes to the law, would be detrimental to practice itself.

4 Pretoria Crits?

I will start with van Marle, included as one of the *Pretoria Crits*. Her main argument is not that no-one should teach a practical course, but that if it is taught it must not be taught by the normal academics at a university which is currently the *status quo*.[20] Van Marle is purely stating that the current academics at the university have been teaching theory and know only theory and should not gamble with fields or educate students on that which they are not versed in as will be shown in this paragraph. Van Marle and Modiri mention the impact US CLS and Brit-Crits have had on South African critical thought.[21] They also include criticisms against both schools of thought.[22] What should be emphasised is that both US CLS and Brit-Crits informed and still informs South African Jurisprudence but does not encapsulate it in the least. South African Jurisprudence is very much focussed on the discussions around the Constitution and its effects. It is true that some have criticised the Constitution and see the Constitution as memorial.[23] This does not mean that they are correct in this opinion and Gravett rightly criticises this view and gives reasons why. One of my major concerns with Gravett's critique is its inclusion of all *Crits*. As van Marle and Gravett clearly state there are those who see the Constitution as monument, for example Emile Zitske, who is included in this brand of *Pretoria Crits*.[24] The difference between seeing the

20 van Marle (n 13) 644.
21 van Marle & Modiri (n 8) 215 – 216.
22 As above.
23 Gravett (n 11); van Marle (n 13) 637-638.
24 Gravett (n 11) 301.

Constitution as memorial or as monument is cardinal for the discussion of 'destruction or deconstruction' as Gravett proposes. The direction of Critical Legal Theory in South Africa might be troubling, but this does not mean that there are not supporters of a philosophical way of looking at it, instead of a political one, tending toward a viewpoint of the Constitution as memorial. The *Pretoria Crits* and *Crits* branding negates the broader argument surrounding the Constitution and negates the fact that there are supporters of the Constitution as monument. In order for Gravett to truly stop the so-called 'radicalisation' of Critical Legal Theory in South Africa, he needs only look at some of the articles written by those he believes to be radical and discuss how a true philosopher would question the authenticity of the truth proclaimed.

4.1 Pretoria Crits in context

The use of van Marle's 2010 article or speech is also taken out of context. The main argument van Marle was making could be summarised as this: 'The elimination of the "true", referring to abstract contemplation, will result also in the disappearance of the "apparent", meaning practical concerns'.[25] In further context the concern for the separation of training and education is done within the context of letting all students be educated in a heterogeneous environment and the view of a future democracy that discusses matters amongst each other in a free and intellectual way.[26] The freedom of students to not be boxed into a specific path, but to choose that path for themselves. If this path entails practice, then the university is the place to make that choice. Van Marle is merely advocating for the freedom to make a choice. The freedom to not be kept in the dark, but to rise and pursue truth instead of being manipulated into believing the shadows to be the reality. The complexities of truth must not be ignored, and van Marle is concerned with the duty of the true philosopher to pursue truth, but also to understand and accept your inevitable failure. What matters is the freedom and resources to pursue the truth. Van Marle, as a true philosopher, is advocating that the university is such a place. To quote Derrida: 'but one should never simplify or pretend to be sure of such simplicity where there is none'.[27] The use of van Marle's words seemingly creates opposition, where the advocacy of theory through the eyes of Nietzsche is in fact an advocacy for practice. It is within the context of philosophy that her words must be used. Van Marle is proposing a free university with the right of students to educate

25 F Nietzsche *'How the "true world" at last became a myth' in "The twilight of the idols, or, how to philosophize with a hammer"'* (1889).
26 van Marle (n 11) 629.
27 Derrida *Limited Inc*, (1988) 119.

