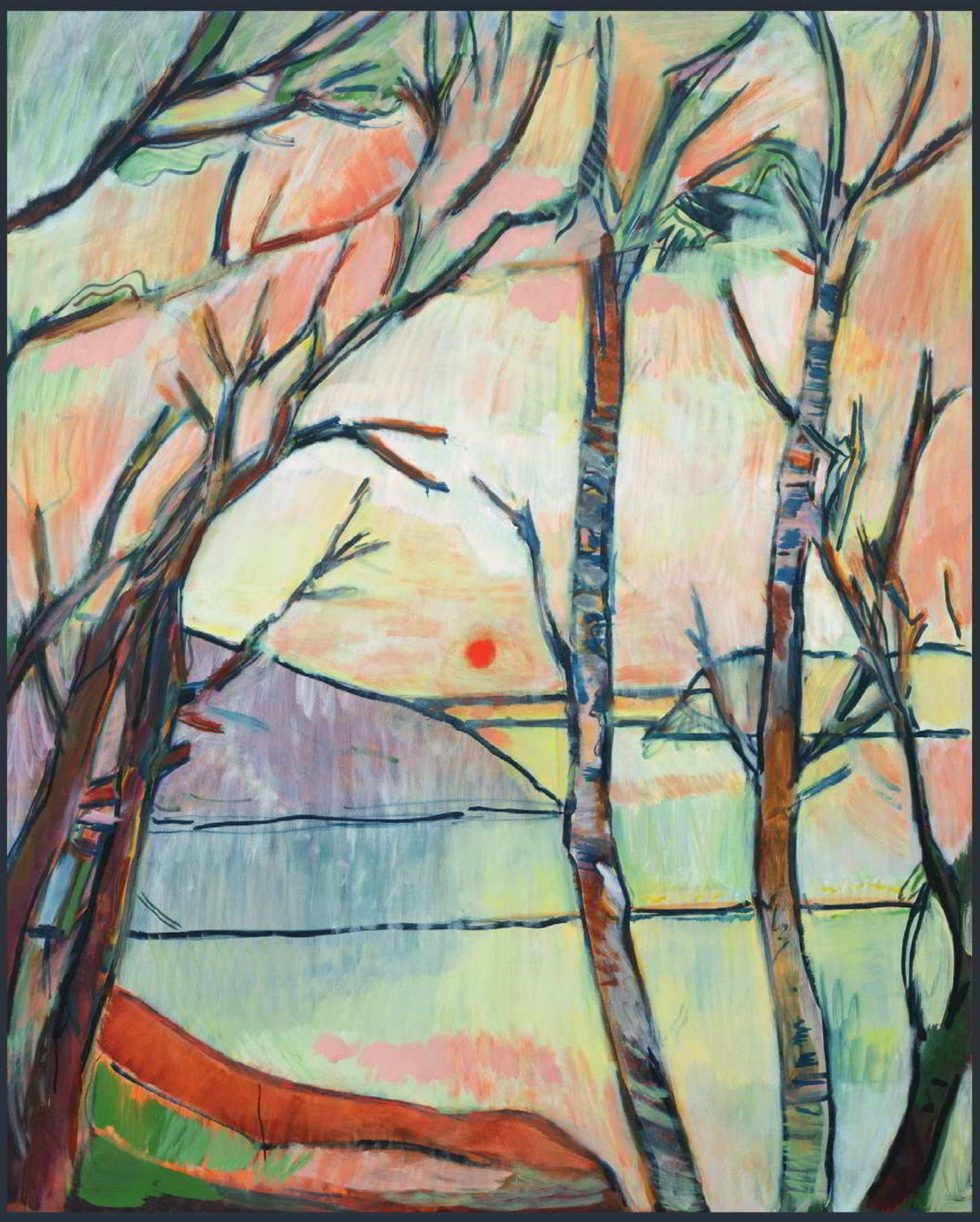
Harry Hobbs and Jeremy Patrick

BEYOND DOCTRINE

Alternative and Critical Approaches to Law



THE FEDERATION PRESS

BEYOND DOCTRINE

BEYOND DOCTRINE

Alternative and Critical Approaches to Law

Editors

Harry Hobbs

Jeremy Patrick

Foreword

Margaret Thornton

THE FEDERATION PRESS

2025

Published in Sydney by
The Federation Press
PO Box 6178, Alexandria, NSW, 2015.
8 Birmingham St, Alexandria, NSW, 2015.
Ph (02) 9552 2200. Fax (02) 9552 1681.
E-mail: info@federationpress.com.au
Website: http://www.federationpress.com.au



A catalogue record for this book is available from the National Library of Australia

ISBN 978 1 76002 562 5 (pbk)
ISBN 978 1 76002 563 2 (ePDF)

© The Federation Press

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publisher.

Typeset by The Federation Press, Alexandria, NSW.
Printed by Pegasus Media & Logistics, Blacktown, NSW.

Foreword

Margaret Thornton

As someone who has long advocated a broadening of the law curriculum, I am particularly pleased to have been invited to write the Foreword to this splendid collection.

The 'Priestley 11', in conjunction with a positivist pedagogy that is expected to produce 'right' answers, is a powerful arbiter of what is taught in Australian law schools. Despite being a prerequisite to admission to practice, its content has changed little in the last century even though Australia has become an increasingly heterogeneous society. Although not all students intend to practise law when they graduate, they like to qualify for admission 'just in case'. The fact that almost all satisfy the requirements invests the Priestley 11 with considerable power in resisting critique.

Despite the obstacle presented by the Priestley 11, significant portions of my career have been expended in law schools where colleagues have sought to convey to students that law is much more than a technocratic system of rules. They have argued that law can only be understood 'in context' by paying attention to history and philosophy, as well as other contemporary socio-legal perspectives. From time to time, this has incurred opposition from traditional legal academics, as well as from the practising profession, who felt that critical perspectives undermined the Priestley 11. Even senior university administrators have argued that a focus on anything other than conventional doctrinalism would alienate law firms and discourage them from employing the law school's graduates. This opposition has been so profound that it even resulted in notable sociolegal scholars being made redundant at law schools, such as Macquarie and La Trobe, despite their reputation for innovative scholarship.

Of course, once a progressive course has been set in motion, it is not easily deflected by the rearguard action of a few self-appointed gatekeepers. What is more, new ways of thinking are fostered by academic research, where independent interests have traditionally been pursued without fear or favour. Thus, while the law curriculum has been constrained by the Priestley 11 in terms of teaching, law schools have rarely imposed formal restrictions on independent research by undergraduate students, doctoral candidates, or academics.

Even though one might feel equivocal about the entry of competition policy into higher education, the introduction of rankings around the millennial turn resulted in a burgeoning of creative legal scholarship that included interdisciplinary research. The formation of interdisciplinary teams proved to be a positive by-product of the increase in grant income as black letter law projects no longer fitted the research bill: 'A mere compilation', said one humanities scholar dismissively of a doctrinal law application that I recall from my time on the Australian Research Council.

A further corollary of the sea change that emerged from the introduction of rankings was its impact on legal publishing, which resulted in a proliferation of law journals, many of which reflected the new interdisciplinary turn. These new journals, furthermore, were interested in original and imaginative contributions, not more of the same. Hence, creative, and innovative scholarship, of the kind evinced by the contributors to this volume, began to appear and to be acknowledged as legitimate.

I would also add that it is pleasing to see explicit acknowledgement of Australian scholarship in the collection. While not wishing to sound ethnocentric, I rue what I term 'Northernhemispherism', one of the less attractive dimensions of the rankings phenomenon. This entails the favouring of British, North American, and European publications over those from Australasia and the Global South. Rankings are often biased because the global ordering is determined by downloads, which tend to be judged by the prestige of a scholar's home institution, preferably Oxbridge or an Ivy League university. As a result, 'Northernhemispherism' invariably outranks scholarship from Australasia and the Global South, regardless of how innovative it might be.

University administrators, seduced by rankings, tend to assume that the 'international', that is, the Northern Hemisphere, publication of an article or book will enhance their institution's ranking in the latest league table. One colleague, for example, was told by their dean to include some American content in an article on family law to facilitate publication in a journal that would attract the 'international' descriptor. This was despite the fact that this academic was more interested in publishing in an Australian journal in order to engage with local experts and practitioners in domestic family law scholarship. I had an even more bizarre experience when I was on the editorial board of a British book series, where I had been led to believe that my role was to bring innovative Australian scholarship to the board's attention. However, when I delivered an original manuscript by an Indigenous scholar, the board rejected it on the ground that it was 'too Australian'; I felt that I had no option but to resign.

It is therefore wonderful to see the way Indigenous scholarship has been seriously engaged with in this collection, along with multiple other critical sociolegal perspectives not included in the Priestley 11 but central to an understanding of the constitution of contemporary society. These essays clearly underscore the fact that law, far from being a technocratic and esoteric body of knowledge disconnected from society, is central to its understanding. The collection will be a wonderful resource for lawyers, law students and anyone with an interest in the role of law in society. Hopefully, it might even nudge the admitting authorities into considering bringing the Priestley 11 into the 21st century!

I congratulate the editors for having the foresight to propose such an innovative collection as well as the energy to bring it to fruition; I also congratulate the contributors for their insightful and original scholarly essays; and finally, a bouquet must go to Federation Press for agreeing to publish the collection.

Margaret Thornton

The Australian National University, Canberra, July 2025

Contents

Foreword by Margaret Thornton *v*

Acknowledgments *ix*

About the Contributors *x*

Introduction 1
Harry Hobbs and Jeremy Patrick

1 Legal History 19
Shaunnagh Dorsett

2 The Point of Legal Philosophy 32
Jonathan Crowe

3 Comparative Law 45
Theunis Roux

4 A Field by any Other Name, or the Field FKA Law and Humanities 59
Alice Palmer

5 Qualitative Research Methods 75
Terry Hutchinson and Harry Hobbs

6 Quantitative Empirical Legal Studies 93
Alysia Blackham

7 Law and Economics 106
Guy Suttner

8 Marxist Approaches to Law 125
Michael Head

9 Legal Realism 141
James Gilchrist Stewart

10 Critical Race Theory 154
Thalia Anthony

11 Feminist Legal Theory 174
Ann Genovese and Heather Douglas

12 Decolonialism 189
Dorothea Anthony

13 Aboriginal Legal Traditions 208
Kristopher Wilson

14 Queer Legal Theory 221
Claerwen O'Hara

15 Postmodernism and Poststructuralism 236
Matthew Mitchell and Flynn Pervan

16 Disability Studies and the Law 254
Darren O'Donovan

17 Earth Jurisprudence 271
Costa Avgoustinos

Conclusion: Law Beyond Doctrine 287
Harry Hobbs and Jeremy Patrick

Index *291*

Acknowledgments

If all work is a collective endeavour, then that must be particularly so for edited collections. Harry and Jeremy gratefully acknowledge the contributors, without whom this book would not exist. We thank them for their enthusiasm in initially accepting our invitation to contribute to this volume, and their care and attention in producing a clear and thorough introduction to their methodological approach to law. We extend our thanks to Margaret Thornton, for her thoughtful and engaging foreword that introduces the collection. We would also like to acknowledge Federation Press for their interest and attention in this project. In particular, we thank Trisha Valliappan for her encouragement and Jay Cruikshank for his careful editing.

On a personal note, Harry thanks Annabel and Frankie Johnson for their support and patience. Though Frankie may prefer *The Gruffalo* to *Beyond Doctrine* for at least the next few years, Harry nonetheless looks forward to attempting to introduce it into the bedtime routine.

About the Contributors

Dr Dorothea Anthony is a Senior Lecturer in the School of Law at the University of Wollongong. She researches predominantly in the areas of human rights and international law, adopting critical perspectives based on her examination of the historical, political, and economic underpinnings of the law. Her work has been published in the *Australian Journal of Human Rights*, *Melbourne Journal of International Law*, *Global Encyclopedia of Territorial Rights*, *Asian Yearbook of International Law*, *European Journal of Legal Education*, and *The Laws of Australia*. Dorothea has taught public and private international law, corporate law, administrative law, legal ethics, and legal research and writing.

Dr Thalia Anthony is a Professor of Law at the University of Technology Sydney. She researches the impacts of colonial laws, past and present, on First Nations communities. Thalia had worked with Aboriginal women in prison and the community to build collective strengths outside of the carceral system. Her research is published in *Indigenous People, Crime and Punishment*, *Decolonising Criminology* and *Unsettling Colonial Automobility*. She is recognised by *The Conversation* as one of Australia's most influential thinkers. Her research is commonly cited in the media; in UN documents; in Supreme Court decisions; and in parliamentary debates.

Dr Costa Avgoustinos is a Lecturer in the Faculty of Law at the University of Technology Sydney (UTS), teaching Constitutional Law, Administrative Law, and Ethics, Law and Justice. His main area of research is Climate Change and (its impacts on) the Constitution, which was the subject of his PhD thesis completed at the University of New South Wales (UNSW). Costa has also been involved in various research projects with colleagues at UTS and other organisations on a range of topics, such as legal protections for First Nations children in foster care, sex workers' rights in NSW, and 'Democracy in Schools' programs.

Dr Alysia Blackham is a Professor at Melbourne Law School, The University of Melbourne, Australia. She is an internationally renowned expert on age discrimination law and the consequences of ageing for workplaces. Her research focuses on the intersection of employment law, equality law and public law, using empirical evidence to cast new light on legal problems.

Dr Jonathan Crowe is Head of School and Dean of the School of Law and Justice at the University of Southern Queensland, where he also holds a Research Chair in Law and Justice. He previously taught at Bond University and the University of Queensland, and has held visiting positions at Georgetown University and the

University of Texas at Austin. He is the author or editor of 11 books and well over 120 book chapters and journal articles, primarily on legal philosophy, ethics and public law. He co-edits the *Journal of Legal Philosophy.*

Dr Shaunnagh Dorsett is Distinguished Professor of Law at the University of Technology Sydney. She is an Honorary Fellow of the American Society for Legal History, a member of the Board of the European Society for Comparative Legal History, and a member of the editorial Committee of *The Journal of Legal History.* She is co-founder of the Legal Histories of Empire conference series. She is the author of a number of books and edited collections including, most recently, *Navigating Legalities: Legal Histories of Empire* (Routledge 2024), edited with Lyndsay Campbell.

Dr Heather Douglas AM is a Professor at the Melbourne Law School, The University of Melbourne and Deputy Director of the ARC Centre of Excellence for the Elimination of Violence Against Women (CEVAW). She researches in criminal law with a focus on legal responses to domestic and family violence. Recent books include a collection edited with Nicole Watson, *Legal Education Through an Indigenous Lens: Decolonising the Law School* (Routledge, 2025) and a collection edited with Kate Fitz-Gibbon, Leigh Goodmark and Sandra Walklate, *The Criminalization of Violence Against Women: Comparative Perspectives* (OUP, 2024). Heather is also the author of *Women, Intimate Partner Violence and the Law* (OUP, 2021). Heather's heritage is Scottish and Irish.

Dr Ann Genovese is a Professor at the Melbourne Law School, The University of Melbourne. She teaches and researches in the fields of Australian history and historiography, feminist history and theory, and jurisprudence, with a focus on archival sources and techniques that show (and contest the orthodoxies) of how Australian people have lived with laws. Her work has been integral to the establishment of an emergent practice – jurisography. Her books include *Australian Critical Decisions: Remembering the Koowarta and Tasmanian Dam Case* (Routledge, 2017); *The Court As Archive* (ANU Press, 2019) (with Rubenstein and Luker); and *Feminist Jurisography: Law, History, Writing* (Routledge, 2022). Ann's heritage is Italo-Australian.

Dr Michael Head is a Professor at the School of Law, Western Sydney University and a correspondent for the *World Socialist Web Site*. His most recent books include *Democracy, Protest and the Law: Defending a Democratic Right* (Routledge 2024), *Domestic Military Powers, Law and Human Rights: Calling out the Armed Forces* (Routledge 2020), *The Legal Power to Launch War: Who Decides*? (with Kristian Boehringer) *(*Routledge 2019) and *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (Ashgate 2016).

Dr Harry Hobbs is an Associate Professor in the Faculty of Law and Justice at the University of New South Wales. Harry holds an ARC Discovery Early Career Research

Award investigating Indigenous-State treaty-making. He has written widely on treaty in leading Australian and international legal journals, such as the *Sydney Law Review* and the *University of Toronto Law Journal*. He is also the co-author of the leading Australian book on the topic: *Treaty* (Federation Press, 2nd ed, 2020) (with George Williams), and an edited volume: *Treaty-Making 250 Years Later* (Federation Press, 2021) (with Alison Whittaker and Lindon Coombes). Alongside this work, Harry examines the phenomenon of micronations and the growth of sovereign citizens and pseudolaw adherents in Australia and their impact on the administration of justice.

Dr Terry Hutchinson currently serves as an Adjunct Professor within the School of Law and Justice at Southern Cross University. Prior to this, Dr Hutchinson held the position of Associate Professor in Law at Queensland University of Technology, being a member of Faculty 1987-2016, and a Visiting Fellow 2017. Her publications on legal research methodologies including *Researching and Writing in Law* (Thomson Reuters, 4th ed, 2018) are widely cited internationally.

Dr Matthew Mitchell is a Lecturer in Criminology at Deakin University. Matthew's research is situated at the intersection of queer criminology and socio-legal studies, focusing on LGBTQ people's interactions with legal systems, gendered and sexuality-related harm, and technology-facilitated violence. He is an expert in qualitative research methods and critical theory, with a particular interest in discourse and legal case analysis. His forthcoming monograph, *Governing Gender: Transgender Children, Hormones, and the Law* (Bristol University Press, 2026), examines how Australian law regulates transgender young people's access to gender-affirming care.

Dr Darren O'Donovan is Senior Lecturer in Administrative Law at La Trobe Law School, Melbourne. He has written extensively on rights, oversight and public administration, with a particular focus on the National Disability Insurance Scheme and social security law. His work has a socio-legal focus and emphasises the centrality of non-judicial review bodies and first instance decision-makers to delivering administrative justice.

Dr Claerwen O'Hara is a Lecturer at Melbourne Law School, a member of the editorial board of the *Australian Feminist Law Journal*, and Co-Chair of the Australian and New Zealand Society of International Law (ANZSIL) Gender, Sexuality and International Law Interest Group. Their research spans the fields of international human rights law and international economic law, with a particular focus on queer and feminist approaches to international law, alternative internationalisms, and law and political economy. They have recently edited two books on queer approaches to international law with Dr Tamsin Phillipa Paige: *Queer Encounters with International Law: Lives, Communities, Subjectivities* (Routledge, 2024) and *Queer Engagements with International Law: Times, Spaces, Imaginings* (Routledge, 2024). Claerwen is

currently working on their first monograph, *Consensus in International Law: Critical History, Queer Reimaginings*, which is under contract with Oxford University Press.

Dr Alice Palmer is a Senior Lecturer at Melbourne Law School (MLS) where she teaches on the intersections between environment, development and human rights law as well as legal methods and reasoning. Palmer's research crosses practical and theoretical aspects of environmental and international laws, with a particular focus on visual images as forms and features of law. At MLS, Palmer is a Program Director of the Art and Law Program of the Institute for International Law and the Humanities (IILAH), and a Deputy Director of the Melbourne Centre for Law and the Environment (MCLE). Her prize-winning book, *Natural Perception: Environmental Images and Aesthetics in International Law*, was published by Cambridge University Press in 2023.

Dr Jeremy Patrick is a Senior Lecturer in the University of Southern Queensland School of Law and Justice, where he developed and teaches a core course on alternative approaches to legal scholarship. Jeremy has studied and taught law in the United States, Canada, and Australia. His scholarship draws upon legal history, comparative law, and legal realism, and is primarily in the areas of constitutional law and law and religion. His monographs and edited collections include *The Impact of Law's History: What's Past is Prologue* (Palgrave MacMillan, 2022), *Faith or Fraud? Fortune-telling, Spirituality, and the Law* (UBC Press, 2020), and *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016). He is a founding co-editor of the *Australian Journal of Law and Religion*.

Dr Flynn Pervan is an Associate Lecturer in Criminology at Deakin University. His work spans historical and theoretical criminology, with a particular emphasis on disciplinary histories, and the historiographical and methodological work of Michel Foucault and Gilles Deleuze.

Dr Theunis Roux is Professor of Law and Head of the School of Global and Public Law at UNSW Sydney. Before relocating to Australia in 2019, he was the founding Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), now affiliated to the University of Johannesburg. He researches in the area of comparative constitutional law, with a particular interest in the law and politics of constitutionalism in the Global South. He is the author of *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press, 2013) and *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018). His most recent significant publication is 'Grand Narratives of Transition: The Quest for Democratic Constitutionalism in India and South Africa' (2024) 57 VRÜ/WCL 5.

Dr James Stewart is a Senior Lecturer in law at the RMIT University School of Law. James' research and teaching focuses on critical legal histories, private law, and legal theory. He has published a number of works on critical legal studies and cultural interactions with law.

Guy Suttner lives in Sydney on the land of the Wangal people. He graduated from UNSW with a Bachelor of Laws (Hons I) and a Bachelor of Arts.

Dr Kristopher Wilson is an Associate Professor in Law at Flinders University. Kris' research covers cybersecurity, computer-related crime, Indigenous traditional knowledge in a digital context, Indigenous legal relations, and cultural and intellectual property protection. Most recently, Kris was a contributor to the 1970 UNESCO and 1995 UNIDROIT Conventions on Stolen or Illegally Transferred Cultural Property (Oxford University Press, 2024) and he is a collaborator on the Indigenous peoples and cultural heritage international research and capacity-building initiative in the second phase (2023-2027) of the UNESCO Chair program. He is currently co-editing a two-volume special issue titled 'Decolonising Cultural Property' for the *International Journal of Cultural Property*, and is a co-editor of a forthcoming book with Palgrave on Indigenous Research Methodologies. Kris is a descendant of the Arabunna and Dieri Peoples.

Introduction

*Harry Hobbs and Jeremy Patrick**

I Law Conventionally Understood

If you were to ask a layperson how they think a difficult legal case is won, they may very well form an image of a besuited, spectacled young lawyer poring over a stack of dusty books in a lonely corner of a large library. The hour is well past midnight when suddenly the eureka moment comes: the all-but-forgotten case from 1872! The never-repealed statute from the reign of King Henry VIII! The unstated premise in the layperson's imagination is that "law" is simply an enormous collection of statutes and cases, and the lawyer that finds the most apt (and potentially obscure) authority will necessarily triumph.

Law students in Australia will have a *slightly* different view. They know that legal research is done on computers, often using expensive, subscription-only databases. But they very well may still hold the same underlying view of law: that challenging legal issues are resolved by adducing authorities until a judge is persuaded by their inexorable weight and declares victory for the side able to produce the most robust argument. Law students will be taught a more sophisticated set of concepts to convey this notion: "precedent", "controlling authorities", a case that can be "distinguished" vs one that is "on all four corners", and the "rule of law", among others. Having been infused with the belief that "law" is a rational, systematic, and effective way to resolve disputes, law students understandably take formal legal doctrine seriously. If nothing else, they will be tested repeatedly on their ability to resolve hypothetical factual scenarios by applying formal legal rules (the so-called "ILAC" or "IRAC" method of problem-solving).[1]

Many graduating law students (though not as many as is commonly assumed) will go on to become practising lawyers and put this doctrinal understanding of law into effect: researching internal memos for their supervising partner, writing client advice letters, drafting submissions, and so forth. A small percentage might become academics in a system of Australian legal education that is heavily influenced by the profession and its demand that the curriculum produce "practice-ready" students. Teaching traditional approaches to law, it will be second nature for most of these academics to produce traditional legal scholarship. An even smaller percentage of

* We thank Maxine Evers and Pauline Collins for their valuable comments on an earlier draft.

1 ILAC: Introduction, Law, Application, Conclusion; IRAC: Introduction, Rule, Application, Conclusion.

law graduates may someday become judges in an Australian judiciary known for a deeply legalistic, technocratic, and institutionalist mindset towards resolving legal issues. In each of these areas – legal education, legal scholarship, and judicial opinion writing – the understanding of law as doctrine reigns supreme.

But there is another way to think about law. Instead of law being a "closed" system that can only be understood through traditional legal research and analysis, law can be conceptualised as an "open" system in which insights, approaches, and influences from other disciplines can be brought to bear.[2] Laws around sexual assault can be accurately described by any good doctrinal criminal lawyer, but feminist legal scholarship offers deep critiques and proposals for reform. Doctrinal public law scholars presented valuable evaluations of the legal effect the Aboriginal and Torres Strait Islander Voice would have (if it were enacted at the referendum),[3] but critical race, Indigenous, and post-colonialist scholars were able to offer something more and different than just technical legal analysis. And where the establishment-oriented legal profession, professoriate, and judiciary pledge allegiance to the "rule of law", a Marxist or modern-day legal realist may remind us of the deep inequalities of wealth, privilege, and status perpetually maintained by the capitalist system and the legal framework that supports it. In short, when law is understood as more than simply a body of rules, but instead as a vital social construct deeply embedded in the history, culture, and values of a people, it makes perfect sense to examine it from a wide range of perspectives.

The purpose of *Beyond Doctrine: Alternative and Critical Approaches to Law* is to highlight different perspectives, reminding readers that "law" is far more than a dry, sterile collection of mechanically applied rules. Our hope is that by broadening the vision of legal education, our legal system itself can be reimagined. Each of the seventeen chapters in this collection provides an introduction to a different way of approaching legal issues, and each is written by one or more experts with a background in and focus specifically on Australian law.