themselves and to know the truth. It is within this context that van Marle also advocates for the survival of 'practical concerns'.[28] In the words of Nietzsche: 'We have abolished the true world [the world of theory and philosophy that van Marle advocates]. What has remained? The apparent one perhaps? [the practical concerns Gravett is advocating for] Oh no! With the true world we have abolished the apparent one.'[29] In this context without the truth behind practice or the truth behind the law, there will neither be practice nor will there be law.[30] With reference to Gravett saying that van Marle argues for practice to be after university, this is not the case. Her exact words are: 'Our students, or at least those who will enter the legal profession as lawyers or advocates, will undergo practical legal training after, *or sometimes even while completing their degrees'*.[31] Contrast the quote given above with Gravett's paraphrasing: '"practical training", claims van Marle is apparently what students should undergo after graduation.'[32] The conflation of the entire degree with theoretical education is not what van Marle did. She is advocating for the truth to be taught, ergo for the true world to be made known or at least not abolished before the students are put into the 'apparent' world. For otherwise the 'apparent' world will crumble with the abolishment of the truth.[33]

Viewed within this context, Gravett is criticising the truth. The pursuance of truth before being placed in the world of practice, he wishes students would be forced into the box of practice whilst not having decided anything yet, whilst they may pursue courses, as van Marle points out during the LLB curriculum and two years after that. Van Marle clearly isn't against practical experience during the degree as she never criticises the current situation where some students as she puts it:' undergo practical training … even while completing their degrees'. She is merely fighting for the truth and the true world to be shown to the ignorant jurists in the 'cave'.[34] She wishes not to impede or abolish the 'apparent' world or the prevention of the entering of the students into the 'apparent' world. She wishes only to succeed in educating the students of the true world. If they have the freedom to do that then the LLB curriculum can be filled with all the practical training Gravett wishes to import whilst keeping in mind the theory necessary to practice law. This concern is made clear in Gravett's article in the *South African Law Journal (SALJ)*. The concern that if students are to see the true world, they might fall into nihilism.[35] This

28 van Marle (n 13) 629.
29 Nietzsche (n 27).
30 As above.
31 van Marle (n 13) 644 (my emphasis).
32 Gravett (n 1) 6.
33 Referring back to Nietzcshe and Van Marle's main argument.
34 The Cave is a reference to the 'allegory of a cave' that can be found in Plato's *Republic*.
35 Gravett (n 11) 316.

is also a common critique of the Euro-British CLS.[36] It is possible that knowing the truth might result in nihilism, but rather than hiding the truth from students, the cure for nihilism must be found. This cure cannot continue to be the absence of truth.

4.2 Pretoria Crits as individual academics

The *Pretoria Crits*, as Gravett refers to them, cannot be thrown together. Each scholar has his or her speciality or area of theoretical knowledge as do all academics. The definition of Jurisprudence as per the Concise is: 'the theory or philosophy of law'.[37] It is therefore, interesting to see Gravett charge the *Pretoria Crits* with teaching and promoting the theory and philosophy of law when the dictionary definition of Jurisprudence asks them to do exactly that. The Pretoria Crits work and teach within the department of Jurisprudence. They, as many academics, stick to what they know. It is surprising to see Gravett criticise them for not addressing problems that are beyond their field of study. He states: 'The Pretoria Crits view the problem in jurisprudential terms, because jurisprudence is all they know'. Is Gravett criticising the jurisprudence department for practicing jurisprudence? The main argument against van Marle and Modiri as part of the '*Pretoria Crits*' is their insistence on theory. This remains again their prerogative as scholars in jurisprudence. The reality as Gravett refers to is that the Faculty of Law and the architects of the curriculum have designed the existing legal curriculum to be theoretical. What Gravett proposes is a change to what has been the *status quo* since even before the end of apartheid. An advocate was and is taught to cross examine whilst doing his pupillage or through other courses. An attorney was and is a candidate attorney before being admitted. In other words, the training is made provision for in the two years of study that follows after law school. If Gravett believes that the existing South African system is inadequate, then it seems appropriate to criticise the system. However, he chooses not to focus on the past practice of South African legal education. In van Marle's 'Reflections' she discusses the fact that previous academic scholars of the apartheid-era used CLS as a way to critique apartheid where the Constitution now provides a new legal framework and every critique must be adapted to include African philosophy with the likes of Ramose to discuss the Constitution as either monument or memorial.[38] It is true that many in the jurisprudence department wish to directly critique the remaining formalistic legal culture by using CLS to keep fighting against the remaining elements of apartheid. The difference between the individual academics who have been thrown

36 van Marle & Modiri (n 8).
37 *South African Concise Oxford Dictionary* (2007).
38 van Marle (n 5) 200.

into a group named the *Pretoria Crits* is stark. Modiri and Madlingozi might see it as Memorial and Zitske might see it as Monument.[39] This difference of opinion is of cardinal importance and creates for a diverse and informed discussion. The act of grouping these diverging opinions together as the *Pretoria Crits* is not an accurate depiction of the reality of intellectual discourse in the Jurisprudence Department of the University of Pretoria. The difference of opinion is better emphasised and admitted in Gravett's *SALJ* article.

Gravett spends a whole paragraph discussing the author of one of the several quotes used by van Marle and Modiri in 2014. Gravett goes on to discuss Kennedy some more in his footnotes: 'as a "cross between Rasputin and Billy Graham"'. [40] The relevance of the discussion of personality traits when discussing an argument is questionable at best.[41] The whole discussion on Kennedy was provoked by a quote that flows into a discussion on South African legal discourse. It is therefore, once again an example where Gravett uses the worst side of American Critical Legal Studies to take the articles written by van Marle and Modiri out of context. Will these references to Neo-Marxist ideologies become clearer after reading a broader political discussion by Gravett in the *SALJ* article? The answer is yes. The superficial reading of the articles written by the *Pretoria Crits* would make it seem as if the *Pretoria Crits* are against the law as practical craft.[42] This is, however, not the case. The *Pretoria Crits* have from the articles referenced by Gravett purely been the discussion of critical thinking and how it should help the legal profession not repeat its complicity in immoral behaviour or unjust behaviour as it had done in the past.[43] This is also what the Constitution of the Republic of South Africa asks when it enshrines a bill of rights.[44] Proof of the 'new' legal order can also be found in the Constitutional Court and its cases.[45] This is why the so-called 'new' legal order cannot be ignored when discussing practical skills for lawyers.

Gravett makes the argument that 'change comes about when theory is combined with doing'.[46] The theory, however, must be taught somewhere. If he wishes to prepare students for reality, then look at subjects that have little to no affect in practice. For example,

39 Gravett (n 11) 301.
40 Gravett (n 1) 9.
41 As above.
42 Gravett (n 1) 9.
43 van Marle (n 5).
44 As above.
45 See the part of this article on Constitutionalism. The use of quotes for 'new' is that the legal order is transforming and cannot be said to be a new legal order as the law and the system has stayed relatively the same, it has just been in a constant process of renovation or more aptly put transformation into a new legal order. Thereby the quotes are to suggest a process not yet complete.
46 Gravett (n 1) 1.

VHD, Payment Methods, at the University of Pretoria. It is a whole semester of learning about financial documents that are not necessarily used anymore. Replace VHD with trial advocacy and move IGZ, Intellectual Property Law, to electives. This creates space for the trial advocacy that Gravett is promoting. But how is it going to solve anything by focusing on the one subject that's purpose is to focus on theory and philosophy? The module wishes only to examine the law. To discuss its relevance, significance and purpose. In a practical sense it might be better to have more practice at the University. The question that remains is why the argument is not based on the reasons why theory needs to be combined with practice and the need for practical experience at the university. Why does Gravett need to 'piggy-back' off the theoretical arguments made by the Department of Jurisprudence. The arguments Gravett makes about the evolution of US law schools and their acceptance of trial advocacy cannot be more valid. The main opponent of Gravett, must be the deans of the university's and their legal academics.[47] The system must be changed, not the Department of Jurisprudence.