This collection is the first of its kind in Australia, but that fact alone raises an interesting question: why has it taken so long? The remainder of this introduction answers that question. Below, Part II outlines the history of legal education in Australia, tracing its colonial roots in the apprenticeship model all the way to modern law schools. Part III dives deeper into law schools and examines a central tension in their purpose: are they essentially trade schools to prepare graduates for legal practice or are they part of the classic Enlightenment project to produce well-rounded citizens schooled in the liberal arts and humanities? In a memorable phrase, are law schools designed to produce 'plumbers' or 'Pericles'?[4] This discussion includes the growing presence of Indigenous understandings of law in Australian law school curricula.

---

2 See Pauline C Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011) ch 5.

3 *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth). On the Voice proposal see Harry Hobbs, 'Special Issue on the Aboriginal and Torres Strait Islander Voice' (2023) 34(2) *Public Law Review* 95-164.

4 William Twining, 'Pericles and the Plumber' (1967) 83(3) *Law Quarterly Review* 396.

Part IV then moves the focus beyond legal education and into legal scholarship to discuss both the dominance of the doctrinal methodology and a range of alternatives.

II A Brief History of Legal Education in Australia

For more than 65,000 years, legal education on this continent concerned the instruction and maintenance of the laws of Aboriginal and Torres Strait Islander peoples and societies. While each community developed their own distinctive body of norms and rules to regulate disputes and promote positive relationships, the First Laws of this continent share foundational commonalities. Holistic and pervasive, Aboriginal laws are broader than Western understandings of 'law'; they encompass notions of culture, of living in a proper manner, and of following the way of the ancestors.[5] These laws are intimately connected to the tracts of Country that each community is connected to and is responsible for. But law does not only 'flow … from the living heart' of Country, it sustains that Country.[6] In the indelible words of Kombumerri and Munaljahlai legal scholar Christine Black, 'the Land is the source of Law'.[7] Aboriginal law is Country, but it is also based on precepts of relationality, respect, and autonomy.[8]

The source, content and shape of Aboriginal law differs from Western law, but legal education requires the same deep grounding in study. Like an apprenticeship, individuals are taught or initiated into the system by highly trained elders who serve as guardians of the law. In ritual and ceremony, senior Elders pass the law down through means of songlines, stories, paintings, and dance, giving meaning to sites and connecting people to Country.[9] Some laws are public, but others are secret. The relationship a person has with Country and community – their gender, their family, their skin group, their level of initiation – can determine the scope of their instruction.

Colonial dispossession and European settlement undermined traditional authority and dislocated members from their community, their Country, and their law. Yet, Aboriginal law continues to be lived, sung, and told on and through the land.[10] Indeed, given the law 'is of Country', it 'cannot be eliminated'.[11] Adapting and responding to accommodate and utilise non-Indigenous law and practice, Aboriginal

5 Marcia Langton and Aaron Corn, *Law: The Way of the Ancestors* (Thames and Hudson, 2023) 36.

6 Ambelin Kwaymullina and Blaze Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 34 *Journal of Australian Studies* 195, 202-3.

7 Christine Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2010).

8 Mary Spiers Williams, 'Challenging Settler State Legal Fantasies: Basic Precepts of First Law' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 61, 74; Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Humanities* 181.

9 James Gurrwanngu Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2 *Northern Territory Law Journal* 236, 240-243.

10 Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015).

11 Williams (n 8) 76.

law 'exists as a real force, influencing or controlling the acts and lives' of Indigenous peoples across the continent.[12]

Nevertheless, given colonisation saw the English common law 'transposed and imported'[13] to this land as a settler 'birthright',[14] to speak of legal education in Australia today is to speak of the instruction and preparation of graduates for entry into the practice of Australian law. In this part, we provide a short overview of the changing model of Australian legal education over the last two centuries, tracing the development from the apprentice to the university graduate. This history is important. As Linda Martin has noted, the 'vital structural and intellectual components of our legal tradition were firmly entrenched during the nineteenth century'.[15] As we will see, despite major changes, the judiciary and profession continues to exercise significant control over legal education.

A The Colonial Apprenticeship Model

The legal profession first began to emerge in England during the thirteenth century. Education followed an apprenticeship model, with aspirants attached to courts.[16] Gradually, responsibility for training was assumed by practitioners, carried out within one of several guilds of lawyers in London, known as the Inns of Court. The four Inns operated in a similar manner to the universities of Cambridge and Oxford but taught the 'law of the land' as opposed to canon or Roman law. Within the Inns, students practised moots, attended lectures (or, given their content and tone, more strictly 'readings'), and dined with colleagues. Senior members of the Inn were responsible for selecting candidates for admission.

By the mid-eighteenth century, responsibility for legal education shifted from the Inns to university-affiliated law schools that took a broader view of the subject. Nonetheless, the profession retained a substantial role. A university law degree did not entitle one to practice: solicitors were required to serve five years as an articled clerk to an established attorney before admission, while aspiring barristers were expected to undertake a pupillage under the guidance of a senior practitioner.[17]

Legal education in the Australian colonies initially followed the apprenticeship model.[18] In the absence of both the Inns and law schools, however, the authority

12 Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (Report No 31, 1986) vol 1, 79 [103].

13 David Lieberman, 'English Legal Culture in the Late Eighteenth Century: Institutions and Values' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 40, 44.

14 Alex Castles, 'The Reception and Status of English Law in Australia' (1963) 1 *Adelaide Law Review* 1. See further *R v Murrell* [1836] NSWSC 35. See, Bruce Kercher, *Australia: R v Ballard, R v Murrell and R v Bonjon* (1998) 3(3) *Australian Indigenous Law Reporter* 410.

15 Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9 *UNSW Law Journal* 111, 111.

16 John Baker, *Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 165-184.

17 Ibid 183.

18 Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' (2008) 39 *University of Toledo Law Review* 233, 234.

responsible for admission served 'as a significant pedagogical force in the colony'.[19] That authority was the profession. While 'no formal educational qualifications were necessary', applicants seeking to become solicitors were required to serve five years as an articled clerk to an established practitioner and then submit to the examination of Supreme Court judges on their character and legal knowledge.[20]

Reflecting a wider political contest between emancipists (freed convicts) and exclusives (free men), the only avenue to the New South Wales Bar required men to seek admission in Great Britain or Ireland: there was no path for local lawyers. This did not change until passage of the *Barristers Admissions Act 1848* (Imp). The Act established a Board consisting of three judges of the Supreme Court of New South Wales, the Attorney-General, and two barristers who would determine whether a candidate would be admitted. Once again, although no formal qualifications were necessary, it was recognised that legal professionals should have a broad 'liberal and legal education'[21] beyond the simple recitation of doctrine and principles. To be admitted, a candidate needed to pass an examination in Greek, Latin, Mathematics, Law and any other branch of knowledge the Board deemed appropriate.[22] Without an accompanying training program,[23] applicants would undertake their own private course of study. A similar Board was established for solicitors in 1877.

The establishment of the Board ensured the profession remained firmly in charge of legal education. As the initial development of legal instruction at the University of Sydney demonstrates, the profession exercised this power by maintaining its 'proprietorial role in managing legal education' throughout the colony.[24] In 1850, the University of Sydney was incorporated. While a Faculty of Law was inaugurated in 1855 (becoming the first law school in Australia),[25] no teaching commenced until 1859 when John Hargrave, Solicitor-General and Member of the Legislative Council, was appointed Reader in General Jurisprudence. Hargrave's lectures were liberal rather than vocational in orientation; a review of his notes reveals a focus on the study of 'abstract law' as 'a high and noble science'.[26] Evidently, the Board was unimpressed. Although legislation exempted Arts graduates from the humanities section of the Bar exam,[27] the Board refused to recognise the jurisprudence examination set by Hargrave.[28] Martin notes the reasons for

19 Martin (n 15) 120.
20 Ibid 115.
21 Ibid.
22 *Barristers Admissions Act 1848* (Imp) 11 Vic 58. Note that the Board could admit practitioners from England without examination: David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 30.
23 Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission* (1964) (the 'Martin Report') vol 2, 52 [11.9].
24 JM Bennett, 'Out of Nothing…' in John and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 29, 29.
25 See Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965, 966-67.
26 Martin (n 15) 122.
27 *Sydney University Graduates Act 1857* (NSW) s 1, 2.
28 Martin (n 15) 126; Barker (n 22) 31.

this refusal were 'not clear',[29] though Hargrave himself had doubts over the efficacy and practical utility of academic legal training. In the face of division and ambivalence, lectures were discontinued in 1869, with the faculty becoming 'almost entirely an examining body'.[30] The divide between the Admissions Board and the University was maintained until 1890, when Pitt Cobbett was appointed the first chair and a full academic program commenced.[31]

The same tension was not present in Victoria. The University of Melbourne began teaching in 1855. Low student enrolments prompted the introduction of legal instruction in 1857.[32] By 'happy accident', the University Chancellor Redmond Barry was also a judge of the Supreme Court of Victoria, which was responsible for the colony's admissions rules. Barry ensured that the Board's rules exempted graduates from the Supreme Court's law exams,[33] ensuring a small but steady stream of enrolments.

B Rise of the Law Schools

The establishment of law schools in Sydney and Melbourne marked the first period in the 'growth of modern-day Australian legal education'.[34] Nonetheless, growth was slow. It took several decades for the remaining colonies and later states to institute their own law schools housed within universities, beginning with Adelaide in 1883, before Hobart (1893), Perth (1927) and Brisbane (1936) followed.[35] As David Barker notes, the formation of law schools in Australia during this early phase was characterised by 'long-drawn out' processes.[36] In part, these delays can be attributed to unease within the profession over the emergence of law as an academic discipline,[37] and uncertainty within the academy that a professional school belonged within a university. The emerging law schools themselves wrestled with this tension: should their objective be to impart a broad and liberal education or to prepare graduates for practice?[38]

This tension also manifested itself in the institutional setting within which Australian law schools operated. These schools were small, with limited resources and few ongoing staff. Indeed, prior to World War II, law schools 'were run primarily by part-time practitioner teachers, led by a full time professor who acted as Dean'.[39] In the immediate post-WWII period, Australia could only count 'around fifteen

29 Martin (n 15) 126.

30 Ibid 128; John Mackinolty, 'Before the Beginning 1850-1890: Mr Justice William Charles Windeyer, Dean, 1883-1891' in John and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 13, 20.

31 Bennett (n 24) 38.

32 James (n 25) 966-67.

33 John Waugh, *First Principles: The Melbourne Law School 1857-2007* (Miegunyah Press, 2007) 7.

34 Susan Bartie, 'Towards a History of Law as an Academic Discipline' (2014) 38 *Melbourne University Law Review* 444, 474.

35 James (n 25) 966-67.

36 Barker (n 22) 42.

37 In each jurisdiction, it was necessary to secure the support of the relevant Admissions Board to ensure graduates would be entitled to practice: ibid.

38 See discussion in Victor Windeyer, 'Learning the Law' (1961) 35 *Australian Law Journal* 102.

39 Susan Bartie, 'A Full Day's Work: A Study of Australia's First Legal Scholarly Community' (2010) 29(1) *University of Queensland Law Journal* 67, 67.

full-time teachers'.[40] This was not seen as a problem, but as 'one of the great strengths of legal education'.[41] Pitt Cobbett, the first Dean of the Sydney Law School explained that drawing heavily from the profession would provide 'an ample guarantee that the teaching would have a sufficiently practical bias'.[42] Almost seventy years later, Dean of the University of Tasmania Law School, Norman Dunbar, reiterated this view, noting that law schools should remain primarily a 'professional institution'.[43] In some cases, the site of the law school accentuated this connection: Sydney Law School's location in the heart of the city's legal district, far removed from university grounds, 'was no accident' and spoke to the profession's desire to 'ensure … that legal education would remain practice-based'.[44] In terms of pedagogy, the approach of early Australian law schools was strictly expositional and lecture-based, treating law as a system of formal principles and rules that needed to be memorised by students and then regurgitated in exams.[45]

The apprenticeship model persisted, particularly in New South Wales. As Justice Kevin Lindgren recalled, given there was only one university in the State, 'most people outside the Sydney Metropolitan area' sought entry by undertaking articles and examinations, rather than the Bachelor of Laws (LLB).[46] Indeed, in 1962 only 59 per cent of the state's solicitors and 50 per cent of barristers were university graduates.[47] This did not change quickly; it was not until 1968, that university graduates comprised a majority of yearly admissions, while in 1978, almost one-third of admittees did not possess a degree.[48]

In this respect, New South Wales was an outlier.[49] By 1962, the overwhelming majority of persons admitted to practice in other jurisdictions had obtained an LLB. In Queensland, the number of graduate solicitors stood at 71 per cent, in South Australia, 88 per cent, while in Victoria, Western Australia, and Tasmania at least 95 per cent of the profession were university graduates.[50] Even so, as Michael Chesterman and David Weisbrot note, these law schools 'were generally viewed as adjuncts to the legal profession rather than truly academic institutions dedicated to liberal educational aims'.[51] The manner and content of their instruction may not have

---

40 Coper (n 18).

41 Barker (n 22) 60.

42 Martin (n 15) 141.

43 Norman Dunbar, 'Common Sense in the Law School' (1961) 1 *University of Tasmania Law Review* 541.

44 Martin (n 15) 142-3.

45 James (n 25) 967.

46 Kevin Lindgren, 'Reflections on Legal Education' (2006) 9 *Newcastle Law Review* 67, 67.

47 Martin Report (n 23) 70.

48 Committee of Inquiry into Legal Education in New South Wales, *Legal Education in New South Wales* (1979) (the 'Bowen Report') 184, Table 7-A.

49 Zelman Cowen and David Derham, 'Australian Legal Education: A Dissent' (1956) 9 *Journal of Legal Education* 53, 54. Cf PB Carter, 'Australian Legal Education: Miscellaneous Comments' (1955) 8 *Journal of Legal Education* 179, 181.

50 Martin Report (n 23) 70.

51 Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 711.

amounted to much more than 'the uncritical transmission of legal doctrine'.[52] As the memorable words of the 1964 Martin Report on the Future of Tertiary Education in Australia, declared: 'Law, it has been said, can be taught under a gum tree, and, for much of Australia's history it might as well have been so taught'.[53]

It was not until the expansion of law schools from the 1960s onwards that this model came under some pressure. Between 1960 and 1980, six law schools were established to service a larger generation of school leavers and an expanding economy.[54] These new schools liberalised the legal profession, opening places for individuals capable of completing a law degree but who may not have been able to secure an articled clerkship. Expansion helped ensure that 'universities became the dominant providers of legal education' in Australia.[55] The growth of these schools and the emergence of professional law teachers also prompted new thinking about legal education.[56] Major reports during this period recognised the need to broaden legal education 'beyond the parroting of a set of rules',[57] to include 'an understanding of the role of the law in society'.[58]

The close relationship between legal education and the profession ensured that legal scholarship largely remained 'predominantly positivist'.[59] Nevertheless, cracks were beginning to emerge. Susan Bartie's close study of scholarly book reviews during this period reveals a cohort of legal academics that argued their students needed to 'to be equipped with knowledge of politics, sociology and philosophy', and that law should be conceived as 'an instrument of social policy'.[60] This period coincided with more fundamental changes to the apprenticeship model. Increasing criticism centred on the system of articled clerks, with many noting that busy practitioners had little time (and perhaps inclination or capacity) to instruct their clerks appropriately.[61] In New South Wales, the requirement to undertake articles was abolished in 1974,[62] in favour of a course of practical legal training. All other states have since introduced a similar practical legal training pre-admission requirement, though Victoria still offers an alternative.[63]

---

52 James (n 25) 965; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26(4) *Sydney Law Review* 537, 539.

53 Martin Report (n 23) 57.

54 Barker (n 22) 65-97.

55 Bartie (n 34) 476.

56 Coper (n 18) 233.

57 Dennis Pearce, 'The Past is a Different Country' in Kevin Lindgren, Francois Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2017) 49, 51.

58 David Barker, 'The Bowen Report' in Kevin Lindgren, Francois Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2017) 57, 61.

59 Chesterman and Weisbrot (n 51) 710; Erwin Griswold, 'Observations on Legal Education in Australia' (1952) 5 *Journal of Legal Education* 139, 145. For legal positivists, the existence of law depends on social facts, not on its ethical or moral content.

60 Bartie (n 39) 84.

61 Martin Report (n 23) 55 [11.28]; Report of the Committee on Legal Education, *Report of the Committee on Legal Education* (1971) ('Ormrod Report') [14].

62 Paul Cooper, 'Training Solicitors: The Expectations of the Profession' (1985) 3(1) *Journal of Professional Legal Education* 57, 58

63 Victorian Legal Admissions Board, 'Supervised Legal Training' <www.lawadmissions.vic.gov.au/qualifications-and-training/supervised-legal-training> (15 March 2024).

The shift towards formal programs of education accelerated with the 'unprecedented and unexpected' law school expansion from the late 1980s.[64] Higher education reforms instituted by Education Minister John Dawkins abolished the distinction between education providers and transformed Australia's universities into 'a mass education system'.[65] Since 1989, 26 law schools have been established, bringing the total in Australia to 38. And yet, the 'avalanche'[66] of university-affiliated law schools has not entirely displaced alternative routes. In New South Wales, for instance, the Legal Profession Admission Board, the successor organisation of the historically split Barristers and Solicitors Admissions Boards, continues to offer a Diploma in Law that satisfies the academic requirements for admission.[67] Even here, however, the encroachment of professional education is visible. Since 1962, a formal course of tuition has been provided by practitioners and academics.[68] Graduates are low but relatively steady.[69]

From a traditional apprenticeship model to rote education in textbook legal principles by part-time teachers to modern and sophisticated curricula taught by full-time academics, legal education in Australia is still heavily influenced by the judiciary and the profession. The right to practise as a lawyer in an Australian jurisdiction is conferred by the relevant Supreme Court, exercised by an admissions board. Law schools must obtain accreditation from these admitting authorities, and this means the content of their core curriculum must satisfy the expectations of the judiciary and profession. As we explore below, this regulatory structure encourages a focus on doctrine and accentuates the key tension inherent within legal education.

III Competing Visions of Legal Education

In 1967, William Twining's celebrated lecture 'Pericles and the Plumber' was published in the *Law Quarterly Review*.[70] As summarised by Daniel Goldsworthy, '[Twining's] lecture, and its title, are an allusion to the tension between the contrasting views

64 Barker (n 22) 99.

65 Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2019) 10(7) *German Law Journal* 641, 641.

66 Barker (n 22) 99–126.

67 The Australian National Institute of Management and Commerce also offers an LLB degree that is accredited in New South Wales: Australian National Institute of Management and Commerce, 'Bachelor of Laws (LLB)' <www.imc.edu.au/future-students/school-of-law/bachelor-of-laws> (9 April 2024).

68 Bowen Report (n 48) 155–156.

69 In 2021-22, 126 students graduated, a slight uptick from 108 and 109 in 2019-20 and 2020-21: NSW Legal Profession Admission Board, *Annual Report 2021-22* (2022) 9. Although not directly comparable, 3,816 students graduated with an LLB or JD from a NSW or ACT law school in 2018: Council of Australian Law Deans, '2018 Data Regarding Law School Graduate Numbers and Outcomes' (2019) <https://cald.asn.au/wp-content/uploads/2019/07/Updated-Factsheet-Law_Students_in_Australia-20-04-2019.pdf>. For discussion, see, Harry Hobbs and George Williams, 'The Participation of Indigenous Australians in Legal Education, 2001-2018' (2019) 42(4) *UNSW Law Journal* 1294, 1315.

70 Twining (n 4).

that legal education is an intellectual field of study on one hand, and on the other that it is essentially practical, vocational training in preparation for legal practice'.[71] Over fifty years later, the tension remains—at least in Australia. In 2020, Margaret Thornton noted that:

> [t]he discipline of law is still somewhat schizophrenic about whether it should prioritise academic or professional norms … This problem has been accentuated in Australia because of the close links between legal education and the legal profession.[72]

The tension reveals fundamental and abiding differences about the nature of law and the role and status of lawyers. If lawyers are practical skill-based problem solvers – essentially a fancy type of tradie that wears suits instead of Hi-Vis – thinking of law school as a type of trade school makes perfect sense. If lawyers are (to use dated gendered terms) "learned men" or "men of letters" devoted to a "life of the mind" requiring deep and wide-ranging intellectual thought, then thinking of law schools as centres of academic learning is what makes sense instead. In what follows, this central tension is explored.

A Law Schools as Trade Schools

The predominant conception of law schools in Australian history has been as a type of professional trade school. Medical schools pump out doctors, nursing schools pump out nurses, and law schools pump out lawyers. After all, what is it that a lawyer does, if they do not practise law? Whereas other trades involve tangible tools—plumbers with their plungers and builders with their hammers—lawyers have intangible tools in the form of a vast body of doctrine (the common law) which continually "works itself pure" and, sooner or later, provides an answer to every conceivable legal question.

The colonial-era advocates of formal legal education in Australia were not Oxford dons or German theorists, but pragmatic lawyers and business leaders who knew that the old apprenticeship model was no longer up to the task. From the earliest days of Australian legal education, the judiciary and the profession influenced what and how was taught in Australian law schools:

> From its evolution in New South Wales, and subsequently in the later colonies, the training of lawyers was very much a practical exercise with control being exercised by the judiciary as to the educational requirements which were mostly practical. The establishment of the early law schools gave rise to controversy from other established university disciplines which considered that law teaching was not an academic discipline but was more a practical vocation which had no place in a university.[73]

Universities did come to accept law schools, of course, but:

---

71 Daniel Goldsworthy, 'The Future of Legal Education in the 21st Century' (2020) 41(1) *Adelaide Law Review* 243, 244.

72 Margaret Thornton, 'The Challenge for Law Schools of Serving Multiple Masters' (2020) 62(2) *Australian Universities' Review* 5, 5.

73 Barker (n 22) 49.

> the professional authorities considered, and made it abundantly clear, that they should not accord recognition for professional entry purposes to a university law degree unless it was perceived to have a substantial 'hard law' content in subjects directly related to private practice.[74]

When an eminent American scholar visited several Australian law schools in the early 1950s, he noted 'the profession in Australia is too much concerned with practical instruction, and that it would make an important contribution to legal education if it would give the universities a considerably freer hand in the development of their programs'.[75] In a rejoinder defending the Australian way of legal education, the then-Dean of Melbourne Law School wrote that:

> [l]aw learning and study which gets out of touch with law practice and administration can become a very arid thing, and it is our belief that this association between law school and law profession is to be cherished. So far as we know, no English school has it, and many American schools lack it.[76]

The conception of law school as a type of trade school was no historical accident, but a conscious choice maintained despite criticism. Indeed, when there was later movement in some law schools towards teaching law as a social practice with ideological implications,[77] the profession and judiciary pushed back hard. The most decisive move towards retrenchment of law schools as trade schools was the 1992 Law Admissions Consultative Committee (LACC) Report.[78] The latter became famous for articulating the so-called "Priestley 11" core areas of knowledge that a law school would have to teach in order for its graduates to be admitted to legal practice.[79]

As Thornton notes:

> It is notable that the Priestley 11 ignored the broadening of the curriculum that had been occurring with the modernisation of the teaching of law and the embrace of social liberalism from the 1970s onwards … Second generation law schools, such as Monash, the University of NSW and Macquarie, were interested in the study of law in its social context and law as an instrument of social justice; they were particularly keen to break away from the 'trade school' image of the past.

---

74 Chesterman and Weisbrot (n 51) 712. As Nickolas James writes, 'The approach of the first Australian law schools to teaching law was strictly formalist and doctrinal. Legal education was little more than the "imparting of information in the form of legal principles, rules and propositions…to be committed to memory for examination purposes". The legal profession controlled both the content of the curriculum and its teaching': James (n 25) 967, quoting Martin Report (n 23) 57 [11.37].

75 Griswold (n 59) 145.

76 Cowen and Derham (n 49) 54.

77 James (n 25) 969.

78 A good overview of these reports is provided in Robert French, 'Legal Education in Australia – A Never Ending Story' (4 July 2011) (Conference Paper) 18-22.

79 *Legal Profession Uniform Admission Rules 2015* (NSW) sch 1 ('Admission Rules'). The Priestley 11 areas of knowledge are 'Criminal Law and Procedure, Torts, Contracts, Property, Equity, Company Law, Administrative Law, Federal and State Constitutional Law, Civil Dispute Resolution, Evidence and Ethics and Professional Responsibility'. The Priestley 11 knowledge areas were named after Justice Priestley, former New South Wales Court of Appeal judge and chair of the LACC, who determined the compulsory subjects for an Australian law degree.

> However, these trends exerted no discernible effect on the LACC. Even non-doctrinal subjects with a long tradition of being taught in universities, such as jurisprudence and legal history, did not appear in the Priestley 11. The expectation that the primary role of the law curriculum was to prepare students for private practice lingered on.[80]

From an outsider's perspective, perhaps the most surprising outcome is that now, over thirty years later, the "Priestley 11" remains almost completely unchanged. Despite early, frequent, and continuing criticism,[81] inertia has effectively locked it in place. In 2024, legal education in Australia is still largely centred, like it was in 1952, around traditional common law subjects taught by the lecture method, with students memorising and applying formal rules of legal doctrine.[82] Alternative ways of thinking about the law can still be taught, but mostly at the margins in the form of voluntary electives.[83] And to be fair, most law schools (and the increasingly-corporatised and managerialist universities they are part of[84]) are not exactly straining at the bit to break free from the dictates of the professional admitting authorities. Universities are under enormous social and government pressure to produce 'job ready' graduates.[85] A key marketing tool for universities is statistics on the percentage of graduates in gainful employment within a year of graduating, while students-as-consumers understandably expect their investment of time and debt to have a tangible payoff.[86]

---

80 Thornton (n 72) 9.

81 See French (n 78) 23 (discussing the 'unanimously negative' response of key stakeholders in 1998, and the Australian Law Reform Commission criticism that the Priestley 11 is formed from stagnant and outdated conceptions of what practicing lawyers need to know); Goldsworthy (n 71) 249 (discussing the 'vast technological progress' since the Priestley 11 that has shaped the legal profession in ways it could not foresee).