5 Philosophy as part of the LLB curriculum and a possible solution

Gravett's main concern with the *Pretoria Crits* can be found, not in the 'leaky pipe' article but in 'deconstruction'.[48] Gravett is concerned about the 'radical' critical legal theory practised by some in the Jurisprudence department. The answer for this lies in the argument made by van Marle.[49] The answer is the true philosopher and his/her search for truth. Truth is the work of the true philosopher. The discovery and understanding of the true world is the very foundation of the apparent world. To criticise a philosophical questioning of the law, will therefore cause the practical to crumble due to a lack of foundation in truth. Philosophy, therefore, is an integral part of all things. It encapsulates everything we as humans do. The fundamental questions of why we are on this earth or even alive. Philosophy and legal philosophy cannot be diminished to Critical Legal Studies. CLS is one part of many theories toward reaching a goal rooted in philosophy. However, he seems to not understand that it is not in a philosopher's nature to proclaim anything as perfect. There are many theories from African philosophy to Feminist theory to Queer theory to Positivism. All are theories, some have been accepted and practiced by those in practice, but the philosophers themselves are mostly observers of the present time, as well as questioning the

47 Gravett (n 1) 12.
48 Gravett (n 11).
49 van Marle (n 13) 632.

foundation of history in truth.[50] This is what Gravett accuses the Jurisprudence Department of. He therefore, is not attacking the Jurisprudence Department, but philosophy itself. The critique he has against the Department might be the answer to his 'radicalisation' concerns.

The definition of philosophy is: 'the study of the fundamental nature of knowledge, reality and existence'.[51] The legal branch of philosophy should be no different, but with a specific focus on legal knowledge, reality and the existence of the legal field. Gravett mentions that the '*Pretoria Crits*' 'refuse to grasp that theoretical and practical training or not incompatible'. To use an ancient but effective allegory to explain the role of the educator through the eyes of a philosopher, I use the allegory of the cave. Gravett is contemplating the problems and speculating about the 'images or shadows of images of justice' and wishes that students 'endeavour to meet the conceptions of those who have never yet seen absolute justice'.[52] As mentioned above philosophers seek true knowledge and questions existence. The philosopher as a teacher is much like the instructor Socrates speaks of when he says: 'the instructor is pointing to the objects as they pass … will he [the student] not fancy the shadows which he formerly saw are truer than the objects which are now shown to him?' and 'he is reluctantly dragged up a steep and rugged ascent … is he not likely to be pained and irritated'. The purpose of philosophy is to educate the 'minds eye'. To ensure that the truth is told. To teach legal philosophy or any philosophy is to teach the truth about the world and not let the students be left to discuss the relationship between shadows. It may be true that the Department of Jurisprudence has relied somewhat on critical legal theory as a field of legal philosophy in their articles, but to use one branch of legal philosophy to discourage the argument made by philosophers to teach, discuss and study knowledge and not practice it, is superficial. It may be true that the Department of Jurisprudence is guilty of relying too much on a 'radical' critical legal theory and the greatest critique toward this 'radical' critical legal theory might lie in philosophy itself. Any philosopher who proclaims to know the full truth is not a true philosopher, for a true philosopher will be preparing for death and will find nothing else to be of concern than that which concerns a dying man.[53]

50 This is a contentious issue, as will be made clear later in the article with the conflict between politics and philosophy as disputed by Plato and Aristotle. Voltaire was one of the first philosopher to question truth in history. In the first part of his *Essai sur les Moeurs et L'Esprit des Nations as titled the Philosophy of History.*

51 South *African Concise Oxford Dictionary* (2007).

52 Plato's *Republic* (Itunes version) 330.

53 van Marle (n 13) 634, quoting Minkinnen.

> Truth is the ultimate object of thinking, but because it is also the object of our desire, it must remain unsolved, an aporia. Thinking without desire and, by the same token, law as such, are authentic paradoxes.[54]

In this quote it becomes clear that those who may come the closest to the understanding of the true world can never be influenced by the needs of the apparent world. For the understanding of truth must never be defiled with anything other the thoughts of those concerning a dying man.