82 See Griswold (n 59) 148 ('Much of the teaching appears to be by what we would call the "lecture method", that is, by direct authoritative laying-down by the instructor, with the student dutifully copying and committing'.) Even if the goal is to produce 'practice-ready' graduates, an argument could be made that the core curriculum as taught in most Australian law schools is not very good at achieving this. However, the rise of clinical legal education, work placement, skills competitions (eg mooting), co-curricular programs, Practical Legal Training courses (after graduation), and so forth helps to fill in potential gaps.

83 Stephen Parker, 'Legal Education in Australia: The Perfect Storm' (2002) 43 *South Texas Law Review* 535, 539 ('In practical terms, these admission subjects constitute about two-thirds of the degree, leaving one-third for elective subjects'). See further Alex Steel, *Good Practice Guide (Bachelor of Laws): Law in Broader Contexts* (Australian Learning and Teaching Council, 2013).

84 See Thornton (n 72) 7.

85 Ibid 6. An interesting discussion, in the Canadian context, is provided by Harry Arthurs, who writes 'Unfortunately, producing practice ready lawyers is something law schools cannot do. The problem is that no one knows what practice ready lawyers look like. We lack information about what legal practitioners do, what knowledge or competencies they actually need or use, what breadth and depth of knowledge qualify new graduates as "ready" to practice, or how long they will remain "ready" before what they learned at law school becomes obsolete'. Harry W Arthurs, 'The Future of Law School: Three Visions and a Prediction' (2014) 51(4) *Alberta Law Review* 705, 706. Additional complications are that a sizable percentage of law graduates will have careers outside of practice, and that technological changes (such as AI) can quickly change the nature of core legal tasks.

86 See Pauline Collins, 'Australian Legal Education at a Crossroads' (2016) 58(1) *Australian Universities' Review* 30, 30 (discussing the expense of legal education and the stress it places on students to find gainful employment quickly).

In this way, law is like most of the humanities in Australia: under pressure to produce off-the-rack employees, not necessarily well-rounded and broadly-educated citizens.

B Law Schools as places of Liberal Education

Law as a subject of study may not have come to Australian universities until the 1850s, but it has a rich, deep, and long-standing connection with joint intellectual enterprise since the very origins of universities in medieval Europe. When students at a medieval university completed their six-year-long Master of Arts degree (comprising the classic subjects of grammar, logic, rhetoric, geometry, astronomy, music, and arithmetic) only then could they pursue study in one of the 'higher faculties': law, theology, or medicine.[87] In this conception, law was a noble and elevated field, equal to the study of the human body and second only to the study of God Himself. Lawyers were not shabbily-dressed, ink-stained loophole-searching word-wranglers (straight out of a Dickens novel) but instead wise and learned men: philosophers, governors, advisors, and statesmen – veritable Platonic Guardians. Law was an erudite branch of knowledge subject to rational classification, study, and articulation. In time, many would even think of it as a science.

Law thus fit easily into the evolving conception of the university as a crucial gateway for young men (as they mostly were until the past century) to become sober, well-rounded, and civic-minded members of the community. A "liberal education" acquainted students with everything from history to literature to mathematics. In the European and eventually American universities, law was a serious subject of intellectual thought to be studied by serious men, not simply a set of practical skills to be learned prior to entering a trade. In the United States specifically, law transitioned from a subject for undergraduates to a postgraduate degree. The assumption being that the broad, liberal education gained during a student's first degree (requiring compulsory courses in subjects like economics, political science, logic, history, and more) would set them up well for studying the complexities of law.[88]

But in Australia, as discussed above, this conception of legal education as part of a broad liberal education never gained widespread adherence. The "law school as trade school" model, heavily influenced by the profession, became the standard. Some scholars point to a brief span starting in the 1960s where critical approaches to law gained a brief foothold (and high visibility) in some law schools:

> In the newer law schools, in particular the traditional underpinnings of the common law and of bourgeois law in general, were assailed by Marxists and other political radicals. The debates were fought out chiefly in classrooms and in staff common rooms, but it also had a more public dimension, not only by virtue of published scholarship but also because law teachers publicly associated themselves with politically radical causes.[89]

---

87 Charles Haskins, *The Rise of Universities* (Cornell University Press, 1923) 27, 34.

88 The rise of joint-degree programs in Australia (eg 'Law & Commerce', etc) are a partial response by universities to supplement what would otherwise be a university law program that includes nothing but law. See Chesterman and Weisbrot (n 51) 715.

89 Ibid.

Similarly, the early 1970s saw some law academics adopt Feminist approaches to law[90] and the 1980s saw some allegiance to the Critical Legal Studies movement.[91] Law or legal studies programs at La Trobe and Macquarie were notable for stepping out of line of the mainstream approach to understanding law.[92]

Still, whatever effects these changes may have had on legal scholarship, the judiciary and profession maintained its dominance over the curriculum and thus legal education in general.[93] Writing in 1987, Chesterman and Weisbrot noted that:

> much of mainstream legal education in Australia continues, despite the events of the 1960s and 1970s, to operate according to a generally traditional, practice-oriented approach. New or restructured courses which embody a radical or critical approach must generally operate at the periphery.[94]

With some exceptions – like several law schools making courses in legal history, dispute resolution and jurisprudence compulsory – the situation seems largely unchanged today. In the eyes of the judiciary and the profession, and the seemingly-unchangeable standards of the Priestley 11, what makes a good lawyer is a sound understanding of traditional core legal topics like torts and contracts – not "theoretical" topics like legal realism, quantitative empirical studies, or comparative law. In Australia today, it is perfectly possible – and indeed probable – that most university law graduates will not have taken a single university course on any subject outside of the law program,[95] and that most of the subjects they take within the law program will be doctrinal in nature. If the dilemma is 'Pericles' or 'plumbers', the preference in Australia is clearly for the latter.

Yet if legal education at first appears unchanged (and unchangeable), appearances can be deceiving. Over the last decade, increasing effort has been exerted to internationalise the curriculum to facilitate global legal practice,[96] promote alternative dispute resolution skills to prepare graduates for the legal sector,[97] and introduce courses on artificial intelligence and the law in anticipation of the significant changes disruptive technologies will have on legal practice.[98] Other changes are occurring too. In the next section we discuss the burgeoning drive to bring Indigenous content into the law curriculum.

---

90 See James (n 25) 969-70.
91 Ibid 970.
92 Ibid 970-71.
93 Ibid 972 ('A widespread critical legal education movement failed to take hold in Australia').
94 Chesterman and Weisbrot (n 51) 721.
95 Although this is not correct for students studying a double or combined degree.
96 See, for example, Robert French, 'Horses for Courses' (International Legal Services Advisory Council National Symposium, 16 March 2012).
97 Kathy Douglas, 'The Teaching of ADR in Australian Law Schools: Promoting Non-Adversarial Practice in Law' (2011) 22(1) *Australasian Dispute Resolution Journal* 49.
98 See, for example, Lyria Bennett Moses and Michael Guihot, *Artificial Intelligence, Robots and the Law* (LexisNexis, 2020).

C Indigenous Content

In recent years, there has been a concerted push to embed Indigenous knowledges and perspectives into the law curriculum.[99] In 2020, for example, the Council of Australian Law Deans (CALD) urged all Australian law schools to 'work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs'.[100] Embedding cultural competency is aimed at reducing the alienation, isolation, and racism that Indigenous students can feel in law school, and ultimately improving outcomes for Indigenous students which continue to lag those of their non-Indigenous colleagues.[101] Indeed, as CALD explained, these programs emerge out of a recognition that 'systemic discrimination … permeates the Australian legal system'.[102] But cultural competency has broader benefits. Non-Indigenous students may develop an understanding of Indigenous cultures, histories, and contemporary realities, enhancing 'critical reflexivity'.[103] It can also bring vocational advantages. As the 2010 Behrendt review notes, the teaching of Indigenous knowledges can equip graduates with the capabilities to 'meet the needs of Indigenous communities'.[104]

The patient work of Indigenous and non-Indigenous academics has led to the introduction of Indigenous content across the law degree in a number of faculties. However, while we agree with Ambelin Kwaymullina, that the 'question for law schools is no longer so much *whether* law curriculum will be Indigenised, but rather *when* and *how*',[105] ongoing challenges remain. In many – perhaps most curriculums – Indigenous content remains 'fragmented' and 'tokenistic'.[106] In other cases, non-Indigenous academics may currently feel unable to effectively teach or lead discussion on Indigenous laws and jurisprudence.[107] Genuinely embedding Indigenous knowledges into the curriculum is not only an implementation challenge, however, but might reflect the deeper divide on the purpose of legal education

---

99 Universities Australia, *Indigenous Strategy 2017-2020*.

100 CALD, 'Discrimination and Structural Bias against First Nations Peoples' (Media Release, 3 December 2020). See further Sally Kift and Kana Nakano *Reimagining the Professional Regulation of Australian Legal Education* (2021) 59: 'In 2020, CALD revised its *Australian Law School Standards* to include a positive statement that law curriculum will seek to develop these Indigenous knowledges and understandings and to foster Indigenous cultural competency'.

101 See, for example, Nicole Watson, 'Indigenous People in Legal Education: Staring into a Mirror Without Reflection' (2005) 6(8) *Indigenous Law Bulletin* 4, 5; Phil Falk, 'Law School and the Indigenous Student Experience' (2005) 6(8) *Indigenous Law Bulletin* 8, 10; Heather Douglas and Cate Banks, '"From a Different Place Altogether": Indigenous Students and Cultural Exclusion at Law School' (2000–1) 15 *Australian Journal of Law and Society* 42. See, generally, Hobbs and Williams (n 69) 1300-1303.

102 CALD (n 100).

103 Annette Gainsford, Marcus Smith and Alison Gerard, 'Accrediting Indigenous Australian Content and Cultural Competency with the Bachelor of Laws' (2021) 31(1) *Legal Education Review* 59, 65.

104 Larissa Behrendt et al, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander Peoples: Final Report* (Report, July 2012) 94.

105 Ambelin Kwaymullina, 'Teaching for the 21st Century: Indigenising Law Curriculum at UWA' (2020) 29 *Legal Education Review* 1, 30 (emphasis in original).

106 Eddie Cubillo, 'Indigenous Programs at Law School' *Law Institute Journal* (July 2022) 30, 31.

107 Ibid.

between trade school and liberal education. In 2019, the Indigenous Cultural Competence for Legal Academics Program found some schools were reluctant to change the law curriculum, perceiving Indigenous knowledges as a 'periphery' issue, that is 'antithetical' to the core curriculum.[108]

The status and place of Aboriginal law – let alone the relationship between Indigenous Australians and the state – is and should be central to the practice and training of legal education in Australia. After all, law and lawyers have been central in the maintenance of colonisation, and the accompanying denial of Aboriginal and Torres Strait Islander peoples' rights and interests in this country. A more robust response is required. In 2015, the Truth and Reconciliation Commission (TRC) of Canada released its final report. Established for the purpose of documenting the history and continuing legacy of the Canadian Indian residential school system on Indigenous students and families, the Commission issued 94 calls to action. Recognising that the process of reconciliation must be societal and broad-based if it is to be effective, many of its recommendations were directed to civil society and non-government organisations. Two were directed to law societies and law schools. The TRC recommended lawyers 'receive appropriate cultural competency training'[109] and 'all law students … take a course in Aboriginal people and the law'.[110] Over the last decade, development has been slow but important steps have been taken. Several law societies now require practising lawyers' complete Indigenous cultural competency training,[111] while some law schools have introduced mandatory courses on Indigenous rights, law, and state-relations.[112]

Similar developments are occurring across the Tasman Sea. The New Zealand Council of Legal Education prescribes qualifications for admission to the legal profession. Recent amendments now require the study of tikanga Māori (Māori Laws and philosophy). From 1 January 2025, students must complete a compulsory subject on Tikanga Māori, and compulsory law subjects must also incorporate relevant material on Tikanga Māori.[113] A complaint by a prominent barrister that these requirements, among other concerns, impinge upon students' freedom of thought was ultimately dismissed.[114]

---

108 Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program: Final Report* (Australian Government Department of Education and Training, 2019) 18. Available at: <https://ltr.edu.au/resources/ID14-3906_Burns_FinalReport_2019.pdf>.

109 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015) Call to Action 27.

110 Ibid, Call to Action 28.

111 See, for example, Law Society of British Columbia, *Law Society Rules* (July 2023) r 3-28.1 'Indigenous intercultural course'.

112 CBC News, '28. Require All Law Students to Take a Course in Aboriginal People and the Law', *CBC News Beyond 94* (22 June 2023) <www.cbc.ca/newsinteractives/beyond-94/require-all-law-students-to-take-a-course-in-aboriginal-people-and-the-law>.

113 Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022 (NZ); *Lawyers and Conveyancers Act 2006* (NZ).

114 New Zealand House of Representatives, Regulations Review Committee, *Complaint about the Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022* (March 2025).

Developments in Canada and Aotearoa New Zealand suggests that legal education in Australia remains incomplete. We agree with Eddie Cubillo that the Law Council of Australia should 'adopt a 12th Priestley unit' on Indigenous history and law.[115] However, if recent years have seen real progress in embedding Indigenous perspectives in some law school curricula, continuing progress is not inevitable. With the defeat of the Voice referendum, some commentators have noticed signs of a general majoritarian societal "pushback" or retrenchment against other efforts at reform. The only matter that seems certain is that the next few years will be telling ones.

IV On the Value of Law Beyond Doctrine

Mainstream legal scholarship occupies a fascinating position in academia in that, in contrast to other disciplines, legal scholars rarely discuss *how* or *why* they do what they do. Whereas research papers in other fields almost inevitably feature a "methodology" section, mainstream legal scholarship simply takes it for granted that legal research is legal research, *simpliciter*. The tools taught in a first-year course on legal research and writing (spotting the relevant issues, looking up the relevant rules and authorities, and applying them to reach a persuasive conclusion) often become so ingrained that they become a new kind of "common sense"—the obvious way to approach legal scholarship. As Terry Hutchinson and Nigel Duncan write, 'the doctrinal method is often so implicit and so tacit that many working within the legal paradigm consider it unnecessary to verbalise the process'.[116] Indeed, even that term – 'doctrinal method'[117] – may be unfamiliar to legal scholars who use it intuitively in every research paper they write.

Reliance on the doctrinal method is understandable. After all, it uses the exact same toolset as practitioners drafting written submissions and judges writing opinions to justify their decisions.[118] And as it is the *only* methodology taught to many law students, it is the one they will most likely choose when a research project presents itself. By the end of law school, the doctrinal method is a comfortable one that is well-accepted by lawyers in the profession, the judiciary, and academia. It is part of what might be thought of as a self-perpetuating system because, in an important sense, the entire goal of doctrinal analysis is to maintain the coherence of the legal system.[119] And because the system is self-perpetuating, it is also a closed one:

115 Eddie Cubillo, 'Outline of Evidence of Dr Eddie Cubillo', *Yoorrook Justice Commission* (15 December 2022) 7 [11]. In Aotearoa New Zealand see, Metiria Stanton Turei, 'Indigenising Aotearoa New Zealand's Legal Education' (2022) 2(2) *Legalities* 127.

116 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 99.

117 The Council of Australian Law Deans has defined the doctrinal method: 'Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials'. See Hutchinson and Duncan (n 116) 105.

118 One might quibble that practitioners are engaging in advocacy while scholars are engaging in objective analyses, but the tools of issue-spotting, synthesising authorities, and reaching persuasive outcomes remain the same.

119 See Westerman (n 2) 89.

a formalist approach to law asks for no help and welcomes no solicitations from other disciplines. When law schools are trade schools producing plumbers (not Pericles), why should they concern themselves with anyone outside that trade? 'In formalism', Hanoch Dagan writes:

> law is governed by a set of fundamental and logically demonstrable principles. Two interrelated features of the formalist conception of law bear emphasis: the purported autonomy and closure of the legal world and the predominance of formal logic within this autonomous universe.[120]

Yet, a crucial question remains. *What if law is more than simply a system of rules to be analysed and applied with ruthless, mechanical logic?* If law *is* something more – such as a contingent social construct influenced by and embedded within a particular cultural context – then insights from outside the "sovereign" legal system become incredibly valuable for understanding it. Once we move beyond thinking of law as doctrine, entire realms of intellectual thought can be brought to bear in exploring the origins, meaning, effects, and implications of legal artifacts.[121] Some may find it exhilarating and others find it disconcerting, but there is no doubt that it alters our understanding of what law, as an academic discipline, is for and can achieve.

In Australia, a conservative profession, a legalistic judiciary, and a doctrinally-oriented academy can marginalise alternative and critical approaches to law. It is not often an article involving Queer Legal Theory will win the citation metric game or that a Marxist analysis will demonstrate "impact" for ERA purposes by being cited in the High Court.[122] But nonetheless, there is real value in thinking about law beyond doctrine. The old saying is that a legal education sharpens the mind by narrowing it. But as the contributions that follow clearly demonstrate, truly perceptive insights about law come from those who are still able to think broadly.

---

120 Hanoch Dagan, 'Law as an Academic Discipline' (2012) Tel Aviv University Law Faculty Papers (Working Paper No 171) 3.

121 Ibid 6 ('The demise of classical formalism opens up a rich, interdisciplinary research agenda for legal scholars').

122 Though note that at least one High Court judge has referred to Marx in discussing the legal consequences of colonisation, see: *Western Australia v Ward* (2002) 213 CLR 1, 231 [529] (McHugh J).

Chapter 1

Legal History

Shaunnagh Dorsett

I Introduction

As an area of scholarship, legal history has a (sometimes deserved) reputation as 'fusty'. It can be perceived as being an endeavour undertaken by earnest scholars, locked in dusty archives, obsessing over old court records. And it can sometimes be that. But it is also a dynamic and exciting area of scholarship; one which is frequently intertwined with feminist critique, environmental history, engagement with post-colonial legacies or international law (to name a few). It can draw on primary archival sources, diaries, letters, material objects, newspapers, cases and statutes or be based on textual analysis of any of these primary sources. It can be empirical or theoretical. In fact, there are endless ways we can do legal history and a vast array of sources on which we can draw. Perhaps once the province of law schools, legal history has become a truly interdisciplinary venture; legal historians are drawn from a range of home disciplines which are as likely to be history or cultural studies (to name but two of many) as law. And, increasingly, scholars engaged with contemporary problems, such as stolen wages, police violence or sovereignty claims are turning to history and the work of legal historians. Much of the dynamism of legal history comes from the engagement with law by scholars from these other disciplines. In Australia – and beyond – the interdisciplinarity of legal history underpins much of its vitality and is key to the shape of the discipline itself.

II Doing Legal History: An Overview and a (very) Short History

So what then is legal history? This collection opened with a besuited, bespectacled young lawyer poring over a stack of dusty books in a lonely corner of a large library. As Harry Hobbs and Jeremy Patrick remind us, law students are used to the exercise of trawling for precedent. Even if the means we use to do this has changed over time – online databases and AI engines rather than old books – we as scholars and practitioners nevertheless hope that there will be a precedent or fact that will help us argue our case. Even if the reality is quite a bit more complex, it is still true to say that precedent rules. This search for precedent can be confused with 'doing legal history'. Surely searching for old cases, statutes and similar materials and the facts they reveal is doing legal history. It's all about the past, right?

Given the love of lawyers and law students of definitions, it may be uncomfortable to realise that there is no universally agreed definition of 'legal history'. To be fair this is the case for most discipline areas. For some, there is an assumption that we all just know what legal history 'is', or what 'doing' legal history entails, or at least we do not question it – it is about (legal) things that happened in the past. What few legal history texts there are, for example, generally do not offer any definition. For others, what we understand by 'legal history' is a matter which is 'deeply controversial'.[1] Indeed any understanding of the remit or shape of legal history might depend from which discipline or perspective you view it. Christopher Tomlin's neat and straightforward description might be enough to get us going:

> legal history is the study of the history of law – of legal discourse, and legal institutions, and legal cultures, and of the circumstances in which and by which they are formed.[2]

However, even to say that legal history is a 'history of law' begs questions; not least of which, as David Ibbetson has noted, is what we mean by 'law'.[3] For lawyers and law students, the answer may be one thing; for scholars from another discipline, it may perhaps be another. It might be easier to talk of who does legal history – or even why we do legal history – than attempt to define it beyond this. What we can say perhaps is that neither simply describing something that happened in the past, nor looking for a useful precedent, would really be considered doing legal history (or really any form of history).

Law is of course intimately tied to the past. We teach law through the past. Common law method relies on precedent. Common law method suggests an incremental, slow and orderly progress towards whatever our current law is, with the potential for hopefully a little change to result from whatever matter is now before the courts. Common law method 'preserve[s] a sense of a collective past' in tension with the recognition of 'a necessity for legal change'.[4] Policy considerations are key, but in the end, we cannot depart too far or too fast from what has come before. Students quickly learn that most significant reforms will require legislative intervention and that, on occasion, courts will even signal to the legislature that they – rather than the courts themselves – should move the law forward. This backward gaze, particularly in the core units of law which all students must endure, is reinforced by generational textbooks which provide detailed lines of authority, added to in each edition. Odd or anomalous developments are explained away or removed as superfluous to orderly progression. Problematically, this endless backward gaze also obfuscates what legal history offers to students and how doing legal history is different from a simple search for precedent.[5]

---

1 Mark Leeming, 'Lawyers' Uses of History, from Entick v Carrington to Smethurst v Commissioner of Police' (2020) 49 *Australian Bar Review* 199, 201.

2 Christopher Tomlins, 'Legal History/History of Law at Berkely', 26 August 2024, available at: <https://issuu.com/berkeleylaw/docs/legal_history_history_of_law_at_berkeley_august_2> (last accessed 17 September 2024), 1.

3 David Ibbetson, 'What is Legal History a History of?' in Andrew Lewis and Michael Lobban (eds), *Law and History: Current Legal Issues* (Oxford University Press, vol 6, 2003) 33, 33.

4 Lee Godden, '*Wik*: Legal Memory and History' (1997) 6 *Griffith Law Review* 122, 123.

5 On this point see also Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2022).

Law schools now rarely offer legal history as a topic to be studied.[6] Individual subjects – particularly foundational or first year subjects – may include some discussion of aspects of the evolution of our legal system (particularly a potted history of the common law) or of small topics of interest – but as an area of law for study it is rarely even offered as an elective. Paradoxically, as an area of scholarship it is healthy and on the rise. Much of this interest in legal history stems from scholars working outside law schools – in history, politics, anthropology, criminology, gender studies or cultural studies. Its very interdisciplinary nature means that it is not just an area of legal research endeavour primarily undertaken by those with legal training which draws on work from other disciplines; the shape of the scholarship (and of legal history itself) will owe much to the training and interests of the writer.

If legal history is rarely taught in law schools now, this is barely a decline. Its place in law schools has always been limited and uncertain. Until the 1920s it had little purchase in the academy although, as Stefan Petrow notes, there were some law schools which did have some kind of legal history subjects as early as the turn of the twentieth century, although these few taught 'the whole history of English law, whether it was relevant to Australia or not'.[7] While the teaching of legal history expanded somewhat from the 1920s to the 1960s (thereafter declining again), it remained a subject in many ways faithfully tied to its English heritage. Students were far more likely to learn about the history of the various English common law courts, or about the Statutes of Westminster and Magna Carta, than anything much about the development of law in Australia and how its development might in fact have diverged rather significantly from that of its progenitor.[8] This arguably resulted from both the prevalence of English trained lawyers in Australia's small number of small law schools,[9] and the lack of textbooks which might have aided in investigating our legal history. Finally, in 1982 Alex Castles published *An Australian Legal History*, a work which gave scholars an overview of *our* history and which became indispensable to legal historians.[10]

All of this is to say that for many years legal history in Australia was the remit largely of scholars in law schools. That shaped the kind of legal history that was recognised as such: it was largely doctrinal or institutional history, or even biographies of judges or other famous legal figures. It might unpack how a particular law functioned in the past and how it evolved into the current doctrine through a careful examination of case law and legislation. How did the doctrine of unjust enrichment develop as a doctrine? When and how was the Supreme Court established? Who was Chief Justice

---

6 As noted in 2023, only two Australian law schools now teach legal history as a formal and compulsory part of the LLB: Julie Copley, Marcus Harmes, Sarah McKibbin, Jeremy Patrick, 'Introduction: Arbiters of Justice: Historical Studies of Southern Queensland Lawgivers' (2023) 27 *Queensland History Journal* 527-59, 527.

7 Stefan Petrow, 'Overcoming "Intellectual Colonialism": Aspects of the Teaching of Legal History in Australia, c.1890-2005' [2006] *Australia and New Zealand Law and History E-Journal* 1, 8.

8 Australia was hardly the only place this happened: see Philip Girard, 'Who's Afraid of Canadian Legal History' (2007) 75 *University of Toronto Law Journal* 727, 737.

9 Petrow (n 7) 9.

10 Alex Castles, *An Australian Legal History* (Law Book Co, 1982). There were of course others working in the area: WJV Windeyer, John Bennett, Enid Campbell and others. But Castles' book was a key moment in the development of the discipline in Australia.

Forbes and what was his contribution? All of which are worthy questions. While this kind of more traditional legal history is still alive and well – perhaps most obviously seen in histories of private law – we have moved well beyond this, to understand that legal history is a highly contextual endeavour, in which legal history is now being written by scholars from various disciplinary perspectives, using legal, extra-legal and non-legal sources. We understand that the development of particular laws and doctrines cannot be divorced from the broader context of the social, political and cultural forces which led to them. Or, conversely, we may seek to understand the role of law in the development or shape of broader social, economic or political issues. This might encompass an examination of the phenomenon of vagrancy in colonial Australia;[11] the relationship between love and law and redress for being 'jilted' in nineteenth and twentieth century Australia;[12] a history of women doing business in the nineteenth century despite the impediments of the doctrine of coverture,[13] or even a history of credit card debt and how that little piece of plastic became so ubiquitous.[14] Just as important to legal historians as a consideration of *how* did some legal phenomenon come to look as it did, is *why* did it and in response to what internal and external forces?

Key to this change was the rise of the rise of social history in the 1960s and 1970s – which emphasised 'history from below' or the importance of understanding lived experience. Social history brought the relationships 'between law and class, race and gender to the fore'.[15] Within the legal academy, scholars began bringing the methods of social history into thinking about the histories of laws. And for many outside the legal academy, work by social historians, such as EP Thompson, highlighted that law and legal regulation played a vital role in framing the relations of peoples in and with society (broadly put).[16] By the late twentieth century legal historians, not just in Australia, but in Canada, New Zealand and beyond, were responding to these developments, as a result increasingly viewing our law as being much more than simply a 'pale inheritance' from England, recognising the plurality of our legal history and the importance of First Nations engagement in shaping our nation, and uncovering the ways in which our legal developments could also be borrowed from or based on innovations in places other than the England.[17]

---

11 Catharine Coleborne, *Vagrant Lives in Colonial Australasia Regulating Mobility and Movement 1840-1920* (Bloomsbury Academic, 2024).

12 Alecia Simmonds, *Courting: An Intimate History of Love and the Law* (La Trobe University Press, 2024).

13 Catherine Bishop, *Minding Her Own Business: Colonial Businesswomen in Sydney* (NewSouth, 2015). The doctrine of coverture meant that husbands were responsible for the maintenance of their wives and controlled their property; married women could not sue or be sued, enter into contracts independently and in all their economic dealings were assumed to be working on behalf of their husbands.

14 Sean H Vanatta, *Plastic Capitalism: Banks, Credit Cards, and the End of Financial Control* (Yale University Press, 2024).

15 On this and legal history, see Jim Phillips, 'Why Legal History Matters' (2010) 41 *Victoria University of Wellington Law Review* 293, 298.

16 See eg EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, 1975).

17 Bruce Kercher, 'Why the History of Australian Law is not English: Second Alex Castles Lecture in Legal History, October 2000' (2004) 7(2) *The Flinders Journal of Law Reform* 177.

In 1993 the Australian and New Zealand Law and History Society was established. This is now the peak scholarly organisation for scholars working in law and history. The society grew out of a series of conferences begun a decade before. Importantly, these conferences and the society which followed were established by three interdisciplinary scholars whose academic home was not a law school and two of whom were not legal scholars in the formal sense. Ian Duncanson, Diane Kirkby and Christopher Tomlins, then all members of the La Trobe Legal Studies department, began the conferences in 1983. From the outset then, the peak society was and remains highly interdisciplinary. The very name – law and history, rather than legal history – signals this and explains much of the shape of law and history scholarship in Australia to this day. Reflecting the membership of the society and the conference attendees, what was once dubbed the 'new Australian legal histories' borrows from, or harnesses, a wide range of theories, concepts and methods from other disciplines (here reflecting laws more general 'borrowing' of interdisciplinary methods) and are often jurisprudentially or philosophically engaged, drawing on legal philosophy, feminist theory, environmental jurisprudence or engaging with post-colonial legacies.[18] Some of these, for example, feminist legal histories, or environmental legal history, are emerging as recognised areas of endeavour in their own right, as new 'sub-disciplines'. In paying attention, then, to race, gender, class, comparative analysis or even through the use of non-legal sources, such as literature, legal historians frequently also draw on the different methods, sources and perspectives covered by the other chapters in this book.

III Why Does Legal History Matter for Australia?

In many ways the question 'why does legal history matter for Australia?' is little different from asking 'Why legal history matters at all?'. But there are some particularly important Australian-inflected reasons why legal history is important for our nation (and which can also help us think about why we do legal history at all). Legal history can of course offer new perspectives on every area of law in which we might be interested – from asking what were the economic and social forces post-World War II that led to the particular banking regulations that facilitated the emergence of credit cards in the mid-twentieth century to considering why transactions in land have to be in writing – and it would be impossible to discuss them all here. Perhaps most obvious, however, is that legal history matters for Australia because after decades of ignoring, or perhaps underplaying, the role of law in colonisation, it is now an inescapable fact that law was complicit in, and foundational to, the (ongoing) process of colonisation. In great part, that acknowledgement has been the result of the interdisciplinary approaches to legal history noted above. Under the sway of work in fields such as settler colonial studies, cultural studies, gender studies, histories of work and labour and others, as well that of key scholars in law schools who drew on newly discovered sources from the early colonial period, the accepted narrative of our legal origins and of the idea that law was somehow just a neutral instrument

18 On the 'new Australian legal histories,' see the special edition of *Law and History Review*: (2003) 21(3) *Law and History Review*.

in colonisation, has been fractured. Importantly, as Anna Clark has recently stated, 'the imperative to acknowledge Indigenous historical perspectives in Australia has become central to its history'.[19] And these perspectives tell a very different story of our law, its effects from its arrival to now and why we still need to 'reckon with law'.[20] Key here has been the work of First Nations scholars both within and without the academy, not only from law, but from a variety of disciplines and with a variety of concerns – John Maynard, Gary Foley, Christine Black, Megan Davis, Noel Pearson, Shino Kinoshi, Larissa Behrendt, to name a few.

Neither law nor (legal) history are neutral disciplines. What is kept in archives, what legal decisions are retained and remembered, what law book writers judge as important to include and not, are practices which shape a discipline and our understanding of events and law's role in those.[21] They may seem neutral – we cannot keep or include everything right? – but collection decisions are all shaped by people's perspectives, ideologies and positionality. These practices often serve to silence the stories of certain (often marginalised) peoples and groups and to not just privilege some accounts of our legal history over others, but to actively shape certain accounts which then become orthodoxy. For much of the late nineteenth and twentieth centuries the story of Australia's legal origins began in 1788 with the arrival of the First Fleet. That was certainly the version of our origins taught in law schools until very recently. It was the version I was taught in the 1980s. Unacknowledged was that First Nations peoples had inhabited Australia for over 50,000 years and that on the arrival of the first Europeans Australia was already a place of law and a place of legal plurality. The arrival of Europeans had a devastating impact across the entire continent and by the mid-nineteenth century Indigenous Australians had been displaced from country and decimated by disease. But equally, the arrival of the common law had a devastating effect on Indigenous laws. The settler revolution, and indeed settler colonialism, were not just accompanied by, but were underpinned by, law.[22] Accounts of both often fail to take into account just how central law was to these processes and that, across the globe, including in the Australian colonies, Indigenous peoples were not just physically displaced or eliminated, but so were their laws.

While it is now much more widely understood that Australia was a place or law, and of legal plurality, prior to 1788, for many years legal histories of Australia supposed the opposite. It was assumed that British law (and in particular the English common law) was the only law of the colony; Indigenous peoples had no laws

19 Anna Clark, 'What is History in a Settler Colonial Society? Mapping the Limits and Possibilities of Ethical Historiography using an Australian Case Study' (2024) 63(4) *History and Theory* 65, 85.

20 Shino Kinoshi, 'Reckoning with the Past' in Peter Cane, Lisa Ford, and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 740.

21 Perhaps the most famous work on this is Ann Laura Stoler's *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton University Press, 2008).

22 For a recent work on settler colonialism in Australian history, see Penny Edmonds and Jane Carey, 'Australian Settler Colonialism over the Long Nineteenth Century' in Edward Cavanagh and Lorenzo Veracini (eds), *The Routledge Handbook of the History of Settler Colonialism* (Routledge, 2017) 371. And for a work critiquing settler colonial studies from a First Nations perspective, see Shino Kinoshi 'First Nations Scholars, Settler Colonial Studies, and Indigenous History' (2019) 50 (3) *Australian Historical Studies* 285.

recognisable as such. Histories of New South Wales were rarely situated within the broader frame of the British Empire, let alone part of a global history of encounter. Even if it was conceded that Australia's First Nations had laws recognisable as such to the British at European colonisation, the legal orthodoxy for many years was that they were long gone, extinguished along with any rights to land, by the forces of that colonisation. Rather, the Australian continent was, so the story went, one of no law, into which the common law arrived and became the only law of the land, and in which Britain's sovereignty was uninterrupted.[23] That view of our legal origins was only reinforced by the High Court's decision in *Mabo v Queensland (No 2)* ('*Mabo (No 2)*').[24] *Mabo (No 2)* finally and famously 'overturned' *terra nullius*. This was of course a very important moment in understanding Australia's legal history. However, legally, little flowed from it. Brennan J also held that on acquisition of sovereignty the common law had become the law of the new colony and of all within it. While native title rights might have survived annexation (or to put it another way, not been extinguished) the Court made it clear that native title was really an exception. It did not purport to suggest that Indigenous laws generally should be recognised.[25] This remains the view of the High Court. In 1788 Indigenous laws (to the extent they are recognised as such) were extinguished – or so the legal story goes.[26]

This narrative of the arrival of the common law in Australia was fractured by the work of legal historians, most notably Bruce Kercher. At the same time that the High Court was considering the case in *Mabo (No 2)*, at Macquarie University Bruce Kercher was uncovering early case law that suggested that this neat story of acquisition of sovereignty and the common law immediately becoming *the* law of the land might be just a bit too neat. Kercher presented several cases – *R v Ballard* and *R v Boatman* – from early New South Wales which challenged this account. He painted a picture of early New South Wales as a more pluralistic place, one in which it was not clear how the legal relations between Indigenous peoples and the common law might ultimately be shaped, and one in which it was not a given that Indigenous Australians would be considered to be within the ambit of the jurisdiction of the New South Wales Supreme Court.[27] He exposed the contingency of modern understandings. Kercher noted that this view had in part originated from a (famous) 1836 decision – *R v Murrell* – in which Burton J had held that the Court did in fact have jurisdiction over Indigenous Australians and that they had no laws recognisable as such. But, as Kercher explained, in doing so Burton J did not follow several earlier decisions in which that same Court had denied that it had jurisdiction over Indigenous accused (although it was ambivalent about whether Indigenous laws were really 'law').[28]

---

23 Shaunnagh Dorsett, 'Plural Legal Orders: Concept and Practice' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 19.

24 (1992) 175 CLR 1.

25 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

26 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152.

27 Bruce Kercher, 'R v Ballard, R v Murrell, R v Bonjon' (1998) 3(3) *Australian Indigenous Law Reporter* 410; Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7.

28 *R v Ballard or Barrett* [1829] NSWSupC 26; *R v Boatman or Jackass and Bulleye* [1832] NSWSupC 4.

Murrell had become the entrenched understanding of early colonial legal opinion for the simple reason that it was the only decision published and therefore available to later lawyers and scholars. The others, then, simply dropped from view. *Murrell* told us the common law was the only law of the colony.

Lost, then, was the contingency of our modern understandings of the legal relations between Indigenous peoples and their laws and the Australian legal system. The law *might* have developed differently. It was not inevitable that the courts *would* refuse to acknowledge indigenous jurisdictions or acknowledge legal plurality. As Jim Phillips tells us, one of the reasons legal history matters is because it reveals the contingency of modern legal constructs. The shape of any law or legal development is contingent on the shape of society generally, the practices of those who gatekeep legal knowledge, and the ideologies of its practitioners. Law is authored and contestable. As Russell Sandberg adds, not just different approaches, but feasible different approaches, might still be available if we understood better how we got to where we are.[29] Jim Phillips makes clear that 'contingency' is not the same thing as 'arbitrary'. In fact, it is the opposite of arbitrary. Legal changes are, as he puts it, 'rationally and logically connected to other kinds of developments'.[30] In order, therefore, to understand why some legal change happened, or why a doctrine is shaped the way it is, we would need to consider the intellectual milieu, personalities and economic and political imperatives in play at the time.

What might we draw on in order to uncover the contingency of legal developments? Let's take an early case like *Ballard* as an example. What might we draw on to understand the context of the decision? Most obviously there are official court records, including those that allow us to track a decision through various stages of litigation, from filing a complaint (civil) to laying an information (criminal) right through to – in the case of criminal matters – possible exercise of the prerogative of mercy. These records might also include judge's notebooks and letters – both between judges and with other government departments. Newspaper accounts of trials can be key. In the colonial period before law reporting, newspapers frequently gave detailed accounts of court proceedings and these are often the best record available of what happened in court that day. We can also look to diaries and letters of participants of those who attended court; official records and correspondence from London and the Colonial Office (the body which oversaw the colonies), which may explain relevant policy frameworks or in which the actual case was reported back to London; and biographies of people involved as well as further newspaper reports which may mention participants and which could shed light on their lives before and after the trial. Important also might be broader works of social, economic or intellectual history which explain relevant attitudes of the time to First Nations peoples. Investigations of more modern periods will be able to draw on further materials – such as internet archives – while commercial companies provide extensive (for pay) collections of materials for researchers.

This is clearly a much wider range of sources than lawyers, courts or even doctrinal scholars would usually draw on and moves us far beyond the idea of finding useful

29 Sandberg (n 5) 201.
30 Phillips (n 15) 300.

precedents. All of these sources together would enable us to construct a nuanced understanding of the contingency and contestability of early Indigenous-settler legal relations in this specific context. Regardless, then, of whether these early cases are useful precedent as such, as law students and lawyers we can draw upon these sources in order to understand the nuance and complexities of our legal origins, to challenge and question the 'orthodoxies' often presented in legal decisions, and to understand how those decisions are the product of particular historical and legal practices.

IV Controversies and Criticisms

As noted at the outset, increasingly scholars engaged with contemporary problems turn to history and the work of legal historians. While this seems an obvious thing to do, to look at history to see how particular laws and legal practices came to be – how we got to where we are – it can also be deeply controversial. In 2013 Al Brophy made an argument for the importance of what he has labelled 'applied legal history'. According to Brophy, applied legal history 'is deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues'. He contended that a 'trend toward self-conscious engagement with the present is part of the turning to history in law'.[31] So why did Brophy feel he needed to make an argument for doing legal history that speaks to contemporary issues? What might be controversial about that? Brophy was keen to distinguish applied legal history from what is often called in American scholarship 'law office history'.[32] Law office history is a term that generally refers to history that is written by advocates looking to bolster or achieve a particular end. 'Law office history' originally arose in the context of interpretation of the United States Constitution. Scholars argued that law office historians and judges – largely those who subscribed to constitutional originalism – 'cherry picked' historic examples which favoured a particular constitutional interpretation. Those who critiqued this approach argued that history ought to be written by dispassionate scholars, searching for 'truth', rather than in order to advocate for a particular legal outcome. The assumption underlying arguments against applied legal history, then, is that it is simply some form of 'Law office history', rather than the deeply researched scholarship for which Brophy argues.

In turn, this concern allied to a broader historical debate. Thinking about the present with or through the past (or indeed visa-versa) is not confined to law office history; across the twentieth century historians generally struggled with or dismissed 'presentist' accounts of history – those in which there is a tendency to interpret the past in presentist terms, perhaps by assuming that attitudes to a particular matter in the past were the same as they are now or even to assume that the past is a 'bad place' (think slavery or attitudes to married women's property) and that we do better now. The labels 'presentist history' and 'law office history' both generally carry a connotation that that this is just not good history. In particular, law office history

31 Alfred L Brophy, 'Introducing Applied Legal History' (2013) 31 *Law and History Review* 233, 233.

32 The term is generally traced to Alfred H Kelly, 'Clio and the Court: An Illicit Love Affair' (1965) *Supreme Court Review* 119.

or advocating history is assumed to 'pick and choose' historical data that supports a hoped for modern legal outcome, while ignoring any data which might be contrary or undermine this outcome. If humanities research is about searching for 'truth' (and this itself is contentious) then applied research seems to undermine this, particularly when it becomes intertwined with the political or ethical (or even legal) positions of scholars undertaking such research.

Does this mean, then, that we can never do legal history (or that we are not even really 'doing history') when the issue we are really concerned with is a modern one – or because we are looking to support a particular contemporary legal argument? Brophy argues for legal research which is more than pure scholarship for scholarship's sake; but which avoids the pitfalls that can occur with history intended to advocate. It would be quite odd to think that the present is not in dialogue with the past: think native title claims or other kinds of research into social and legal relations between First Nations and the colonies/Australian nation, as one example. Much of the best and most influential modern legal history brings the past into conversation with the present. The key, however, is *how* and *why* that research is undertaken, and here we return to Brophy's initial contention of deeply researched, serious scholarship – scholarship which does not 'cherry pick' sources and which accepts that a deep engagement with the past will often uncover deeply uncomfortable events, attitudes, policies and laws, and may lead to undesired conclusions. To start with the present and a particular political or legal position, and to search specifically for evidence in the past that supports that position is arguably not 'doing good history'. But to start with an interesting or important or contentious contemporary position or problem and seek to understand how we 'got to where we are now' by carefully considering all the evidence is exactly the kind of important legal history that we ought to be undertaking.[33] To give but one example, recent successful settlements in favour of Indigenous plaintiffs for stolen wages have only been possible because of careful examinations of past practices and the histories of Indigenous pastoralism, indigenous servants and accompanying wage theft.[34]

This brings us to our second controversy: how courts (and those who appear before them) use history or historical facts. One of the particular grumbles that legal historians sometimes have is that courts 'do history badly'. At the heart of the grumble is that rather than undertaking a proper examination of context, drawing on a full range of the kind of materials mentioned in the previous section, courts 'cherry pick' those which best suit the argument and the decision to which they wish to come, ignoring other sources or narratives which might tend to a contrary or different understanding. Or that, used as they are to a search for precedent, continuity and progression that, as Justice Mark Leeming puts it 'lawyers are so accustomed to emphasise continuity that their understanding of legal history may be affected'.[35] While Leeming might not say so specifically, the same might be said for judges.

To some extent what sources courts refer to depends on what material counsel bring forward. In bringing historical material before the court, counsel are most

33 Brophy (n 31) 237.

34 See *Street v Western Australia* [2024] FCA 1368.

35 Leeming (n 1) 200.

commonly presenting these as evidencing some kind of historical 'fact'; an event happened this way; this was the relevant court practice at a particular time; this is the correct version of a decision (before formal law reporting cases were often reported multiple times); or this was the government policy that was applied. Counsel appear in order to represent clients and to make the best possible arguments for them and that of course includes putting forward the material which best supports their cases. As Leeming notes, 'legal history in the hands of a litigator is the opposite of some disinterested quest for greater understanding'.[36] It is, if you like, akin to law office history – historical investigation undertaken for the purposes of advocacy.

Some judges themselves have noted the difficulties that attend generally to using history and historical sources in reaching determinations. In *The Wik Peoples v Queensland*, Gummow J famously noted:

> There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms. … Even if any such taxonomy were to be devised, it might then be said of it that it was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflict.[37]

In other words, history is useful to courts as a mechanism to aid in or support legal arguments in the present. In some ways, then, this is a very particular instantiation of our first controversy. The legal question at the heart of *Wik* was the effect of the granting of particular pastoral leases on potential native title rights in the same area. In that case, the court determined, by a 4 to 3 majority, that pastoral leases did not extinguish native title, as they did not confer exclusive possession. This was an important legal question: as pastoral leases have at one time or other covered much of the Australian continent, had the court determined that they did completely extinguish native title then there would have been much less land left which could have been claimed as subject to native title. The majority drew on histories of imperial and local policy on pastoral leases and of the legislation under which they are granted in order to find that pastoral leases were a very specific form of statutory tenure, created for very specific purposes, and therefore only extinguished native title to the extent of the inconsistency between the particular lease and the particular native title rights being claimed. Both Gummow J (above) and Kirby J, however, noted the difficulty and artificiality of using history for this purpose. Kirby J examined the specific legislation under which the leases were granted and the leases themselves and he noted that none of the legislation expressly extinguished Aboriginal rights – largely because the government did not consider that such rights existed. He stated that:

> [t]here is an inescapable element of artificiality, in looking back over Australian legal history, which developed upon a particular hypothesis about Aboriginal legal rights, and endeavouring to reinterpret that history with the knowledge afforded by *Mabo [No 2]*.[38]

---

36 Ibid 201.

37 *The Wik Peoples v Queensland* (1996) 187 CLR 1, 182-83 ('*Wik*').

38 *Wik* (1996) 187 CLR 1, 230.

Notably, while both Kirby J and Gummow J clearly saw as important a broader more contextual approach to understanding the nature and effect of a pastoral lease (than say Brennan CJ who authored the minority judgment and who took a much more traditional approach relying mainly on statutory interpretation and precedent), they nevertheless drew on a much narrower range of sources than might a legal historian investigating the same question. Few counsel or judges are trained as historians. Even if they are, in these roles they are not acting as historians. Just as legal principles (and their application to the facts) can be contested, so of course can be historical events and the materials which support their investigation. Perhaps a feature of legal analysis is a search for factual certainty, which makes the application of law to facts more straightforward. A good example might be the idea that sovereignty was acquired over New South Wales in 1788. Even a cursory view of history makes clear that it cannot have been this simple or straightforward. This search for certainty can often lead to counsel and courts 'flattening' the complexity of historically-contested events.

The criticism of 'cherry picking' or that the use of history by courts is purpose driven should not suggest that courts simply pull random facts or create historical narratives in order to support arguments.[39] There are examples in every area of law of courts taking the time and space to provide a detailed narration of the legal background (likely but not always predominantly a doctrinal history) to particular legal doctrines or events. These narrations may in certain cases inform or even be a key part of the final reasoning of the court. *Wik* is such an example. But courts are not using history for the same purposes as scholars. Courts are not engaged as such in a disinterested quest for historical truth and nor should we expect them to be. After all, it can be argued that the job of courts is not to do history, it is to determine the rights of those before it, and to develop the law so as to be fit for the contemporary world. The shape of that narration, and what 'facts' are included and excluded, must inevitably be shaped by the purposes for which it is being made and by individual judges' and courts' views on their role in making law.[40] Conversely, however, that does not mean that we should not expect courts to at least take some care in their use of historical sources.

V Conclusion

So why do legal history? As this chapter has suggested, historico-legal scholarship can provide alternative perspectives on contemporary legal, economic or social positions, uncover different and untaken by-ways or even explain that some long-held legal positions are based on misunderstandings or incomplete context. Legal history has the power to disrupt accepted narratives. It can, for example, expose the complex origins of doctrines we take for granted, and which for almost a century have been core to what we teach students – often via generational textbooks – and shed light on the ways that these doctrines have been constructed and are contestable and contingent.[41] And

39 For a more nuanced view of what courts do with historical 'facts' and a suggested taxonomy, see Bradley Selway, 'Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129.

40 On the High Court's use of history and common law declaratory theory, see Godden (n 4).

41 On this see also Sandberg (n 5) 205.

it can allow us to think of other ways law could develop and even perhaps give us the arguments to make that happen.

However, we can probably do no better than end with Mark Leeming's reminder as to why lawyers and judges should care about legal history:

> We need to understand legal history … in order to practise our profession. … But we are not bound by the past. We should pursue it … because it presents a feast of intellectual riches of intrinsic worth. It makes our profession civilised, more learned, and, not least, more fun.[42]

It may be the last of these that is one of the most compelling reasons to do legal history. Although we undertake historico-legal study for serious reasons – to understand our current law better and to think about how it could be shaped otherwise or perhaps simply as a disinterested scholarly endeavour searching for the 'truth'– legal history, drawing on so many different sources as it does, can also be a treasure hunt or a puzzle or simply a pleasurable activity for the intellectually curious. Researching our legal past can be slow, frustrating, painstaking, literally dusty and dirty, and also enormously fun.

Further Reading

Alfred L Brophy, 'Introducing Applied Legal History' (2013) 31 *Law and History Review* 233-240

Anna Clark, 'What is History in a Settler Colonial Society? Mapping the Limits and Possibilities of Ethical Historiography using an Australian Case Study' (2024) 63(4) *History and Theory* 65–84

Shaunnagh Dorsett, 'Plural Legal Orders: Concept and Practice' in Peter Cane, Lisa Ford and Mark McMillan (eds), *Cambridge Legal History of Australia* (Cambridge University Press, 2022) 19-39

Penny Edmonds and Jane Carey, 'Australian Settler Colonialism over the Long Nineteenth Century' in Edward Cavanagh, Lorenzo Veracini (eds), *The Routledge Handbook of the History of Settler Colonialism* (Routledge, 2017), 371-390

Tanya Josev, 'Australian Historians and Historiography in the Courtroom' (2020) 43 *Melbourne University Law Review* 1069-1099

Bruce Kercher, 'Why the History of Australian Law is not English: Second Alex Castles Lecture in Legal History, October 2000' (2004) 7(2) *The Flinders Journal of Law Reform* 177–204

Shino Kinoshi, 'Reckoning with the Past' in Peter Cane, Lisa Ford, and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 740-764

Mark Leeming, 'Lawyers' Uses of History, from *Entick v Carrington* to *Smethurst v Commissioner of Police*' (2020) 49 *Australian Bar Review* 199-226

Jim Phillips, 'Why Legal History Matters' (2010) 41 *Victoria University of Wellington Law Review* 293-316

Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2021) esp ch 8 (198-224)

42 Leeming (n 1) 226.

Chapter 2

The Point of Legal Philosophy

Jonathan Crowe

To forget one's purpose is the commonest form of stupidity.