Philosophers and their search for truth, however, comes with its own caveat. The warning is that in the search for truth, your desire for the truth might prohibit you from ever finding it. The conflict or non-conflict between philosophy and politics has existed since the days of Socrates. Plato clearly advocates for politics to be part of philosophy's goal, where Aristotle tries to keep philosophy and politics away from each other and thus in conflict. It is up to the philosopher to decide, but the caveat remains that once the philosopher dives into politics by descending into the cave and dragging the others in the cave up the descent, he/she risks the truth to be nothing more than another façade as the truth cannot ever be said to be the truth but merely a truth from the perspective of the observer. Gravett makes the argument that some Critical legal theorists are promoting deconstruction but are in actual fact destructive of too much of the law, without providing an adequate replacement.[55] This may be true, as I see the philosophy behind the finding of truth in the law or exposing the truth might seem to be destructive, but the law must be able to withstand attacks on its so-called justice. Gravett himself expresses the reality of injustice in the law. The argument Gravett makes is that in order to counter the nihilism that comes with knowing that the law is not perfect is to focus on the parts, however small, that are just and promote justice.[56] This, he argues, is how legal education is currently avoiding nihilism in students and promote a positive image of the law.

6 The metaphor of Pericles and the leaky pipe

I would like to shortly discuss Gravett's use of Twinning's Pericles and the leaky pipe. Pericles was one of the greatest Greek statesmen of his time. Born 495 BCE, Pericles was the first politician to note the importance of philosophy. His discussions were of the state and the

54 P Minkinnen *Thinking Without Desire. A First Philosophy of Law* (1999) 187.
55 Gravett (n 11) 320.
56 Gravett (n 11) 320.

greater picture of the world in which Athens was the leading city.[57] If Gravett's metaphor is to be broken down into pieces: 'Pericles should learn to Fix a Leaky Pipe'. In order for a lawyer to be a Pericles as described by Twinning he must first be a: 'lawgiver, the enlightened policy-maker and the wise judge'.[58] If the metaphor mentioned above is to be interpreted in the way that the article suggests, which is to suggest that theory and practice is not mutually exclusive, then Pericles must first become Pericles. For that to happen Pericles must be educated in philosophy and the understanding of the humanities and the law before he may move on to learning about the leaky pipe. Pericles must first be educated and become a wise judge, as wise as possible before he starts to fix the leaky pipe. For in using Pericles and a plumber, Twinning chose two polar images as way to say we need to find a midway or choose one. The argument made by philosophers is that students must first try and come as close to Pericles as they can, before they may practice anything, whether it be the fixing of a pipe or replacement of the pipe. Therefore, the question remains what the right amount of theory would be. This is up to the Universities and their Curriculum discussions. However, it remains within the interest of the students of law, for the profession to remain a distinguished one.

7 The Law as part of humanities

Gravett himself has on occasion used Irving Younger's Ten Commandments of Cross Examination in his classes on trial advocacy. To quote Younger: 'In a word, read. Not law: there is too much law as it is, and most of it is better unread'.[59] Younger proposes this to experience the world that the law governs.[60] The world that the law governs consists of humanity. It consists of people and ethical problems. The law as part of humanities is not far-fetched in my opinion as all things are seen through the eye of Man and written down accordingly. The state exists for the people and in a democracy is governed by the people. The law forms part of this existence for the people and governance by the people. It is therefore, imperative to have a great amount of influence from humanities. The importance of the humanities must however, never be underestimated as the goal and raison d'être of the law. Especially in a constitutional democracy

57 Pericles' and his 'Funeral Oration' http://hrlibrary.umn.edu/education/thucydides.html (accessed 22 July 2018); 'It is true that we are called a democracy, for the administration is in the hands of the many and not of the few … a struggle transmitted to us their sons this great empire'.