– Friedrich Nietzsche, as quoted by Lon Fuller[1]

I Introduction

What is the point of legal philosophy? Many law students have posed this question, particularly while suffering through the indignities of a compulsory jurisprudence course. The point of this field of study may not be easy to grasp for those accustomed to studying the black letter law – with one eye, perhaps, fixed on a lucrative career in a commercial law firm. This chapter explores the question and proposes an answer. The answer I give, in brief, is that legal philosophy enables us to examine and better understand the point of law and, by extension, the point of being a lawyer. For those of us who engage with law in our studies, careers and lives – including law students, lawyers, legal academics, judges and others – these questions are also related to the broader issue of the point of life in general.

The response to the question of the point of legal philosophy sketched above is very broad – one might say *philosophical* – in character. There are other ways of responding to this question. For example, from a student's or academic's perspective, one might wonder how legal philosophy can be used as a tool to enhance legal scholarship. There are many examples of legal philosophy being employed by scholars to better understand legal doctrines. In Australia, for instance, academics have drawn on philosophy to shed light on contentious issues in constitutional law, such as the role of constitutional implications,[2] and private law, such as the scope of duties of care in the tort of negligence.[3]

---

1 'Das Vergessen der Absichten ist die häufigste Dummheit, die gemacht wird': Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1964) 95.

2 See eg Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Jonathan Crowe, 'The Narrative Model of Constitutional Implications: A Defence of *Roach v Electoral Commissioner*' (2019) 42 *University of New South Wales Law Journal* 91.

3 See eg Desmond Manderson, *Proximity, Levinas and the Soul of Law* (McGill-Queen's University Press, 2006).

One might also ask whether legal philosophy has informed law reform or judicial decisions in the Australian context. Again, one can point here to examples such as the detailed survey of philosophical perspectives in the Australian Law Reform Commission's recent report on judicial impartiality[4] or references to prominent legal philosophers such as HLA Hart[5] and Ronald Dworkin[6] in High Court cases. Judges often seem to shy away from explicit philosophical discussions, even if they may be relevant to the legal point at hand.[7] However, the lack of express reference to legal philosophy does not necessarily mean a judge's conclusions are not informed by philosophical assumptions about, for example, the underlying purpose of a particular field of law.

More could be said about the role of legal philosophy in legal scholarship and doctrine, both in the Australian context and more generally. However, I am going to resist framing the discussion in this chapter primarily in those terms. This is because I think the main relevance of legal philosophy for law students and scholars, as well as lawyers and judges, lies not in its application to specific doctrinal questions, but in its ability to inform broader reflections on the purpose of law. In taking this broader approach to the subject-matter, I am practicing what I preach, by adopting a philosophical approach to examining the point of legal philosophy. This claim raises a further preliminary issue relevant to this chapter: namely, what exactly do we mean when we talk about *legal philosophy*?

I have suggested elsewhere that a fruitful way to understand the nature of legal philosophy is by reference to *philosophy* more generally.[8] The word 'philosophy' comes from the Greek *philosophia*, meaning 'love of wisdom'. More specifically, philosophy seeks greater understanding about concepts and ideas we take for granted in everyday life. As John Campbell puts it, '[p]hilosophy is thinking in slow motion. It breaks down, describes and assesses moves we ordinarily make at great speed – to do with our natural motivations and beliefs'.[9] Legal philosophy – also sometimes called legal theory or jurisprudence – applies this methodology to concepts and ideas about law. It seeks to explore more carefully our ideas about such topics as law's relationship to power and authority, the nature and extent of legal obligations and law's connection to justice and the common good.

Since legal philosophy involves stepping back from everyday legal concepts, it makes sense that its main influence might be found not in resolving points of legal doctrine, but rather in helping to shape and refine background understandings about

---

4 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report 138, December 2021) 49-63. See also Australian Law Reform Commission, *Conceptions of Judicial Impartiality in Theory and Practice* (Background Paper JI4, April 2021).

5 See, for example, *Al Kateb v Godwin* [2004] HCA 37, [265] (Hayne J).

6 See, for example, *Re Wakim* [1999] HCA 27, [40] (Gaudron J); *Al Kateb v Godwin* [2004] HCA 37, [69] (McHugh J).

7 This perhaps reflects the perception articulated by Michael Bryan that '[a]ny judge who announces that he or she will apply a "philosophy" of judging will rightly be accused of deciding cases, not according to the evidence, but according to preconceived views': Michael Bryan, 'Justice Callinan's Judgments in Private Law: Story Telling, Legal Coherence and Corrective Justice' (2008) 27 *University of Queensland Law Journal* 29, 29.

8 Jonathan Crowe, *Legal Theory* (Thomson Reuters, 4th ed, 2024) ch 1.

9 Steve Pyke, *Philosophers* (Oxford University Press, 1993) 22.

the nature and purpose of law in general. These understandings will then inform our engagement with specific legal rules and cases, whether or not they are brought specifically to mind when resolving those questions. They will also inform the practical decisions people make when interacting with law in their everyday lives. Everyone faces decisions involving law from time to time, such as whether to follow a specific legal requirement. However, these decisions will be particularly prominent in the lives of law students and lawyers. It is to these existential implications of legal philosophy that the present chapter now turns.

The chapter will proceed along the general lines sketched in the opening paragraph. I will begin by considering how legal philosophy advances our understanding of the purpose of law, before extending this analysis to show how it illuminates the point of legal practice. I will highlight some challenges traditional views of legal ethics pose to remembering the point of being a lawyer. I will then connect these topics to the value of reflecting upon the meaning of one's work and life. I will argue that the inherent value of a balanced and integrated life makes these forms of reflection important to everyone's well-being. Legal philosophy, in short, is an opportunity to reflect upon the deeper ends of life in the law in a way that may otherwise be discouraged by the pressures of legal education and practice. It is a tool that can help us refocus, when needed, on those things that make life worth living.

II The Point of Law

Jurisprudence is replete with claims about the purpose or point of law. Aristotle, for example, held that the point of law corresponds with the point of society and, indeed, the point of life in general – namely, the pursuit of happiness or *eudaimonia*.[10] Aristotle famously regarded humans as 'political animals', meaning they naturally tend to form social groups.[11] Humans are distinguished from other animals by their capacity for speech, which enables them to communicate on matters concerning the good life. Participation in political institutions is an integral part of the good life for humans. Law, then, helps constitute the social structures that make human flourishing possible.

Contemporary legal theorists have advanced various related theses. Lon Fuller contended that the point of law is to order social action in accordance with rules – thereby making peaceful coexistence possible for individuals with diverse objectives and life plans.[12] Humans have many different – and sometimes conflicting – plans for their lives, but they must nonetheless agree upon shared rules if they are to cooperate and get along harmoniously in society. Governance structures that are not rule-based will fail to achieve this objective in various ways.[13] Law therefore benefits all members of society in allowing everybody a peaceful environment to pursue their different goals. It thereby respects the status of each member of the community as 'a self-determining agent'.[14]

---

10 Aristotle, *Nicomachean Ethics* (David Ross trans, Oxford University Press, 1998) bk 1, ch 7.
11 Aristotle, *The Politics* (T A Sinclair trans, Penguin, 1982) bk 1, ch 2.
12 Fuller (n 1) 122.
13 Ibid 33-38.
14 Ibid 166.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

John Finnis has more recently argued that the point of law is to coordinate society for the common good.[15] Finnis argues that human life is oriented towards certain intrinsic goods.[16] These goods capture everything it is valuable and worthwhile to pursue in our lives. The common good, as Finnis defines it, consists in ensuring the conditions necessary for all members of a society to participate in the intrinsic goods.[17] The role of law in this picture is to coordinate social behaviour so that people can work together effectively to bring the common good about. For people to do their part for the common good, they must be able to know what they are expected to contribute to society. This would not be possible, Finnis argues, without authoritative legal standards everyone can agree on.[18]

The legal philosophers discussed so far in this section – Aristotle, Fuller and Finnis – all belong broadly to the natural law tradition in jurisprudence. This tradition is characterised by a focus on the ways in which legal institutions help people lead flourishing lives by pursuing a vision of a good human life.[19] For Aristotle, for example, the good life is represented by *eudaimonia*, while for Finnis it involves pursuing intrinsic human goods. Legal positivism, the main rival to natural law theory in contemporary jurisprudence, denies that law must be understood by reference to this kind of moral purpose.[20] Rather, for legal positivists, what makes something a law is simply that it is enacted by a person or body – such as a legislature or judge – that society recognises as having the power to make laws.

Legal theorists within the natural law tradition have been somewhat more likely than their legal positivist counterparts to engage directly with the question of law's point. This reflects the orientation of the natural law tradition towards connecting questions about the nature of positive law with broader issues about human nature, political philosophy and ethics.[21] However legal positivists have by no means completely neglected law's purpose. The leading contemporary legal positivist, HLA Hart, identified minimum conditions necessary for the survival of a functioning society which it is law's purpose to safeguard. He termed these 'the minimum content of natural law'.[22] Absent these conditions, law will fail in its basic function of ensuring the survival of society.

Joseph Raz, the most prominent legal positivist after Hart, also advances sophisticated views on the function of law. Raz provides a list of the primary and secondary functions law plays in society.[23] The distinctive way law fulfils these functions, according to Raz's theory, is to provide its subjects with what he terms 'exclusionary reasons

15 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 276-277.

16 Ibid ch 4.

17 Ibid 155.

18 Ibid 232.

19 For discussion, see Jonathan Crowe and Constance Youngwon Lee, 'The Natural Law Outlook' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019).

20 For discussion, see Crowe (n 8) ch 4; Jonathan Crowe, 'Natural Law Theories' (2016) 11 *Philosophy Compass* 91, 92-93.

21 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 1-2.

22 HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 193.

23 Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) ch 9.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

for action'.[24] Exclusionary reasons are reasons to disregard other reasons that one would ordinarily have to consider when deciding how to act. Part of what it means for law to be authoritative is that it provides its subjects with reasons of this kind. When law succeeds in providing exclusionary reasons, it provides a service to members of the community, because they need no longer weigh up all their relevant reasons for action when deciding what to do. They can simply do what the law requires without assessing other kinds of considerations.

For my part, I have argued in other work that the purpose of law is to mark the boundaries of acceptable social conduct.[25] However, law does not set these boundaries in an arbitrary way, but does so – to echo Finnis's language – in order to advance the common good. The common good, as I use the term, captures the interest that every member of society has in living in an environment where all the members can lead fulfilling and meaningful lives.[26] Law advances this objective – as both Fuller and Finnis tell us – by serving as a locus of social coordination. Contrary to what Finnis and Raz argue, it does not do this by issuing authoritative pronouncements, but rather works alongside other moral and social norms to provide a framework for social action.[27]

We can see from the preceding discussion that the views of legal theorists on law's point are diverse, but there are some clear recurring themes, such as law's role in facilitating social coordination and the pursuit of the common good. The theorists we have canvassed also agree that law does not exist for no reason at all – or, indeed, purely to facilitate dominant social power structures – but has at least the potential to play a constructive and valuable social role.[28] Those whose work it is to ensure that law plays its function well, rather than simply being coopted as a tool of the powerful, therefore have a crucial role to play in advancing the interests of their fellow citizens and society at large.

How do we know what the point of law is? We must, as the theorists discussed previously would generally agree, engage in reasoned reflection on the social institutions and practices by which law is constituted. We must, in other words, pay close attention to the way that members of the community talk and think about the law. In so doing, we engage in what Neil MacCormick, describing Hart's methodology, called a *hermeneutic* exercise.[29] We are seeking to interpret social practices, paying attention to what Hart terms *the internal point of view* – namely, the meaning they hold for those who accept them as a guide for action, as opposed to detached external observers.[30] In other words, we are seeking to better understand what drives us as members of human communities.

What are the practical consequences of this picture? What, so to speak, is the point of reflecting on law's point? I will suggest shortly that this exercise has value for those contemplating a career in legal practice, both in terms of their approach to

---

24 Ibid 30.
25 Crowe (n 21) ch 9.
26 Ibid 88.
27 Ibid ch 10.
28 Other legal philosophers, by contrast, argue that the purpose of law is indeed to facilitate dominant social power structures. We will return to these perspectives later in this chapter.
29 Neil MacCormick, *HLA Hart* (Stanford University Press, 2nd ed, 2008) 53-54.
30 Hart (n 22) 89.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

their work and for wider existential reasons. However, for the purposes of the present section, I will focus on two kinds of practical consequences that flow from reflecting on law's purpose, according to some of the theorists referenced previously.

The first of these practical applications is drawn out by the work of Fuller. Fuller, as is well known, builds on his account of law's purpose to develop a theory of what he describes as 'the inner morality of law'.[31] Fuller describes eight principles of legality which must be observed, at least to some extent, if it is to be possible for law to fulfil its purpose.[32] For example, it is only possible for laws to effectively guide social action if they are publicised in advance. Otherwise, law's subjects will not know what it requires. For Fuller, then, an exploration of law's point enables us to recognise values which are inherent to the very concept of law and which must be honoured if law's purpose is to be fulfilled.

A second application can be drawn from the accounts of law's purpose advanced by natural law theorists. These authors, as we have seen, view law's purpose as promoting the common good. The notion of the common good, on this view, illuminates why it is that we have law in the first place. However, it also places limitations on both the content of law and the actions of legal officials. If the purpose of law is to advance the common good, then it would be perverse for either legal rules or legal officials to harm the common good. The natural law view of law's purpose therefore has the consequence that those who make and apply the law should strive to act in such a way as to bring the common good about.[33] However, to succeed in promoting the common good, they must first understand it.

The upshot of these theories, then, is that those whose role it is to shape and apply the law must not only have a technical grasp of legal doctrine, but also appreciate what law is for. Otherwise, they are in danger of developing law in a way that undermines its purpose. They may, like Fuller's hypothetical King Rex, ineptly undermine law's internal morality through the accretion of technical errors.[34] Or they may, by failing to direct their minds to the common good, not only fail to promote that end, but actively undermine it. Legal education has a role in play in guarding against these errors. It should encourage law students to reflect upon law's purpose, as well as its technical rules, lest the law students of today grow up to be the King Rexes or soulless legal technocrats of the future.

It is, for this reason, worthwhile for law students and academics, as well as lawyers and judges, to bring their mind explicitly to philosophical questions when engaging in research projects, giving advice or making decisions. These activities will often be guided implicitly by an understanding of law's objectives. However, unless these questions are brought expressly and carefully to mind – as legal philosophy encourages us to do – they may remain underdeveloped or disconnected from the substance of the activity in question. Legal philosophy, in this sense, helps us to ensure that our interactions with law in our lives do not become divorced from our underlying conception of law's purpose.

---

31 Fuller (n 1) 42.

32 Ibid 39.

33 For discussion, see Crowe (n 21) chs 11-12.

34 Fuller (n 1) 33-38.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

III The Point of Being a Lawyer

What is the point of being a lawyer? If you ask law students this question – in my experience, at least – you receive a variety of answers. Some students will openly aver the attractions of law's prestige as a profession, the expected pecuniary advantages it will bring them in due course, or the overriding role of their parents' advice in shaping their career choices. Others, however, will confess to a desire to help the vulnerable in the community or advance the cause of some important value, such as human rights or justice. Those choosing the latter responses are sometimes observed to cast a slightly self-conscious glance at their peers, as if to acknowledge the naivety of what they are about to say.

The more idealistic law students, however, are onto something. If we follow the broadly Aristotelian line of thought introduced at the start of this chapter, we might expect to find continuity between the point of being a lawyer, the point of the law in general and the point of human communities. According to the natural law perspective introduced previously, for example, human communities exist to further the common good of their members and law assists in that goal by coordinating social behaviour in accordance with shared rules. The point of being a lawyer, according to this perspective, is to play a particular role in maintaining a well-functioning legal system, bearing in mind the system's overarching objective of contributing constructively to the common good.

There is, however, a pitfall inherent in this picture. Lawyers, judges and other legal officials have defined roles to play within a legal system. These roles differ, for example, from those of legislators. According to the tripartite separation of powers, legislators make the law, judges interpret and apply the law, and the executive enforces the law. Lawyers, for their part, advise and represent the subjects of law when disputes arise, advocating their rights and interests before decision-makers.

This understanding of the roles played in the legal system by various actors has resulted in a conception of legal ethics as shaped by role morality. An ethical lawyer, on this view, is one who understands and performs the lawyer's role.[35] The lawyer's role, in turn, manifests itself in various duties owed to other actors in the legal system. For example, lawyers have a duty to the court and duties to their clients. They must represent their clients to the best of their ability, following instructions, respecting confidentiality and so on, while respecting their overarching duty not to subvert the legal process.

This picture is accurate, so far as it goes. Law, as discussed in the previous section, serves as a mechanism for social coordination. One way in which it does this is by implementing a kind of division of labour among the various legal actors. These defined roles instruct lawyers and legal officials how to do their share to maintain the legal system and thereby to promote the common good. However, it is important to note that, on this picture, the roles of legal actors do not exist for their own sake, but rather to serve the overarching objective of advancing the good of the community. It follows that when legal roles and the common good come into conflict, the common good must ultimately prevail.

---

35 For a helpful overview, see Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Various problems arise when law students or others are taught to observe the role morality of the legal system without paying heed to its underlying purpose. For example, it is widely believed that judges, when confronted with a clash between the law and justice, should stick to their role and apply the law as it stands, leaving any amendments in the hands of legislature.[36] In Australia, for instance, judges very rarely explicitly override or amend the law in the name of justice or morality. I have argued elsewhere, however, that this strong form of judicial deference rests on a mistake.[37] The role of a judge is, in the end, to promote the common good. If the law comes into conflict with the common good, then judges should bring them into dialogue to ensure that law fulfils its purpose.

Furthermore, judges should take account of the common good openly, rather than allowing it to covertly influence their judgments. Judges, like everyone else, are influenced by their moral views when making practical decisions.[38] If judges seek to hide the influence moral considerations have on their judgments, fearing that it will compromise their proper role, they may end up doing a disservice to Fuller's values of legality, by obscuring the true motivations for their decisions. We would end up with a legal system where judges decide for one set of reasons while purporting to be guided by another.

This kind of problem manifests itself in a different way when it comes to the role of a lawyer. The role of the lawyer is to represent their client, thereby contributing to the legal system. However, a problem arises when lawyers represent their clients in ways that conflict with the common good. For example, a defence barrister who aggressively and persistently questions the complainant in a rape trial, seeking to draw out minor inconsistencies in their testimony, while knowing that such fragmented testimony is a common symptom of trauma,[39] does not help the court discover the truth about the matter. Nor is such questioning necessary to provide the defendant with a fair and adequate opportunity to challenge the accusations made against them. Problems of this nature are prone to arise when role morality is elevated in legal ethics without attention to deeper values.

An overly myopic emphasis on role morality may also pose a threat to the well-being of lawyers and legal officials. Lawyers may get into the habit of compartmentalising their lives, playing one role at work and a very different one outside it. If

---

36 For academic defences of this perspective, see James Allan, 'An Unashamed Majoritarian' (2004) 27 *Dalhousie Law Journal* 537; James Allan, 'Human Rights: Can We Afford to Leave Them to Judges?' (2005) 16 *Commonwealth Judicial Journal* 4; Tom Campbell, 'Judicial Activism: Justice or Treason?' (2003) 10 *Otago Law Review* 307.

37 Crowe (n 21) ch 12.

38 For discussion, see Jonathan Crowe, 'The Role of Snap Judgements in Constitutional Deliberation: A Dialectical Equilibrium Model' in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018); Jonathan Crowe, 'Not-So-Easy Cases' (2019) 40 *Statute Law Review* 75.

39 See, for example, Daisy A Segovia, Deryn Strange and Melanie KT Takarangi, 'Trauma Memories on Trial: Is Cross-Examination a Safeguard against Distorted Analogue Traumatic Memories?' (2017) 25 *Memory* 95; Annie Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

pressed, they may find it challenging to integrate the two perspectives. The attitude to one's career represented by the adage 'that's just my job' threatens to create a kind of normative dissonance between the goals a person embraces in their career and their deeper personal values. It is not far-fetched to suggest that this kind of dissonance may be a significant factor in the high rates of psychological distress reported by law students and lawyers.[40]

IV The Meaning of Life

The point made at the end of the previous section raises deeper existential questions. We have so far considered the point of law and of being a lawyer. What, we might boldly venture to ask, is the point of life in general? Does it bear any relation to these previous discussions? Even philosophers, who are supposed to be interested in such questions, have largely tended to avoid them. However, Aristotle had a relatively straightforward answer. The point of life is to pursue *eudaimonia*, variously translated as happiness or the good life.[41] The point of life, in short, is to live life well. So far, so good – but what exactly does that mean? There is hardly universal agreement on what constitutes a good life.

I will focus here on one family of views about the good life that I believe to be broadly on the right track. According to this outlook, people construct their own personal versions of the good life by choosing among an array of fundamental human goods. These goods are categorised differently by different theorists, but they plausibly include such values as health, friendship, knowledge, recreation and aesthetic experience.[42] People can choose how to pursue and prioritise these goods in their lives in order to construct a model of a flourishing life that suits their interests, priorities and character.

People can find meaning in life by exercising these choices between different manifestations of value and thereby defining what type of person they want to be. For this reason, I have argued previously that the pursuit of meaning by choosing among human goods is itself a fundamental human value.[43] It is important to emphasise that the choices open to people in constructing a meaningful and flourishing life are not limited to choosing to prioritise, say, friendship over knowledge at a particular point in time. Each of the basic forms of human value itself comes in many different forms defined by the social environment. A person can, for example, pursue the value of

40 A particularly influential study is Norm Kelk et al, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (Brain and Mind Research Institute, 2009). For further discussion, see Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149; Wendy Larcombe and Katherine Fethers, 'Schooling the Blues: An Investigation of Factors Associated with Psychological Distress Among Law Students' (2013) 36 *University of New South Wales Law Journal* 390; Wendy Larcombe, Sue Finch and Rachel Sore, 'Who's Distressed? Not Only Law Students: Psychological Distress Levels in University Students Across Diverse Fields of Study' (2015) 37(2) *Sydney Law Review* 243.

41 Aristotle (n 10) bk 1, ch 7.

42 For discussion, see Crowe (n 21) ch 2.

43 Ibid 53-55.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

recreation in countless ways, forming connections with different subcommunities sharing the same interests.

The possibilities for self-definition offered by human goods are quite literally endless. In this respect, the picture of the good life just outlined resonates not only with Aristotle's vision of *eudaimonia*, but also with the emphasis placed by existentialist philosophers, such as Jean-Paul Sartre, on the indispensability of personal choice and responsibility in the pursuit of a meaningful existence.[44] The meaning of life, in a sense, is therefore for each person to create meaning in their own lives by purposefully shaping their life plans through interaction with the manifestations of human value.

The capacity for choice between different conceptions of a good life is, however, not unlimited. First, although the array of choices presented by human goods is extensive, there are also choices which do not make sense in this context. Some choices which do not correspond to any form of good are quite literally pointless, while others directly or indirectly set back the well-being of oneself or others. Sometimes, actions aimed at pursuing one or more of the goods may do so in unbalanced ways which pose a threat to well-being. Exercise, for example, is generally a valuable way of pursuing the good of health, but someone who becomes addicted to exercise may end up causing themselves harm.

I have suggested in other work that human well-being consists in pursuing the basic forms of value in a *balanced* and *integrated* way.[45] The notion of balance here captures the importance of not unreasonably prioritising particular forms of value at the expense of others. The notion of integration, meanwhile, represents the value in forming an overall picture of one's life that is consistent with the kind of person one wishes to be. A person's life might get out of balance, for example, if they spend all their time working and neglect their friends and family. Similarly, a person's life may lack integration if what they do at work cannot be easily reconciled with the values they prioritise in other contexts.

Plausibly, the high levels of psychological distress reported by law students and lawyers are not unrelated to these two challenges. Studying law is hard work and many legal workplaces expect their new recruits to demonstrate their commitment by working long hours. These threats to a balanced life are exacerbated if law students and lawyers find it difficult to reconcile their study or work with their personal values. The kind of compartmentalisation encouraged by some versions of role morality in legal practice risks entrenching a fragmented, rather than integrated, conception of one's life. Someone who finds themselves in this position may feel themselves drifting away from their core values.

Neglecting the opportunity to reflect upon purposes can therefore pose a threat to psychological, as well as existential, well-being. A person who lacks this opportunity may drift into a course of study and a career without a clear sense of what

---

44 For an overview, see Jonathan Crowe, 'The Authentic Judge: French Existentialism and the Judicial Role' (2019) 47 *Australian Bar Review* 41.

45 Jonathan Crowe, 'What is Wellness? The Role of Human Values' (2020) 45 *Alternative Law Journal* 261. See also Jonathan Crowe, 'Defining Wellness in Legal Education: A Reply to Kawamata' (2023) 48 *Alternative Law Journal* 140.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

they are doing. They may then find themselves in a situation where they struggle to balance their work with the things that make their life meaningful. They may also find that their work is at odds with the type of person they wish to be. Someone in this position may feel trapped, helpless or unmoored. They may struggle to confront existential questions such as 'Who am I really?' and 'What type of person do I want to be?' Like Friedrich Nietzsche's madman proclaiming the death of God, they 'feel the breath of empty space'.[46]

V Sceptical Responses

However, what if empty space is all there is? There are certainly those who would deny that law has any determinate or unified purpose – or that this purpose is a benign one. Brian Leiter, for example, has cast doubt on whether law has a definable function – or, indeed, any essential properties at all – because the roles it plays in social life are 'hostage to changing human ends and purposes'.[47] All we can say about the purpose of law and other human artifacts, on this view, is that they have the functions humans choose to impose on them from time to time. Leslie Green similarly cautions against defining law in terms of its functions for essentially this reason.[48] The ends law serves in different societies, he contends, are too multifaceted and diverse to make such an analysis illuminating.

Critical legal theorists of different stripes, for their part, would question the idea that law's function is benign. If law has a purpose, these critics might argue, it is to perpetuate dominant social power structures at the expense of the marginalised and vulnerable. Law, on this view, has functions such as maintaining capitalist class structures, upholding the patriarchy and perpetuating institutionalised racism. Any other purported function of law is a smokescreen designed to justify the existing social order. Law, stripped bare, is a machine for reproducing power. It legitimises the dominant order by cloaking it in the veneer of legitimacy afforded by concepts like the common good.

A few points can be made in response to these perspectives. First, if the purpose of law depends on what use humans make of it from time to time, then it is up to human communities to decide what function law should have. We can choose, if we wish, to work towards a vision of law that aligns with our understanding of the common good. We can, by this process, give law meaning, in the same way that we can give our individual lives meaning by choosing our personal projects. There is therefore no necessary inconsistency between the claim that law's purpose is contingent on changing human purposes and the purposive vision of life in the law articulated earlier in this chapter.

The important critiques of law advanced by various critical legal theories are also not necessarily at odds with the idea that law's purpose is to advance the common good. We might coherently acknowledge that law does often serve to perpetuate existing social power structures, while also going on to say that, to the extent that it

---

46 Friedrich Nietzsche, *The Gay Science* (Walter Kaufmann trans, Vintage, 1974) [125].

47 Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31 *Oxford Journal of Legal Studies* 663, 666-667.

48 Leslie Green, 'The Functions of Law' (1998) 12 *Cogito* 117, 120-121.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

does this, it fails in its purpose of promoting human flourishing for all members of society. The purposive idea of law I have outlined, if developed in this way, becomes a powerful tool for challenging law's oppressive elements. It allows us to say, for example, that a law that fails in its purpose is not merely a bad law, but fails according to a standard internal to the concept of law itself.[49] This undermines its legality, as well as its justice.

It is, of course, important to acknowledge that purposive views of law have not always embraced this critical potential – and indeed have sometimes advanced socially regressive ideas under the cloak of concepts such as the common good. Finnis, for example, as well as being a leading contemporary proponent of natural law theory, is also well known for his homophobic and socially conservative positions.[50] However, there are also those who have embraced law's purpose in the name of social progress – such as Martin Luther King Jr, for example, whose writings have been characterised (along with those of other civil rights authors) as articulating a form of 'Black Natural Law'.[51]

VI Legal Philosophy, the Universe and Everything

We began this chapter by asking, 'What is the point of legal philosophy?' I suggested first that legal philosophy, at its best, is an opportunity to reflect upon the point of law. Law does not exist for no reason, but to serve the common good. I then connected this idea to the point of being a lawyer. A lawyer serves the legal system by playing a particular socially defined role. However, this role only make sense if it is placed in the context of law's purpose. A lawyer who plays their role without paying attention to this backdrop may be led down a path where the role conflicts with the ends it is supposed to serve. This risks creating normative dissonance both in the life of that lawyer and in the legal system more broadly.

I then talked about the meaning of life. I considered the view that life's meaning comes from engaging with an array of human goods in such a way as to construct a personal narrative about one's existence. Life's meaning comes from shaping the kind of person you wish to be. However, it is important to do this in a balanced and integrated manner. Otherwise, the shape of a person's life can end up posing a threat to their psychological and existential well-being. The neglect of purposes, in this context, can become not just a form of stupidity, as Nietzsche put it, but also a form of self-harm. I concluded by considering some sceptical and critical responses to the idea of law's purpose, showing how they can help to inform more nuanced and progressive versions of the purposive outlook.

---

49 Fuller (n 1) 42.

50 See, for example, John Finnis, 'The Rights and Wrongs of Abortion: A Reply to Judith Thomson' (1973) 2 *Philosophy and Public Affairs* 117; John Finnis, 'Law, Morality and "Sexual Orientation"' (1994) 69 *Notre Dame Law Review* 1049. For criticism, see Jonathan Crowe, 'Natural Law and Authoritarianism' in Richard Nate, Marko Trajkovic and Martha Egan, *Perspectives on Authoritarianism and Totalitarianism from Literature, Philosophy, Law and History* (Königshausen and Neumann, 2025).

51 Vincent Lloyd, 'Black Natural Law' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

The opportunity to reflect on purposes is valuable. It is conducive to a meaningful and flourishing life. It may be possible to live a comfortable life without pondering such deeper questions – but such a life is risky, because it may produce an unbalanced or fragmented existence. The study of legal philosophy is an opportunity for law students and lawyers to put their lives in context. It is a chance to think about what they are doing and why they are doing it. This kind of reflection, if taken seriously, may lead them to make choices in life that enhance their pursuit of meaning and flourishing.

Sometimes, life becomes unhealthy. At such times, we need the resources to identify what is not working in our lives and make a change. This type of existential reflection is inherently difficult. Not all of us can be like Rainer Maria Rilke and realise by looking at a classical sculpture that 'you must change your life'.[52] It is easier, as David Bowie put it, to 'never leave the stream / of warm impermanence' rather than 'turn to face the strange'.[53] At difficult times like these, we need all the resources we can get. Legal philosophy may not save too many lives, but it can't hurt to have the habit of reflecting on purposes when you're not sure where your life is going. Drag yourself away from social media and read a bit of Fuller from time to time. As the toucan said about Guinness: it's good for you.

Further Reading

Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) chs 9-10

Jonathan Crowe, 'What is Wellness? The Role of Human Values' (2020) 45 *Alternative Law Journal* 261

Jonathan Crowe, *Legal Theory* (Thomson Reuters, 4th ed, 2024) ch 1

Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1964) ch 2

HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) ch 9

Martin Luther King Jr, 'Letter from Birmingham Jail' in *A Testament of Hope: The Essential Writings of Martin Luther King Jr* (James M Washington ed, Harper Collins, 1986)

Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) ch 2

52 Rainer Maria Rilke, 'Archaic Torso of Apollo' in *The New Poems: The Other Part* (Len Krisak trans, Boydell & Brewer, 2015) 173-174.

53 David Bowie, 'Changes', *Hunky Dory* (RCA Records, 1971).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Chapter 3

Comparative Law

Theunis Roux

I Overview

Does comparative law go 'beyond doctrine'? The answer depends in part on what is meant by that term. If we understand doctrine to encompass not just formal legal norms, but also the conventions of legal reasoning that support the interpretation of those norms,[1] we might be inclined to say, 'not necessarily'. For then there appears to be at least one version of comparative law that is very much doctrinal, viz, that version that involves the legal researcher, practising lawyer or judge referring to foreign law in the course of an argument about how a legal norm in their own legal system ought to be interpreted.[2] In this guise, comparative law is arguably a mode of doctrinal reasoning like any other. To be sure, the extent of its use and its doctrinal significance will vary from legal system to legal system. But, in principle, comparative law in this form is the same species of thing as arguing from precedent or applying the rules of statutory interpretation. It is a tool deployed in the quintessentially doctrinal exercise of making the law 'the best that it can be'.[3]

On another view, this conclusion leaves out a vital step. The meaning and import of a foreign legal norm cannot be ascertained by recourse to doctrine alone, even on the broad definition just given. That is because any reference to a foreign legal norm must necessarily be sensitive to the context in which it is embedded. Foreign legal norms, on this view, exist within clusters of shared meaning that must be understood in all their cultural distinctiveness if comparison is to be meaningful.[4] That being so, the comparative lawyer, even one who purports to be working within the interpretive practices of their own legal tradition, must perforce make use of other disciplines – including history, political science, and sociology – to contextualise

1 On this question, see Mátyás Bódig, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Edward Elgar, 2021); Jason NE Varuhas, 'Mapping Doctrinal Methods' in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar, 2023) 70.

2 Susan Kiefel, 'The Significance of Comparative Law to Common Law Judges: An Australian Perspective' in Katharine Boele-Woelki and Diego P Fernández Arroyo (eds), *Current Issues of Comparative Law – Questions actuelles de droit compare* (Springer, 2019) 3, 9 (comparative law 'forms part of the judicial method, the purpose of which is to deepen one's understanding of our laws in order to answer a novel and difficult question').

3 Ronald Dworkin, *Law's Empire* (Belknap Press, 1986).

4 Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

the norms to which they are referring. That interpretive step necessarily takes them beyond doctrine.

Or does it? If doctrine encompasses the reasoning methods through which the contextualisation of a foreign legal norm occurs, the key question, proponents of the first view might respond, is not whether the comparative lawyer must have recourse to other disciplines, but whether such recourse could still in some sense be said to be doctrinally controlled. Provided the perspective remains that of the legal-professional insider participating in the construction of doctrine, the mere fact that the comparative lawyer draws on other disciplines does not mean that they have ceased to reason doctrinally. What matters is the extent to which those other disciplines are subordinated to law's purposes. Law, after all, is a 'parasitic discipline' that invariably makes use of the conceptual frameworks of other disciplines.[5] If that is all that is happening when a comparative lawyer contextualises a foreign legal norm, it may be business as usual.

The resolution of these competing views hinges on questions about the legal-systemic role of the legal academic, legal practitioner and judge that can only be briefly addressed here.[6] It is easy to accept, for example, that a barrister's rough-and-ready enlistment of a foreign legal norm or a judge's cursory summary of an aspect of foreign law might be entirely doctrinal. Neither of these role players has the time to offer a fully worked-out contextualisation of the norm on which they are drawing. The legal academic doing comparative law, on the other hand, may have time for deeper reflection of this kind and perhaps even mastery of other disciplines. One of the functions legal academics have, after all, is to be vanguardists and systematisers – utilising their institutional advantage as non-practising lawyers to push the law to new insights. What counts as an acceptable reference to foreign law for the legal academic might therefore be different from the standard applied to a barrister or judge. At a certain point, the legal academic doing comparative law might so immerse themselves in the perspective of another discipline that it no longer makes sense to think of them as reasoning doctrinally.

Whatever view one takes of this threshold issue, doctrinally-oriented comparative law is clearly just one way in which comparative law can be pursued, and nowadays perhaps not even the most important one. In a world where a great deal of law is transnational or global,[7] the practice of comparative law is about much more than improving legal regulation within a single system. Rather, comparative law encompasses all the various ways in which, and the purposes for which, comparison between legal systems occurs. So, for example, comparative law might be used to support the drafting of an international treaty in terms of which signatory states agree to align their regulatory frameworks.[8] Or legal comparison might be pursued for its own sake, as an exercise in generating scholarly knowledge about the functioning of law and legal institutions under specified conditions. When comparative law is used

---

5 Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25 *Journal of Law & Society* 71.

6 See further, Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24 *Legal Education Review* 173.

7 Mathias Siems, *Comparative Law* (Cambridge University Press, 2nd ed, 2018) 310.

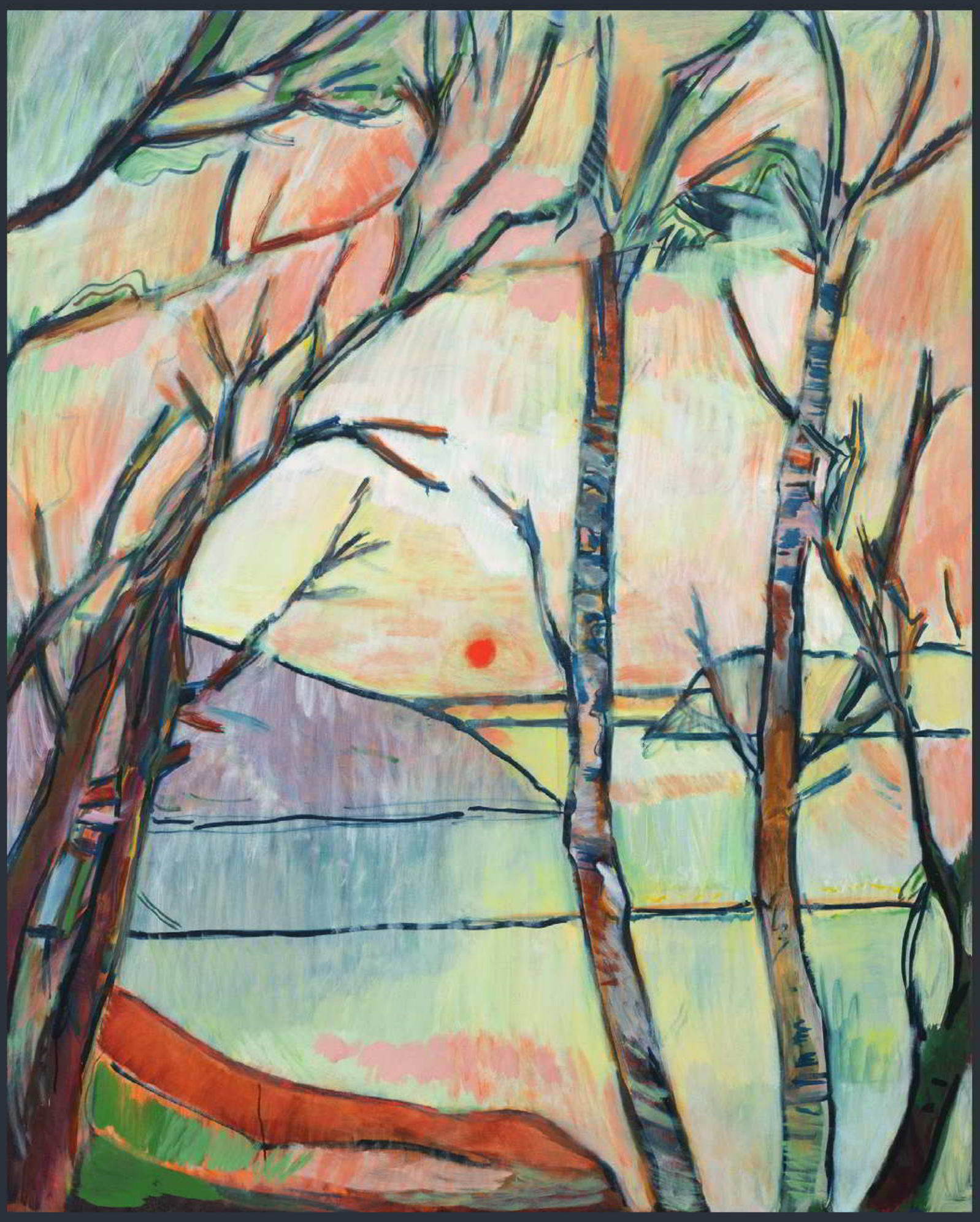
8 Ibid 5.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Harry Hobbs and Jeremy Patrick

BEYOND DOCTRINE

Alternative and Critical Approaches to Law



THE FEDERATION PRESS

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedd y/

BEYOND DOCTRINE

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

BEYOND DOCTRINE

Alternative and Critical Approaches to Law

Editors

Harry Hobbs

Jeremy Patrick

Foreword

Margaret Thornton

THE FEDERATION PRESS

2025

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Published in Sydney by
The Federation Press
PO Box 6178, Alexandria, NSW, 2015.
8 Birmingham St, Alexandria, NSW, 2015.
Ph (02) 9552 2200. Fax (02) 9552 1681.
E-mail: info@federationpress.com.au
Website: http://www.federationpress.com.au



A catalogue record for this book is available from the National Library of Australia

ISBN 978 1 76002 562 5 (pbk)
ISBN 978 1 76002 563 2 (ePDF)

© The Federation Press

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publisher.

Typeset by The Federation Press, Alexandria, NSW.
Printed by Pegasus Media & Logistics, Blacktown, NSW.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Foreword

Margaret Thornton

As someone who has long advocated a broadening of the law curriculum, I am particularly pleased to have been invited to write the Foreword to this splendid collection.

The 'Priestley 11', in conjunction with a positivist pedagogy that is expected to produce 'right' answers, is a powerful arbiter of what is taught in Australian law schools. Despite being a prerequisite to admission to practice, its content has changed little in the last century even though Australia has become an increasingly heterogeneous society. Although not all students intend to practise law when they graduate, they like to qualify for admission 'just in case'. The fact that almost all satisfy the requirements invests the Priestley 11 with considerable power in resisting critique.

Despite the obstacle presented by the Priestley 11, significant portions of my career have been expended in law schools where colleagues have sought to convey to students that law is much more than a technocratic system of rules. They have argued that law can only be understood 'in context' by paying attention to history and philosophy, as well as other contemporary socio-legal perspectives. From time to time, this has incurred opposition from traditional legal academics, as well as from the practising profession, who felt that critical perspectives undermined the Priestley 11. Even senior university administrators have argued that a focus on anything other than conventional doctrinalism would alienate law firms and discourage them from employing the law school's graduates. This opposition has been so profound that it even resulted in notable sociolegal scholars being made redundant at law schools, such as Macquarie and La Trobe, despite their reputation for innovative scholarship.

Of course, once a progressive course has been set in motion, it is not easily deflected by the rearguard action of a few self-appointed gatekeepers. What is more, new ways of thinking are fostered by academic research, where independent interests have traditionally been pursued without fear or favour. Thus, while the law curriculum has been constrained by the Priestley 11 in terms of teaching, law schools have rarely imposed formal restrictions on independent research by undergraduate students, doctoral candidates, or academics.

Even though one might feel equivocal about the entry of competition policy into higher education, the introduction of rankings around the millennial turn resulted in a burgeoning of creative legal scholarship that included interdisciplinary research. The formation of interdisciplinary teams proved to be a positive by-product of the increase in grant income as black letter law projects no longer fitted the research bill: 'A mere compilation', said one humanities scholar dismissively of a doctrinal law application that I recall from my time on the Australian Research Council.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

A further corollary of the sea change that emerged from the introduction of rankings was its impact on legal publishing, which resulted in a proliferation of law journals, many of which reflected the new interdisciplinary turn. These new journals, furthermore, were interested in original and imaginative contributions, not more of the same. Hence, creative, and innovative scholarship, of the kind evinced by the contributors to this volume, began to appear and to be acknowledged as legitimate.

I would also add that it is pleasing to see explicit acknowledgement of Australian scholarship in the collection. While not wishing to sound ethnocentric, I rue what I term 'Northernhemispherism', one of the less attractive dimensions of the rankings phenomenon. This entails the favouring of British, North American, and European publications over those from Australasia and the Global South. Rankings are often biased because the global ordering is determined by downloads, which tend to be judged by the prestige of a scholar's home institution, preferably Oxbridge or an Ivy League university. As a result, 'Northernhemispherism' invariably outranks scholarship from Australasia and the Global South, regardless of how innovative it might be.

University administrators, seduced by rankings, tend to assume that the 'international', that is, the Northern Hemisphere, publication of an article or book will enhance their institution's ranking in the latest league table. One colleague, for example, was told by their dean to include some American content in an article on family law to facilitate publication in a journal that would attract the 'international' descriptor. This was despite the fact that this academic was more interested in publishing in an Australian journal in order to engage with local experts and practitioners in domestic family law scholarship. I had an even more bizarre experience when I was on the editorial board of a British book series, where I had been led to believe that my role was to bring innovative Australian scholarship to the board's attention. However, when I delivered an original manuscript by an Indigenous scholar, the board rejected it on the ground that it was 'too Australian'; I felt that I had no option but to resign.

It is therefore wonderful to see the way Indigenous scholarship has been seriously engaged with in this collection, along with multiple other critical sociolegal perspectives not included in the Priestley 11 but central to an understanding of the constitution of contemporary society. These essays clearly underscore the fact that law, far from being a technocratic and esoteric body of knowledge disconnected from society, is central to its understanding. The collection will be a wonderful resource for lawyers, law students and anyone with an interest in the role of law in society. Hopefully, it might even nudge the admitting authorities into considering bringing the Priestley 11 into the 21st century!

I congratulate the editors for having the foresight to propose such an innovative collection as well as the energy to bring it to fruition; I also congratulate the contributors for their insightful and original scholarly essays; and finally, a bouquet must go to Federation Press for agreeing to publish the collection.

Margaret Thornton

The Australian National University, Canberra, July 2025

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Contents

Foreword by Margaret Thornton *v*

Acknowledgments *ix*

About the Contributors *x*

Introduction 1
Harry Hobbs and Jeremy Patrick

1 Legal History 19
Shaunnagh Dorsett

2 The Point of Legal Philosophy 32
Jonathan Crowe

3 Comparative Law 45
Theunis Roux

4 A Field by any Other Name, or the Field FKA Law and Humanities 59
Alice Palmer

5 Qualitative Research Methods 75
Terry Hutchinson and Harry Hobbs

6 Quantitative Empirical Legal Studies 93
Alysia Blackham

7 Law and Economics 106
Guy Suttner

8 Marxist Approaches to Law 125
Michael Head

9 Legal Realism 141
James Gilchrist Stewart

10 Critical Race Theory 154
Thalia Anthony

11 Feminist Legal Theory 174
Ann Genovese and Heather Douglas

12 Decolonialism 189
Dorothea Anthony

13 Aboriginal Legal Traditions 208
Kristopher Wilson

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

14 Queer Legal Theory 221
Claerwen O'Hara

15 Postmodernism and Poststructuralism 236
Matthew Mitchell and Flynn Pervan

16 Disability Studies and the Law 254
Darren O'Donovan

17 Earth Jurisprudence 271
Costa Avgoustinos

Conclusion: Law Beyond Doctrine 287
Harry Hobbs and Jeremy Patrick

Index *291*

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Acknowledgments

If all work is a collective endeavour, then that must be particularly so for edited collections. Harry and Jeremy gratefully acknowledge the contributors, without whom this book would not exist. We thank them for their enthusiasm in initially accepting our invitation to contribute to this volume, and their care and attention in producing a clear and thorough introduction to their methodological approach to law. We extend our thanks to Margaret Thornton, for her thoughtful and engaging foreword that introduces the collection. We would also like to acknowledge Federation Press for their interest and attention in this project. In particular, we thank Trisha Valliappan for her encouragement and Jay Cruikshank for his careful editing.

On a personal note, Harry thanks Annabel and Frankie Johnson for their support and patience. Though Frankie may prefer *The Gruffalo* to *Beyond Doctrine* for at least the next few years, Harry nonetheless looks forward to attempting to introduce it into the bedtime routine.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

About the Contributors

Dr Dorothea Anthony is a Senior Lecturer in the School of Law at the University of Wollongong. She researches predominantly in the areas of human rights and international law, adopting critical perspectives based on her examination of the historical, political, and economic underpinnings of the law. Her work has been published in the *Australian Journal of Human Rights*, *Melbourne Journal of International Law*, *Global Encyclopedia of Territorial Rights*, *Asian Yearbook of International Law*, *European Journal of Legal Education*, and *The Laws of Australia*. Dorothea has taught public and private international law, corporate law, administrative law, legal ethics, and legal research and writing.

Dr Thalia Anthony is a Professor of Law at the University of Technology Sydney. She researches the impacts of colonial laws, past and present, on First Nations communities. Thalia had worked with Aboriginal women in prison and the community to build collective strengths outside of the carceral system. Her research is published in *Indigenous People, Crime and Punishment*, *Decolonising Criminology* and *Unsettling Colonial Automobility*. She is recognised by *The Conversation* as one of Australia's most influential thinkers. Her research is commonly cited in the media; in UN documents; in Supreme Court decisions; and in parliamentary debates.

Dr Costa Avgoustinos is a Lecturer in the Faculty of Law at the University of Technology Sydney (UTS), teaching Constitutional Law, Administrative Law, and Ethics, Law and Justice. His main area of research is Climate Change and (its impacts on) the Constitution, which was the subject of his PhD thesis completed at the University of New South Wales (UNSW). Costa has also been involved in various research projects with colleagues at UTS and other organisations on a range of topics, such as legal protections for First Nations children in foster care, sex workers' rights in NSW, and 'Democracy in Schools' programs.

Dr Alysia Blackham is a Professor at Melbourne Law School, The University of Melbourne, Australia. She is an internationally renowned expert on age discrimination law and the consequences of ageing for workplaces. Her research focuses on the intersection of employment law, equality law and public law, using empirical evidence to cast new light on legal problems.

Dr Jonathan Crowe is Head of School and Dean of the School of Law and Justice at the University of Southern Queensland, where he also holds a Research Chair in Law and Justice. He previously taught at Bond University and the University of Queensland, and has held visiting positions at Georgetown University and the

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

University of Texas at Austin. He is the author or editor of 11 books and well over 120 book chapters and journal articles, primarily on legal philosophy, ethics and public law. He co-edits the *Journal of Legal Philosophy.*

Dr Shaunnagh Dorsett is Distinguished Professor of Law at the University of Technology Sydney. She is an Honorary Fellow of the American Society for Legal History, a member of the Board of the European Society for Comparative Legal History, and a member of the editorial Committee of *The Journal of Legal History.* She is co-founder of the Legal Histories of Empire conference series. She is the author of a number of books and edited collections including, most recently, *Navigating Legalities: Legal Histories of Empire* (Routledge 2024), edited with Lyndsay Campbell.