58 Twinning 'Pericles and the plumber' abstract.http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198264835.001.0001/acprof-9780198264835-chapter-004 (Accesed 7 September 2019).

59 I Younger *Ten Commandments of Cross Examination* (1975).

60 As above.

such as ours. The line between the law and those who govern is very thinly drawn as the Constitution and the guardians of the Constitution are both situated in the hands of the law. The fact, however, remains that the judiciary forms part and parcel of the state. The law may not purely be a humanities study, but as mentioned above, the raison d'être for the law remains humanity and that is why the Department of Jurisprudence is so adamant to focus on humanities, for the discussion of the existence of the law will automatically take a study into the raison d'être of the law which leads one to humanities. Gravett suggests that law falls within the realm of engineering, medicine, management and accountancy.[61] I believe he is right. Law, just like engineering, medicine, management and accountancy would have no meaning if it was not for humanity. We would not need roads or planes or cars if there were no people to use them. We would not need medicine if there were no people to treat. We wouldn't need management and accountancy if there were no people doing business and trading interests. Humanity is not a discipline that can be contained. It is enshrined in everything we have accomplished. We see through the lens of our own humanity. Gravett refers to Medicine and I refer him to one of my favourite films:[62]

> What's wrong with death sir? What are we so mortally afraid of? Why can't we treat death with a certain amount of humanity and dignity, and decency, and God forbid, maybe even humour. Death is not the enemy gentlemen. If we're going to fight a disease, let's fight one of the most terrible diseases of all, indifference.

That same indifference is what a law school will reap when it rips humanity out of the law. Humanity cannot be packed into a neat box and named 'Humanities'. It follows and infects everything a human being touches, whether it be the law, medicine, engineering or accounting. Not only is it absurd to try and box humanities up, but to be indifferent is to walk on foundations of nothingness.

8 The Introduction of Constitutionalism

Questions keep arising among students studying law and reading case law from the Constitutional Court. Will the theory we are learning prepare us in answering questions from the Constitutional Court? Will I understand the impact of human dignity on every argument I make? The arguments made by Modiri regarding the introduction of the Constitution and the 'new' legal and political order and its absence in the discussion on transformation of the LLB curriculum is worth discussing.[63] It is true that the law and the legal profession is in a

61 Gravett (n 1) 10.
62 Patch Adams (1988).
63 J Modiri 'Crises in legal education' (2014) 3 *Acta Academia* 6.

transitionary phase, from the formalist neutrality that was expected from the previous legal order to the substantive constitutional approach of the modern Constitutional Democracy. Students who move into practice will, unfortunately, face both legal orders. It is, therefore, unreasonable to advocate for an advocate in the efficient and practical sense as Gravett proposes without educating students on the realities of decolonisation and transformative constitutionalism. The reality is that future attorneys and practitioners will face both legal orders. The fact is that both legal orders exist in practice. Gravett has provided evidence in the *Leaky pipe*, but I will provide some evidence of the 'new' legal order that was started by the Chief Justice of the Constitutional Court with the introduction of transformative constitutionalism. The Constitutional Court has ruled many times in the favour of the legal writer who can 'respond … to "disenchantment"'.[64] In the case of *City of Tshwane Metropolitan Municipality v Afriforum and another* (*Afriforum)*,[65] the court encouraged a way of reasoning that looks at the true world. The Court wants the attorney to show it the nihilist way in which the law has treated your client and then ask the court to deliver justice. In arguing the true world before the Court, the client wins. The Constitutional Court has shown itself to encourage a way of argument that looks to the humanities. The focus on human dignity as a cornerstone of the law is the shift toward a study of humanities that many legal professionals are afraid and sometimes unable to make. This shift can clearly be seen in *Afriforum*. To quote the court: 'fellow human beings deserving of human dignity and equality … even if what Afriforum says constitutes harm does in reality amount to harm'.[66] In the case of *SAPS v Solidarity obo Barnard* the court stated: 'So, plainly, it [the Constitution] has a transformative mission. It hopes to have us re-imagine power relations within society.[67] However much of the current legal profession objects toward this type of reasoning or the impact it has on legal certainty or on the rule of law. The Constitutional Court is the highest court in the country and its cases provide precedent that must be followed. It is, therefore, seminal that practitioners be taught to argue in the lieu of this 'new' legal order. The arguments are centred around harm to human dignity This is the argument van Marle made in her questioning of complicity and jurisprudence. It is also notable that van Marle uses the words of the former dean of Yale Law School where he notes