Dr Heather Douglas AM is a Professor at the Melbourne Law School, The University of Melbourne and Deputy Director of the ARC Centre of Excellence for the Elimination of Violence Against Women (CEVAW). She researches in criminal law with a focus on legal responses to domestic and family violence. Recent books include a collection edited with Nicole Watson, *Legal Education Through an Indigenous Lens: Decolonising the Law School* (Routledge, 2025) and a collection edited with Kate Fitz-Gibbon, Leigh Goodmark and Sandra Walklate, *The Criminalization of Violence Against Women: Comparative Perspectives* (OUP, 2024). Heather is also the author of *Women, Intimate Partner Violence and the Law* (OUP, 2021). Heather's heritage is Scottish and Irish.

Dr Ann Genovese is a Professor at the Melbourne Law School, The University of Melbourne. She teaches and researches in the fields of Australian history and historiography, feminist history and theory, and jurisprudence, with a focus on archival sources and techniques that show (and contest the orthodoxies) of how Australian people have lived with laws. Her work has been integral to the establishment of an emergent practice – jurisography. Her books include *Australian Critical Decisions: Remembering the Koowarta and Tasmanian Dam Case* (Routledge, 2017); *The Court As Archive* (ANU Press, 2019) (with Rubenstein and Luker); and *Feminist Jurisography: Law, History, Writing* (Routledge, 2022). Ann's heritage is Italo-Australian.

Dr Michael Head is a Professor at the School of Law, Western Sydney University and a correspondent for the *World Socialist Web Site*. His most recent books include *Democracy, Protest and the Law: Defending a Democratic Right* (Routledge 2024), *Domestic Military Powers, Law and Human Rights: Calling out the Armed Forces* (Routledge 2020), *The Legal Power to Launch War: Who Decides*? (with Kristian Boehringer) *(*Routledge 2019) and *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (Ashgate 2016).

Dr Harry Hobbs is an Associate Professor in the Faculty of Law and Justice at the University of New South Wales. Harry holds an ARC Discovery Early Career Research

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Award investigating Indigenous-State treaty-making. He has written widely on treaty in leading Australian and international legal journals, such as the *Sydney Law Review* and the *University of Toronto Law Journal*. He is also the co-author of the leading Australian book on the topic: *Treaty* (Federation Press, 2nd ed, 2020) (with George Williams), and an edited volume: *Treaty-Making 250 Years Later* (Federation Press, 2021) (with Alison Whittaker and Lindon Coombes). Alongside this work, Harry examines the phenomenon of micronations and the growth of sovereign citizens and pseudolaw adherents in Australia and their impact on the administration of justice.

Dr Terry Hutchinson currently serves as an Adjunct Professor within the School of Law and Justice at Southern Cross University. Prior to this, Dr Hutchinson held the position of Associate Professor in Law at Queensland University of Technology, being a member of Faculty 1987-2016, and a Visiting Fellow 2017. Her publications on legal research methodologies including *Researching and Writing in Law* (Thomson Reuters, 4th ed, 2018) are widely cited internationally.

Dr Matthew Mitchell is a Lecturer in Criminology at Deakin University. Matthew's research is situated at the intersection of queer criminology and socio-legal studies, focusing on LGBTQ people's interactions with legal systems, gendered and sexuality-related harm, and technology-facilitated violence. He is an expert in qualitative research methods and critical theory, with a particular interest in discourse and legal case analysis. His forthcoming monograph, *Governing Gender: Transgender Children, Hormones, and the Law* (Bristol University Press, 2026), examines how Australian law regulates transgender young people's access to gender-affirming care.

Dr Darren O'Donovan is Senior Lecturer in Administrative Law at La Trobe Law School, Melbourne. He has written extensively on rights, oversight and public administration, with a particular focus on the National Disability Insurance Scheme and social security law. His work has a socio-legal focus and emphasises the centrality of non-judicial review bodies and first instance decision-makers to delivering administrative justice.

Dr Claerwen O'Hara is a Lecturer at Melbourne Law School, a member of the editorial board of the *Australian Feminist Law Journal*, and Co-Chair of the Australian and New Zealand Society of International Law (ANZSIL) Gender, Sexuality and International Law Interest Group. Their research spans the fields of international human rights law and international economic law, with a particular focus on queer and feminist approaches to international law, alternative internationalisms, and law and political economy. They have recently edited two books on queer approaches to international law with Dr Tamsin Phillipa Paige: *Queer Encounters with International Law: Lives, Communities, Subjectivities* (Routledge, 2024) and *Queer Engagements with International Law: Times, Spaces, Imaginings* (Routledge, 2024). Claerwen is

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

currently working on their first monograph, *Consensus in International Law: Critical History, Queer Reimaginings*, which is under contract with Oxford University Press.

Dr Alice Palmer is a Senior Lecturer at Melbourne Law School (MLS) where she teaches on the intersections between environment, development and human rights law as well as legal methods and reasoning. Palmer's research crosses practical and theoretical aspects of environmental and international laws, with a particular focus on visual images as forms and features of law. At MLS, Palmer is a Program Director of the Art and Law Program of the Institute for International Law and the Humanities (IILAH), and a Deputy Director of the Melbourne Centre for Law and the Environment (MCLE). Her prize-winning book, *Natural Perception: Environmental Images and Aesthetics in International Law*, was published by Cambridge University Press in 2023.

Dr Jeremy Patrick is a Senior Lecturer in the University of Southern Queensland School of Law and Justice, where he developed and teaches a core course on alternative approaches to legal scholarship. Jeremy has studied and taught law in the United States, Canada, and Australia. His scholarship draws upon legal history, comparative law, and legal realism, and is primarily in the areas of constitutional law and law and religion. His monographs and edited collections include *The Impact of Law's History: What's Past is Prologue* (Palgrave MacMillan, 2022), *Faith or Fraud? Fortune-telling, Spirituality, and the Law* (UBC Press, 2020), and *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016). He is a founding co-editor of the *Australian Journal of Law and Religion*.

Dr Flynn Pervan is an Associate Lecturer in Criminology at Deakin University. His work spans historical and theoretical criminology, with a particular emphasis on disciplinary histories, and the historiographical and methodological work of Michel Foucault and Gilles Deleuze.

Dr Theunis Roux is Professor of Law and Head of the School of Global and Public Law at UNSW Sydney. Before relocating to Australia in 2019, he was the founding Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), now affiliated to the University of Johannesburg. He researches in the area of comparative constitutional law, with a particular interest in the law and politics of constitutionalism in the Global South. He is the author of *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press, 2013) and *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018). His most recent significant publication is 'Grand Narratives of Transition: The Quest for Democratic Constitutionalism in India and South Africa' (2024) 57 VRÜ/WCL 5.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Dr James Stewart is a Senior Lecturer in law at the RMIT University School of Law. James' research and teaching focuses on critical legal histories, private law, and legal theory. He has published a number of works on critical legal studies and cultural interactions with law.

Guy Suttner lives in Sydney on the land of the Wangal people. He graduated from UNSW with a Bachelor of Laws (Hons I) and a Bachelor of Arts.

Dr Kristopher Wilson is an Associate Professor in Law at Flinders University. Kris' research covers cybersecurity, computer-related crime, Indigenous traditional knowledge in a digital context, Indigenous legal relations, and cultural and intellectual property protection. Most recently, Kris was a contributor to the 1970 UNESCO and 1995 UNIDROIT Conventions on Stolen or Illegally Transferred Cultural Property (Oxford University Press, 2024) and he is a collaborator on the Indigenous peoples and cultural heritage international research and capacity-building initiative in the second phase (2023-2027) of the UNESCO Chair program. He is currently co-editing a two-volume special issue titled 'Decolonising Cultural Property' for the *International Journal of Cultural Property*, and is a co-editor of a forthcoming book with Palgrave on Indigenous Research Methodologies. Kris is a descendant of the Arabunna and Dieri Peoples.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Introduction

*Harry Hobbs and Jeremy Patrick**

I Law Conventionally Understood

If you were to ask a layperson how they think a difficult legal case is won, they may very well form an image of a besuited, spectacled young lawyer poring over a stack of dusty books in a lonely corner of a large library. The hour is well past midnight when suddenly the eureka moment comes: the all-but-forgotten case from 1872! The never-repealed statute from the reign of King Henry VIII! The unstated premise in the layperson's imagination is that "law" is simply an enormous collection of statutes and cases, and the lawyer that finds the most apt (and potentially obscure) authority will necessarily triumph.

Law students in Australia will have a *slightly* different view. They know that legal research is done on computers, often using expensive, subscription-only databases. But they very well may still hold the same underlying view of law: that challenging legal issues are resolved by adducing authorities until a judge is persuaded by their inexorable weight and declares victory for the side able to produce the most robust argument. Law students will be taught a more sophisticated set of concepts to convey this notion: "precedent", "controlling authorities", a case that can be "distinguished" vs one that is "on all four corners", and the "rule of law", among others. Having been infused with the belief that "law" is a rational, systematic, and effective way to resolve disputes, law students understandably take formal legal doctrine seriously. If nothing else, they will be tested repeatedly on their ability to resolve hypothetical factual scenarios by applying formal legal rules (the so-called "ILAC" or "IRAC" method of problem-solving).[1]

Many graduating law students (though not as many as is commonly assumed) will go on to become practising lawyers and put this doctrinal understanding of law into effect: researching internal memos for their supervising partner, writing client advice letters, drafting submissions, and so forth. A small percentage might become academics in a system of Australian legal education that is heavily influenced by the profession and its demand that the curriculum produce "practice-ready" students. Teaching traditional approaches to law, it will be second nature for most of these academics to produce traditional legal scholarship. An even smaller percentage of

* We thank Maxine Evers and Pauline Collins for their valuable comments on an earlier draft.

1 ILAC: Introduction, Law, Application, Conclusion; IRAC: Introduction, Rule, Application, Conclusion.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

law graduates may someday become judges in an Australian judiciary known for a deeply legalistic, technocratic, and institutionalist mindset towards resolving legal issues. In each of these areas – legal education, legal scholarship, and judicial opinion writing – the understanding of law as doctrine reigns supreme.

But there is another way to think about law. Instead of law being a "closed" system that can only be understood through traditional legal research and analysis, law can be conceptualised as an "open" system in which insights, approaches, and influences from other disciplines can be brought to bear.[2] Laws around sexual assault can be accurately described by any good doctrinal criminal lawyer, but feminist legal scholarship offers deep critiques and proposals for reform. Doctrinal public law scholars presented valuable evaluations of the legal effect the Aboriginal and Torres Strait Islander Voice would have (if it were enacted at the referendum),[3] but critical race, Indigenous, and post-colonialist scholars were able to offer something more and different than just technical legal analysis. And where the establishment-oriented legal profession, professoriate, and judiciary pledge allegiance to the "rule of law", a Marxist or modern-day legal realist may remind us of the deep inequalities of wealth, privilege, and status perpetually maintained by the capitalist system and the legal framework that supports it. In short, when law is understood as more than simply a body of rules, but instead as a vital social construct deeply embedded in the history, culture, and values of a people, it makes perfect sense to examine it from a wide range of perspectives.

The purpose of *Beyond Doctrine: Alternative and Critical Approaches to Law* is to highlight different perspectives, reminding readers that "law" is far more than a dry, sterile collection of mechanically applied rules. Our hope is that by broadening the vision of legal education, our legal system itself can be reimagined. Each of the seventeen chapters in this collection provides an introduction to a different way of approaching legal issues, and each is written by one or more experts with a background in and focus specifically on Australian law.

This collection is the first of its kind in Australia, but that fact alone raises an interesting question: why has it taken so long? The remainder of this introduction answers that question. Below, Part II outlines the history of legal education in Australia, tracing its colonial roots in the apprenticeship model all the way to modern law schools. Part III dives deeper into law schools and examines a central tension in their purpose: are they essentially trade schools to prepare graduates for legal practice or are they part of the classic Enlightenment project to produce well-rounded citizens schooled in the liberal arts and humanities? In a memorable phrase, are law schools designed to produce 'plumbers' or 'Pericles'?[4] This discussion includes the growing presence of Indigenous understandings of law in Australian law school curricula.

---

2 See Pauline C Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011) ch 5.

3 *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth). On the Voice proposal see Harry Hobbs, 'Special Issue on the Aboriginal and Torres Strait Islander Voice' (2023) 34(2) *Public Law Review* 95-164.

4 William Twining, 'Pericles and the Plumber' (1967) 83(3) *Law Quarterly Review* 396.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Part IV then moves the focus beyond legal education and into legal scholarship to discuss both the dominance of the doctrinal methodology and a range of alternatives.

II A Brief History of Legal Education in Australia

For more than 65,000 years, legal education on this continent concerned the instruction and maintenance of the laws of Aboriginal and Torres Strait Islander peoples and societies. While each community developed their own distinctive body of norms and rules to regulate disputes and promote positive relationships, the First Laws of this continent share foundational commonalities. Holistic and pervasive, Aboriginal laws are broader than Western understandings of 'law'; they encompass notions of culture, of living in a proper manner, and of following the way of the ancestors.[5] These laws are intimately connected to the tracts of Country that each community is connected to and is responsible for. But law does not only 'flow … from the living heart' of Country, it sustains that Country.[6] In the indelible words of Kombumerri and Munaljahlai legal scholar Christine Black, 'the Land is the source of Law'.[7] Aboriginal law is Country, but it is also based on precepts of relationality, respect, and autonomy.[8]

The source, content and shape of Aboriginal law differs from Western law, but legal education requires the same deep grounding in study. Like an apprenticeship, individuals are taught or initiated into the system by highly trained elders who serve as guardians of the law. In ritual and ceremony, senior Elders pass the law down through means of songlines, stories, paintings, and dance, giving meaning to sites and connecting people to Country.[9] Some laws are public, but others are secret. The relationship a person has with Country and community – their gender, their family, their skin group, their level of initiation – can determine the scope of their instruction.

Colonial dispossession and European settlement undermined traditional authority and dislocated members from their community, their Country, and their law. Yet, Aboriginal law continues to be lived, sung, and told on and through the land.[10] Indeed, given the law 'is of Country', it 'cannot be eliminated'.[11] Adapting and responding to accommodate and utilise non-Indigenous law and practice, Aboriginal

5 Marcia Langton and Aaron Corn, *Law: The Way of the Ancestors* (Thames and Hudson, 2023) 36.

6 Ambelin Kwaymullina and Blaze Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 34 *Journal of Australian Studies* 195, 202-3.

7 Christine Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2010).

8 Mary Spiers Williams, 'Challenging Settler State Legal Fantasies: Basic Precepts of First Law' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 61, 74; Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Humanities* 181.

9 James Gurrwanngu Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2 *Northern Territory Law Journal* 236, 240-243.

10 Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015).

11 Williams (n 8) 76.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

law 'exists as a real force, influencing or controlling the acts and lives' of Indigenous peoples across the continent.[12]

Nevertheless, given colonisation saw the English common law 'transposed and imported'[13] to this land as a settler 'birthright',[14] to speak of legal education in Australia today is to speak of the instruction and preparation of graduates for entry into the practice of Australian law. In this part, we provide a short overview of the changing model of Australian legal education over the last two centuries, tracing the development from the apprentice to the university graduate. This history is important. As Linda Martin has noted, the 'vital structural and intellectual components of our legal tradition were firmly entrenched during the nineteenth century'.[15] As we will see, despite major changes, the judiciary and profession continues to exercise significant control over legal education.

A The Colonial Apprenticeship Model

The legal profession first began to emerge in England during the thirteenth century. Education followed an apprenticeship model, with aspirants attached to courts.[16] Gradually, responsibility for training was assumed by practitioners, carried out within one of several guilds of lawyers in London, known as the Inns of Court. The four Inns operated in a similar manner to the universities of Cambridge and Oxford but taught the 'law of the land' as opposed to canon or Roman law. Within the Inns, students practised moots, attended lectures (or, given their content and tone, more strictly 'readings'), and dined with colleagues. Senior members of the Inn were responsible for selecting candidates for admission.

By the mid-eighteenth century, responsibility for legal education shifted from the Inns to university-affiliated law schools that took a broader view of the subject. Nonetheless, the profession retained a substantial role. A university law degree did not entitle one to practice: solicitors were required to serve five years as an articled clerk to an established attorney before admission, while aspiring barristers were expected to undertake a pupillage under the guidance of a senior practitioner.[17]

Legal education in the Australian colonies initially followed the apprenticeship model.[18] In the absence of both the Inns and law schools, however, the authority

12 Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (Report No 31, 1986) vol 1, 79 [103].

13 David Lieberman, 'English Legal Culture in the Late Eighteenth Century: Institutions and Values' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 40, 44.

14 Alex Castles, 'The Reception and Status of English Law in Australia' (1963) 1 *Adelaide Law Review* 1. See further *R v Murrell* [1836] NSWSC 35. See, Bruce Kercher, *Australia: R v Ballard, R v Murrell and R v Bonjon* (1998) 3(3) *Australian Indigenous Law Reporter* 410.

15 Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9 *UNSW Law Journal* 111, 111.

16 John Baker, *Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 165-184.

17 Ibid 183.

18 Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' (2008) 39 *University of Toledo Law Review* 233, 234.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

responsible for admission served 'as a significant pedagogical force in the colony'.[19] That authority was the profession. While 'no formal educational qualifications were necessary', applicants seeking to become solicitors were required to serve five years as an articled clerk to an established practitioner and then submit to the examination of Supreme Court judges on their character and legal knowledge.[20]

Reflecting a wider political contest between emancipists (freed convicts) and exclusives (free men), the only avenue to the New South Wales Bar required men to seek admission in Great Britain or Ireland: there was no path for local lawyers. This did not change until passage of the *Barristers Admissions Act 1848* (Imp). The Act established a Board consisting of three judges of the Supreme Court of New South Wales, the Attorney-General, and two barristers who would determine whether a candidate would be admitted. Once again, although no formal qualifications were necessary, it was recognised that legal professionals should have a broad 'liberal and legal education'[21] beyond the simple recitation of doctrine and principles. To be admitted, a candidate needed to pass an examination in Greek, Latin, Mathematics, Law and any other branch of knowledge the Board deemed appropriate.[22] Without an accompanying training program,[23] applicants would undertake their own private course of study. A similar Board was established for solicitors in 1877.

The establishment of the Board ensured the profession remained firmly in charge of legal education. As the initial development of legal instruction at the University of Sydney demonstrates, the profession exercised this power by maintaining its 'proprietorial role in managing legal education' throughout the colony.[24] In 1850, the University of Sydney was incorporated. While a Faculty of Law was inaugurated in 1855 (becoming the first law school in Australia),[25] no teaching commenced until 1859 when John Hargrave, Solicitor-General and Member of the Legislative Council, was appointed Reader in General Jurisprudence. Hargrave's lectures were liberal rather than vocational in orientation; a review of his notes reveals a focus on the study of 'abstract law' as 'a high and noble science'.[26] Evidently, the Board was unimpressed. Although legislation exempted Arts graduates from the humanities section of the Bar exam,[27] the Board refused to recognise the jurisprudence examination set by Hargrave.[28] Martin notes the reasons for

19 Martin (n 15) 120.
20 Ibid 115.
21 Ibid.
22 *Barristers Admissions Act 1848* (Imp) 11 Vic 58. Note that the Board could admit practitioners from England without examination: David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 30.
23 Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission* (1964) (the 'Martin Report') vol 2, 52 [11.9].
24 JM Bennett, 'Out of Nothing…' in John and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 29, 29.
25 See Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965, 966-67.
26 Martin (n 15) 122.
27 *Sydney University Graduates Act 1857* (NSW) s 1, 2.
28 Martin (n 15) 126; Barker (n 22) 31.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

this refusal were 'not clear',[29] though Hargrave himself had doubts over the efficacy and practical utility of academic legal training. In the face of division and ambivalence, lectures were discontinued in 1869, with the faculty becoming 'almost entirely an examining body'.[30] The divide between the Admissions Board and the University was maintained until 1890, when Pitt Cobbett was appointed the first chair and a full academic program commenced.[31]

The same tension was not present in Victoria. The University of Melbourne began teaching in 1855. Low student enrolments prompted the introduction of legal instruction in 1857.[32] By 'happy accident', the University Chancellor Redmond Barry was also a judge of the Supreme Court of Victoria, which was responsible for the colony's admissions rules. Barry ensured that the Board's rules exempted graduates from the Supreme Court's law exams,[33] ensuring a small but steady stream of enrolments.

B Rise of the Law Schools

The establishment of law schools in Sydney and Melbourne marked the first period in the 'growth of modern-day Australian legal education'.[34] Nonetheless, growth was slow. It took several decades for the remaining colonies and later states to institute their own law schools housed within universities, beginning with Adelaide in 1883, before Hobart (1893), Perth (1927) and Brisbane (1936) followed.[35] As David Barker notes, the formation of law schools in Australia during this early phase was characterised by 'long-drawn out' processes.[36] In part, these delays can be attributed to unease within the profession over the emergence of law as an academic discipline,[37] and uncertainty within the academy that a professional school belonged within a university. The emerging law schools themselves wrestled with this tension: should their objective be to impart a broad and liberal education or to prepare graduates for practice?[38]

This tension also manifested itself in the institutional setting within which Australian law schools operated. These schools were small, with limited resources and few ongoing staff. Indeed, prior to World War II, law schools 'were run primarily by part-time practitioner teachers, led by a full time professor who acted as Dean'.[39] In the immediate post-WWII period, Australia could only count 'around fifteen

29 Martin (n 15) 126.

30 Ibid 128; John Mackinolty, 'Before the Beginning 1850-1890: Mr Justice William Charles Windeyer, Dean, 1883-1891' in John and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 13, 20.

31 Bennett (n 24) 38.

32 James (n 25) 966-67.

33 John Waugh, *First Principles: The Melbourne Law School 1857-2007* (Miegunyah Press, 2007) 7.

34 Susan Bartie, 'Towards a History of Law as an Academic Discipline' (2014) 38 *Melbourne University Law Review* 444, 474.

35 James (n 25) 966-67.

36 Barker (n 22) 42.

37 In each jurisdiction, it was necessary to secure the support of the relevant Admissions Board to ensure graduates would be entitled to practice: ibid.

38 See discussion in Victor Windeyer, 'Learning the Law' (1961) 35 *Australian Law Journal* 102.

39 Susan Bartie, 'A Full Day's Work: A Study of Australia's First Legal Scholarly Community' (2010) 29(1) *University of Queensland Law Journal* 67, 67.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

full-time teachers'.[40] This was not seen as a problem, but as 'one of the great strengths of legal education'.[41] Pitt Cobbett, the first Dean of the Sydney Law School explained that drawing heavily from the profession would provide 'an ample guarantee that the teaching would have a sufficiently practical bias'.[42] Almost seventy years later, Dean of the University of Tasmania Law School, Norman Dunbar, reiterated this view, noting that law schools should remain primarily a 'professional institution'.[43] In some cases, the site of the law school accentuated this connection: Sydney Law School's location in the heart of the city's legal district, far removed from university grounds, 'was no accident' and spoke to the profession's desire to 'ensure … that legal education would remain practice-based'.[44] In terms of pedagogy, the approach of early Australian law schools was strictly expositional and lecture-based, treating law as a system of formal principles and rules that needed to be memorised by students and then regurgitated in exams.[45]

The apprenticeship model persisted, particularly in New South Wales. As Justice Kevin Lindgren recalled, given there was only one university in the State, 'most people outside the Sydney Metropolitan area' sought entry by undertaking articles and examinations, rather than the Bachelor of Laws (LLB).[46] Indeed, in 1962 only 59 per cent of the state's solicitors and 50 per cent of barristers were university graduates.[47] This did not change quickly; it was not until 1968, that university graduates comprised a majority of yearly admissions, while in 1978, almost one-third of admittees did not possess a degree.[48]

In this respect, New South Wales was an outlier.[49] By 1962, the overwhelming majority of persons admitted to practice in other jurisdictions had obtained an LLB. In Queensland, the number of graduate solicitors stood at 71 per cent, in South Australia, 88 per cent, while in Victoria, Western Australia, and Tasmania at least 95 per cent of the profession were university graduates.[50] Even so, as Michael Chesterman and David Weisbrot note, these law schools 'were generally viewed as adjuncts to the legal profession rather than truly academic institutions dedicated to liberal educational aims'.[51] The manner and content of their instruction may not have

40 Coper (n 18).
41 Barker (n 22) 60.
42 Martin (n 15) 141.
43 Norman Dunbar, 'Common Sense in the Law School' (1961) 1 *University of Tasmania Law Review* 541.
44 Martin (n 15) 142-3.
45 James (n 25) 967.
46 Kevin Lindgren, 'Reflections on Legal Education' (2006) 9 *Newcastle Law Review* 67, 67.
47 Martin Report (n 23) 70.
48 Committee of Inquiry into Legal Education in New South Wales, *Legal Education in New South Wales* (1979) (the 'Bowen Report') 184, Table 7-A.
49 Zelman Cowen and David Derham, 'Australian Legal Education: A Dissent' (1956) 9 *Journal of Legal Education* 53, 54. Cf PB Carter, 'Australian Legal Education: Miscellaneous Comments' (1955) 8 *Journal of Legal Education* 179, 181.
50 Martin Report (n 23) 70.
51 Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 711.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

amounted to much more than 'the uncritical transmission of legal doctrine'.[52] As the memorable words of the 1964 Martin Report on the Future of Tertiary Education in Australia, declared: 'Law, it has been said, can be taught under a gum tree, and, for much of Australia's history it might as well have been so taught'.[53]

It was not until the expansion of law schools from the 1960s onwards that this model came under some pressure. Between 1960 and 1980, six law schools were established to service a larger generation of school leavers and an expanding economy.[54] These new schools liberalised the legal profession, opening places for individuals capable of completing a law degree but who may not have been able to secure an articled clerkship. Expansion helped ensure that 'universities became the dominant providers of legal education' in Australia.[55] The growth of these schools and the emergence of professional law teachers also prompted new thinking about legal education.[56] Major reports during this period recognised the need to broaden legal education 'beyond the parroting of a set of rules',[57] to include 'an understanding of the role of the law in society'.[58]

The close relationship between legal education and the profession ensured that legal scholarship largely remained 'predominantly positivist'.[59] Nevertheless, cracks were beginning to emerge. Susan Bartie's close study of scholarly book reviews during this period reveals a cohort of legal academics that argued their students needed to 'to be equipped with knowledge of politics, sociology and philosophy', and that law should be conceived as 'an instrument of social policy'.[60] This period coincided with more fundamental changes to the apprenticeship model. Increasing criticism centred on the system of articled clerks, with many noting that busy practitioners had little time (and perhaps inclination or capacity) to instruct their clerks appropriately.[61] In New South Wales, the requirement to undertake articles was abolished in 1974,[62] in favour of a course of practical legal training. All other states have since introduced a similar practical legal training pre-admission requirement, though Victoria still offers an alternative.[63]

---

52 James (n 25) 965; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26(4) *Sydney Law Review* 537, 539.

53 Martin Report (n 23) 57.

54 Barker (n 22) 65-97.

55 Bartie (n 34) 476.

56 Coper (n 18) 233.

57 Dennis Pearce, 'The Past is a Different Country' in Kevin Lindgren, Francois Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2017) 49, 51.