64 van Marle (n 5) 210.

65 *City of Tshwane Metropolitan Municipality v Afriforum and another* 2016 (6) SA 279 (CC).

66 *City of Tshwane Metropolitan Municipality v Afriforum and another* 2016 (6) SA 279 (CC) para 58.

67 *SAPS v Solidarity obo Barnard* 2014 (6) SA 123 (CC) para 29; Moseneke ACJ continues: 'In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination'.

> distinguished lawyer, the one who is recognised by his or her peers in the profession as an exemplary practitioner and whose work is marked by subtlety and imagination, possesses more than mere doctrinal knowledge and argumentative skill … when one lawyer wishes to praise the work of another, the compliment he [or she] is most likely to pay him [or her] is to say that he [or she] is a person of sound judgment.[68]

This ironically ties in with the teachings of Gravett when prescribing Irving Younger's ten commandments of cross-examination where Younger encourages the reading of novels and poetry outside the law. The same work prescribed by Gravett gives the means by which to become not a mere writer or drafter of the legal documents, but to become exceptional. This is the relevance of an understanding of humanities and the use of 'experience' as Younger would call it, is what makes a lawyer exceptional as he or she can persuade any judge by using not colourful language but understanding the world through poetry and literature and arguing and writing with the full understanding of the world and the reasoning behind your argument. The reading of literature is not to copy the language into your writing, but to understand the world and incorporate that understanding into legal writing and arguments. The question would be what the Constitutional Court expects of a legal practitioner? Are the students that receive an LLB prepared to argue before every court in the country, especially the Constitutional Court (as its precedent can and must be used in all subordinate courts)?

9 Conclusion

The different arguments made by different academics must be taken separately and critiqued separately. Gravett's method of defence for the apparent world [the world of practice] by questioning the true world [the world of theory and philosophy] may yet yield results, but if it is done without constraint it runs the risk of destroying the true world in its entirety and with it crumbles the apparent as well. For the true philosopher knows that the foundations of the true world are yet to be discovered. It might be foolish to question the search for truth rather than questioning the authenticity of those who proclaim to know it. Humanities are informing legal arguments more and more everyday with the introduction of human rights and the right to human dignity specifically as a focus of the highest court in South Africa, the Constitutional Court. As was shown in this article the Constitutional Court is driving the questions asked by the so-called *Pretoria Crits,* but the questioning of the law is and should be motivated by philosophical questioning. It was also made clear in this article that a true philosopher will drift toward nihilism and the truth,

68 A Kronman 'Living in the law' *The University of Chicago Law Review* 54(3) 861 – 2: as quoted in van Marle (n 13) 210.

so far, will be nihilistic in character but providing distractions or keeping the truth hidden is not the answer. Students have a right to know and search for a cure for the nihilism that seems to inevitably follow the excavation of truth. The cure cannot and should not always be the powerful authority that comes with a judgment from the Constitutional Court. The true power and character of the law must not be hidden, for otherwise it will never change into anything less meaningless than it already is. This does not mean, however, that the philosophers who have seemingly uncovered this authentic truth can easily delve into the cave and drag the 'pained' students with force out of the cave and risk destroying the protections, however false, with it. For the newly discovered truth might turn out to be just another shadow on a newly discovered cave. Let us question the truth together and with it not disable others but better ourselves and the legal profession in South Africa.