58 David Barker, 'The Bowen Report' in Kevin Lindgren, Francois Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2017) 57, 61.

59 Chesterman and Weisbrot (n 51) 710; Erwin Griswold, 'Observations on Legal Education in Australia' (1952) 5 *Journal of Legal Education* 139, 145. For legal positivists, the existence of law depends on social facts, not on its ethical or moral content.

60 Bartie (n 39) 84.

61 Martin Report (n 23) 55 [11.28]; Report of the Committee on Legal Education, *Report of the Committee on Legal Education* (1971) ('Ormrod Report') [14].

62 Paul Cooper, 'Training Solicitors: The Expectations of the Profession' (1985) 3(1) *Journal of Professional Legal Education* 57, 58

63 Victorian Legal Admissions Board, 'Supervised Legal Training' <www.lawadmissions.vic.gov.au/qualifications-and-training/supervised-legal-training> (15 March 2024).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

The shift towards formal programs of education accelerated with the 'unprecedented and unexpected' law school expansion from the late 1980s.[64] Higher education reforms instituted by Education Minister John Dawkins abolished the distinction between education providers and transformed Australia's universities into 'a mass education system'.[65] Since 1989, 26 law schools have been established, bringing the total in Australia to 38. And yet, the 'avalanche'[66] of university-affiliated law schools has not entirely displaced alternative routes. In New South Wales, for instance, the Legal Profession Admission Board, the successor organisation of the historically split Barristers and Solicitors Admissions Boards, continues to offer a Diploma in Law that satisfies the academic requirements for admission.[67] Even here, however, the encroachment of professional education is visible. Since 1962, a formal course of tuition has been provided by practitioners and academics.[68] Graduates are low but relatively steady.[69]

From a traditional apprenticeship model to rote education in textbook legal principles by part-time teachers to modern and sophisticated curricula taught by full-time academics, legal education in Australia is still heavily influenced by the judiciary and the profession. The right to practise as a lawyer in an Australian jurisdiction is conferred by the relevant Supreme Court, exercised by an admissions board. Law schools must obtain accreditation from these admitting authorities, and this means the content of their core curriculum must satisfy the expectations of the judiciary and profession. As we explore below, this regulatory structure encourages a focus on doctrine and accentuates the key tension inherent within legal education.

III Competing Visions of Legal Education

In 1967, William Twining's celebrated lecture 'Pericles and the Plumber' was published in the *Law Quarterly Review*.[70] As summarised by Daniel Goldsworthy, '[Twining's] lecture, and its title, are an allusion to the tension between the contrasting views

64 Barker (n 22) 99.

65 Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2019) 10(7) *German Law Journal* 641, 641.

66 Barker (n 22) 99–126.

67 The Australian National Institute of Management and Commerce also offers an LLB degree that is accredited in New South Wales: Australian National Institute of Management and Commerce, 'Bachelor of Laws (LLB)' <www.imc.edu.au/future-students/school-of-law/bachelor-of-laws> (9 April 2024).

68 Bowen Report (n 48) 155–156.

69 In 2021-22, 126 students graduated, a slight uptick from 108 and 109 in 2019-20 and 2020-21: NSW Legal Profession Admission Board, *Annual Report 2021-22* (2022) 9. Although not directly comparable, 3,816 students graduated with an LLB or JD from a NSW or ACT law school in 2018: Council of Australian Law Deans, '2018 Data Regarding Law School Graduate Numbers and Outcomes' (2019) <https://cald.asn.au/wp-content/uploads/2019/07/Updated-Factsheet-Law_Students_in_Australia-20-04-2019.pdf>. For discussion, see, Harry Hobbs and George Williams, 'The Participation of Indigenous Australians in Legal Education, 2001-2018' (2019) 42(4) *UNSW Law Journal* 1294, 1315.

70 Twining (n 4).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

that legal education is an intellectual field of study on one hand, and on the other that it is essentially practical, vocational training in preparation for legal practice'.[71] Over fifty years later, the tension remains—at least in Australia. In 2020, Margaret Thornton noted that:

> [t]he discipline of law is still somewhat schizophrenic about whether it should prioritise academic or professional norms … This problem has been accentuated in Australia because of the close links between legal education and the legal profession.[72]

The tension reveals fundamental and abiding differences about the nature of law and the role and status of lawyers. If lawyers are practical skill-based problem solvers – essentially a fancy type of tradie that wears suits instead of Hi-Vis – thinking of law school as a type of trade school makes perfect sense. If lawyers are (to use dated gendered terms) "learned men" or "men of letters" devoted to a "life of the mind" requiring deep and wide-ranging intellectual thought, then thinking of law schools as centres of academic learning is what makes sense instead. In what follows, this central tension is explored.

A Law Schools as Trade Schools

The predominant conception of law schools in Australian history has been as a type of professional trade school. Medical schools pump out doctors, nursing schools pump out nurses, and law schools pump out lawyers. After all, what is it that a lawyer does, if they do not practise law? Whereas other trades involve tangible tools—plumbers with their plungers and builders with their hammers—lawyers have intangible tools in the form of a vast body of doctrine (the common law) which continually "works itself pure" and, sooner or later, provides an answer to every conceivable legal question.

The colonial-era advocates of formal legal education in Australia were not Oxford dons or German theorists, but pragmatic lawyers and business leaders who knew that the old apprenticeship model was no longer up to the task. From the earliest days of Australian legal education, the judiciary and the profession influenced what and how was taught in Australian law schools:

> From its evolution in New South Wales, and subsequently in the later colonies, the training of lawyers was very much a practical exercise with control being exercised by the judiciary as to the educational requirements which were mostly practical. The establishment of the early law schools gave rise to controversy from other established university disciplines which considered that law teaching was not an academic discipline but was more a practical vocation which had no place in a university.[73]

Universities did come to accept law schools, of course, but:

---

71 Daniel Goldsworthy, 'The Future of Legal Education in the 21st Century' (2020) 41(1) *Adelaide Law Review* 243, 244.

72 Margaret Thornton, 'The Challenge for Law Schools of Serving Multiple Masters' (2020) 62(2) *Australian Universities' Review* 5, 5.

73 Barker (n 22) 49.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

> the professional authorities considered, and made it abundantly clear, that they should not accord recognition for professional entry purposes to a university law degree unless it was perceived to have a substantial 'hard law' content in subjects directly related to private practice.[74]

When an eminent American scholar visited several Australian law schools in the early 1950s, he noted 'the profession in Australia is too much concerned with practical instruction, and that it would make an important contribution to legal education if it would give the universities a considerably freer hand in the development of their programs'.[75] In a rejoinder defending the Australian way of legal education, the then-Dean of Melbourne Law School wrote that:

> [l]aw learning and study which gets out of touch with law practice and administration can become a very arid thing, and it is our belief that this association between law school and law profession is to be cherished. So far as we know, no English school has it, and many American schools lack it.[76]

The conception of law school as a type of trade school was no historical accident, but a conscious choice maintained despite criticism. Indeed, when there was later movement in some law schools towards teaching law as a social practice with ideological implications,[77] the profession and judiciary pushed back hard. The most decisive move towards retrenchment of law schools as trade schools was the 1992 Law Admissions Consultative Committee (LACC) Report.[78] The latter became famous for articulating the so-called "Priestley 11" core areas of knowledge that a law school would have to teach in order for its graduates to be admitted to legal practice.[79]

As Thornton notes:

> It is notable that the Priestley 11 ignored the broadening of the curriculum that had been occurring with the modernisation of the teaching of law and the embrace of social liberalism from the 1970s onwards … Second generation law schools, such as Monash, the University of NSW and Macquarie, were interested in the study of law in its social context and law as an instrument of social justice; they were particularly keen to break away from the 'trade school' image of the past.

---

74 Chesterman and Weisbrot (n 51) 712. As Nickolas James writes, 'The approach of the first Australian law schools to teaching law was strictly formalist and doctrinal. Legal education was little more than the "imparting of information in the form of legal principles, rules and propositions…to be committed to memory for examination purposes". The legal profession controlled both the content of the curriculum and its teaching': James (n 25) 967, quoting Martin Report (n 23) 57 [11.37].

75 Griswold (n 59) 145.

76 Cowen and Derham (n 49) 54.

77 James (n 25) 969.

78 A good overview of these reports is provided in Robert French, 'Legal Education in Australia – A Never Ending Story' (4 July 2011) (Conference Paper) 18-22.

79 *Legal Profession Uniform Admission Rules 2015* (NSW) sch 1 ('Admission Rules'). The Priestley 11 areas of knowledge are 'Criminal Law and Procedure, Torts, Contracts, Property, Equity, Company Law, Administrative Law, Federal and State Constitutional Law, Civil Dispute Resolution, Evidence and Ethics and Professional Responsibility'. The Priestley 11 knowledge areas were named after Justice Priestley, former New South Wales Court of Appeal judge and chair of the LACC, who determined the compulsory subjects for an Australian law degree.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

> However, these trends exerted no discernible effect on the LACC. Even non-doctrinal subjects with a long tradition of being taught in universities, such as jurisprudence and legal history, did not appear in the Priestley 11. The expectation that the primary role of the law curriculum was to prepare students for private practice lingered on.[80]

From an outsider's perspective, perhaps the most surprising outcome is that now, over thirty years later, the "Priestley 11" remains almost completely unchanged. Despite early, frequent, and continuing criticism,[81] inertia has effectively locked it in place. In 2024, legal education in Australia is still largely centred, like it was in 1952, around traditional common law subjects taught by the lecture method, with students memorising and applying formal rules of legal doctrine.[82] Alternative ways of thinking about the law can still be taught, but mostly at the margins in the form of voluntary electives.[83] And to be fair, most law schools (and the increasingly-corporatised and managerialist universities they are part of[84]) are not exactly straining at the bit to break free from the dictates of the professional admitting authorities. Universities are under enormous social and government pressure to produce 'job ready' graduates.[85] A key marketing tool for universities is statistics on the percentage of graduates in gainful employment within a year of graduating, while students-as-consumers understandably expect their investment of time and debt to have a tangible payoff.[86]

---

80 Thornton (n 72) 9.

81 See French (n 78) 23 (discussing the 'unanimously negative' response of key stakeholders in 1998, and the Australian Law Reform Commission criticism that the Priestley 11 is formed from stagnant and outdated conceptions of what practicing lawyers need to know); Goldsworthy (n 71) 249 (discussing the 'vast technological progress' since the Priestley 11 that has shaped the legal profession in ways it could not foresee).

82 See Griswold (n 59) 148 ('Much of the teaching appears to be by what we would call the "lecture method", that is, by direct authoritative laying-down by the instructor, with the student dutifully copying and committing'.) Even if the goal is to produce 'practice-ready' graduates, an argument could be made that the core curriculum as taught in most Australian law schools is not very good at achieving this. However, the rise of clinical legal education, work placement, skills competitions (eg mooting), co-curricular programs, Practical Legal Training courses (after graduation), and so forth helps to fill in potential gaps.

83 Stephen Parker, 'Legal Education in Australia: The Perfect Storm' (2002) 43 *South Texas Law Review* 535, 539 ('In practical terms, these admission subjects constitute about two-thirds of the degree, leaving one-third for elective subjects'). See further Alex Steel, *Good Practice Guide (Bachelor of Laws): Law in Broader Contexts* (Australian Learning and Teaching Council, 2013).

84 See Thornton (n 72) 7.

85 Ibid 6. An interesting discussion, in the Canadian context, is provided by Harry Arthurs, who writes 'Unfortunately, producing practice ready lawyers is something law schools cannot do. The problem is that no one knows what practice ready lawyers look like. We lack information about what legal practitioners do, what knowledge or competencies they actually need or use, what breadth and depth of knowledge qualify new graduates as "ready" to practice, or how long they will remain "ready" before what they learned at law school becomes obsolete'. Harry W Arthurs, 'The Future of Law School: Three Visions and a Prediction' (2014) 51(4) *Alberta Law Review* 705, 706. Additional complications are that a sizable percentage of law graduates will have careers outside of practice, and that technological changes (such as AI) can quickly change the nature of core legal tasks.

86 See Pauline Collins, 'Australian Legal Education at a Crossroads' (2016) 58(1) *Australian Universities' Review* 30, 30 (discussing the expense of legal education and the stress it places on students to find gainful employment quickly).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

In this way, law is like most of the humanities in Australia: under pressure to produce off-the-rack employees, not necessarily well-rounded and broadly-educated citizens.

B Law Schools as places of Liberal Education

Law as a subject of study may not have come to Australian universities until the 1850s, but it has a rich, deep, and long-standing connection with joint intellectual enterprise since the very origins of universities in medieval Europe. When students at a medieval university completed their six-year-long Master of Arts degree (comprising the classic subjects of grammar, logic, rhetoric, geometry, astronomy, music, and arithmetic) only then could they pursue study in one of the 'higher faculties': law, theology, or medicine.[87] In this conception, law was a noble and elevated field, equal to the study of the human body and second only to the study of God Himself. Lawyers were not shabbily-dressed, ink-stained loophole-searching word-wranglers (straight out of a Dickens novel) but instead wise and learned men: philosophers, governors, advisors, and statesmen – veritable Platonic Guardians. Law was an erudite branch of knowledge subject to rational classification, study, and articulation. In time, many would even think of it as a science.

Law thus fit easily into the evolving conception of the university as a crucial gateway for young men (as they mostly were until the past century) to become sober, well-rounded, and civic-minded members of the community. A "liberal education" acquainted students with everything from history to literature to mathematics. In the European and eventually American universities, law was a serious subject of intellectual thought to be studied by serious men, not simply a set of practical skills to be learned prior to entering a trade. In the United States specifically, law transitioned from a subject for undergraduates to a postgraduate degree. The assumption being that the broad, liberal education gained during a student's first degree (requiring compulsory courses in subjects like economics, political science, logic, history, and more) would set them up well for studying the complexities of law.[88]

But in Australia, as discussed above, this conception of legal education as part of a broad liberal education never gained widespread adherence. The "law school as trade school" model, heavily influenced by the profession, became the standard. Some scholars point to a brief span starting in the 1960s where critical approaches to law gained a brief foothold (and high visibility) in some law schools:

> In the newer law schools, in particular the traditional underpinnings of the common law and of bourgeois law in general, were assailed by Marxists and other political radicals. The debates were fought out chiefly in classrooms and in staff common rooms, but it also had a more public dimension, not only by virtue of published scholarship but also because law teachers publicly associated themselves with politically radical causes.[89]

---

87 Charles Haskins, *The Rise of Universities* (Cornell University Press, 1923) 27, 34.

88 The rise of joint-degree programs in Australia (eg 'Law & Commerce', etc) are a partial response by universities to supplement what would otherwise be a university law program that includes nothing but law. See Chesterman and Weisbrot (n 51) 715.

89 Ibid.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Similarly, the early 1970s saw some law academics adopt Feminist approaches to law[90] and the 1980s saw some allegiance to the Critical Legal Studies movement.[91] Law or legal studies programs at La Trobe and Macquarie were notable for stepping out of line of the mainstream approach to understanding law.[92]

Still, whatever effects these changes may have had on legal scholarship, the judiciary and profession maintained its dominance over the curriculum and thus legal education in general.[93] Writing in 1987, Chesterman and Weisbrot noted that:

> much of mainstream legal education in Australia continues, despite the events of the 1960s and 1970s, to operate according to a generally traditional, practice-oriented approach. New or restructured courses which embody a radical or critical approach must generally operate at the periphery.[94]

With some exceptions – like several law schools making courses in legal history, dispute resolution and jurisprudence compulsory – the situation seems largely unchanged today. In the eyes of the judiciary and the profession, and the seemingly-unchangeable standards of the Priestley 11, what makes a good lawyer is a sound understanding of traditional core legal topics like torts and contracts – not "theoretical" topics like legal realism, quantitative empirical studies, or comparative law. In Australia today, it is perfectly possible – and indeed probable – that most university law graduates will not have taken a single university course on any subject outside of the law program,[95] and that most of the subjects they take within the law program will be doctrinal in nature. If the dilemma is 'Pericles' or 'plumbers', the preference in Australia is clearly for the latter.

Yet if legal education at first appears unchanged (and unchangeable), appearances can be deceiving. Over the last decade, increasing effort has been exerted to internationalise the curriculum to facilitate global legal practice,[96] promote alternative dispute resolution skills to prepare graduates for the legal sector,[97] and introduce courses on artificial intelligence and the law in anticipation of the significant changes disruptive technologies will have on legal practice.[98] Other changes are occurring too. In the next section we discuss the burgeoning drive to bring Indigenous content into the law curriculum.

---

90 See James (n 25) 969-70.
91 Ibid 970.
92 Ibid 970-71.
93 Ibid 972 ('A widespread critical legal education movement failed to take hold in Australia.').
94 Chesterman and Weisbrot (n 51) 721.
95 Although this is not correct for students studying a double or combined degree.
96 See, for example, Robert French, 'Horses for Courses' (International Legal Services Advisory Council National Symposium, 16 March 2012).
97 Kathy Douglas, 'The Teaching of ADR in Australian Law Schools: Promoting Non-Adversarial Practice in Law' (2011) 22(1) *Australasian Dispute Resolution Journal* 49.
98 See, for example, Lyria Bennett Moses and Michael Guihot, *Artificial Intelligence, Robots and the Law* (LexisNexis, 2020).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

C Indigenous Content

In recent years, there has been a concerted push to embed Indigenous knowledges and perspectives into the law curriculum.[99] In 2020, for example, the Council of Australian Law Deans (CALD) urged all Australian law schools to 'work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs'.[100] Embedding cultural competency is aimed at reducing the alienation, isolation, and racism that Indigenous students can feel in law school, and ultimately improving outcomes for Indigenous students which continue to lag those of their non-Indigenous colleagues.[101] Indeed, as CALD explained, these programs emerge out of a recognition that 'systemic discrimination … permeates the Australian legal system'.[102] But cultural competency has broader benefits. Non-Indigenous students may develop an understanding of Indigenous cultures, histories, and contemporary realities, enhancing 'critical reflexivity'.[103] It can also bring vocational advantages. As the 2010 Behrendt review notes, the teaching of Indigenous knowledges can equip graduates with the capabilities to 'meet the needs of Indigenous communities'.[104]

The patient work of Indigenous and non-Indigenous academics has led to the introduction of Indigenous content across the law degree in a number of faculties. However, while we agree with Ambelin Kwaymullina, that the 'question for law schools is no longer so much *whether* law curriculum will be Indigenised, but rather *when* and *how*',[105] ongoing challenges remain. In many – perhaps most curriculums – Indigenous content remains 'fragmented' and 'tokenistic'.[106] In other cases, non-Indigenous academics may currently feel unable to effectively teach or lead discussion on Indigenous laws and jurisprudence.[107] Genuinely embedding Indigenous knowledges into the curriculum is not only an implementation challenge, however, but might reflect the deeper divide on the purpose of legal education

---

99 Universities Australia, *Indigenous Strategy 2017-2020*.

100 CALD, 'Discrimination and Structural Bias against First Nations Peoples' (Media Release, 3 December 2020). See further Sally Kift and Kana Nakano *Reimagining the Professional Regulation of Australian Legal Education* (2021) 59: 'In 2020, CALD revised its *Australian Law School Standards* to include a positive statement that law curriculum will seek to develop these Indigenous knowledges and understandings and to foster Indigenous cultural competency'.

101 See, for example, Nicole Watson, 'Indigenous People in Legal Education: Staring into a Mirror Without Reflection' (2005) 6(8) *Indigenous Law Bulletin* 4, 5; Phil Falk, 'Law School and the Indigenous Student Experience' (2005) 6(8) *Indigenous Law Bulletin* 8, 10; Heather Douglas and Cate Banks, '"From a Different Place Altogether": Indigenous Students and Cultural Exclusion at Law School' (2000–1) 15 *Australian Journal of Law and Society* 42. See, generally, Hobbs and Williams (n 69) 1300-1303.

102 CALD (n 100).

103 Annette Gainsford, Marcus Smith and Alison Gerard, 'Accrediting Indigenous Australian Content and Cultural Competency with the Bachelor of Laws' (2021) 31(1) *Legal Education Review* 59, 65.

104 Larissa Behrendt et al, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander Peoples: Final Report* (Report, July 2012) 94.

105 Ambelin Kwaymullina, 'Teaching for the 21st Century: Indigenising Law Curriculum at UWA' (2020) 29 *Legal Education Review* 1, 30 (emphasis in original).

106 Eddie Cubillo, 'Indigenous Programs at Law School' *Law Institute Journal* (July 2022) 30, 31.

107 Ibid.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

between trade school and liberal education. In 2019, the Indigenous Cultural Competence for Legal Academics Program found some schools were reluctant to change the law curriculum, perceiving Indigenous knowledges as a 'periphery' issue, that is 'antithetical' to the core curriculum.[108]

The status and place of Aboriginal law – let alone the relationship between Indigenous Australians and the state – is and should be central to the practice and training of legal education in Australia. After all, law and lawyers have been central in the maintenance of colonisation, and the accompanying denial of Aboriginal and Torres Strait Islander peoples' rights and interests in this country. A more robust response is required. In 2015, the Truth and Reconciliation Commission (TRC) of Canada released its final report. Established for the purpose of documenting the history and continuing legacy of the Canadian Indian residential school system on Indigenous students and families, the Commission issued 94 calls to action. Recognising that the process of reconciliation must be societal and broad-based if it is to be effective, many of its recommendations were directed to civil society and non-government organisations. Two were directed to law societies and law schools. The TRC recommended lawyers 'receive appropriate cultural competency training'[109] and 'all law students … take a course in Aboriginal people and the law'.[110] Over the last decade, development has been slow but important steps have been taken. Several law societies now require practising lawyers' complete Indigenous cultural competency training,[111] while some law schools have introduced mandatory courses on Indigenous rights, law, and state-relations.[112]

Similar developments are occurring across the Tasman Sea. The New Zealand Council of Legal Education prescribes qualifications for admission to the legal profession. Recent amendments now require the study of tikanga Māori (Māori Laws and philosophy). From 1 January 2025, students must complete a compulsory subject on Tikanga Māori, and compulsory law subjects must also incorporate relevant material on Tikanga Māori.[113] A complaint by a prominent barrister that these requirements, among other concerns, impinge upon students' freedom of thought was ultimately dismissed.[114]

---

108 Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program: Final Report* (Australian Government Department of Education and Training, 2019) 18. Available at: <https://ltr.edu.au/resources/ID14-3906_Burns_FinalReport_2019.pdf>.

109 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015) Call to Action 27.

110 Ibid, Call to Action 28.

111 See, for example, Law Society of British Columbia, *Law Society Rules* (July 2023) r 3-28.1 'Indigenous intercultural course'.

112 CBC News, '28. Require All Law Students to Take a Course in Aboriginal People and the Law', *CBC News Beyond 94* (22 June 2023) <www.cbc.ca/newsinteractives/beyond-94/require-all-law-students-to-take-a-course-in-aboriginal-people-and-the-law>.

113 Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022 (NZ); *Lawyers and Conveyancers Act 2006* (NZ).

114 New Zealand House of Representatives, Regulations Review Committee, *Complaint about the Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022* (March 2025).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Developments in Canada and Aotearoa New Zealand suggests that legal education in Australia remains incomplete. We agree with Eddie Cubillo that the Law Council of Australia should 'adopt a 12th Priestley unit' on Indigenous history and law.[115] However, if recent years have seen real progress in embedding Indigenous perspectives in some law school curricula, continuing progress is not inevitable. With the defeat of the Voice referendum, some commentators have noticed signs of a general majoritarian societal "pushback" or retrenchment against other efforts at reform. The only matter that seems certain is that the next few years will be telling ones.

IV On the Value of Law Beyond Doctrine

Mainstream legal scholarship occupies a fascinating position in academia in that, in contrast to other disciplines, legal scholars rarely discuss *how* or *why* they do what they do. Whereas research papers in other fields almost inevitably feature a "methodology" section, mainstream legal scholarship simply takes it for granted that legal research is legal research, *simpliciter*. The tools taught in a first-year course on legal research and writing (spotting the relevant issues, looking up the relevant rules and authorities, and applying them to reach a persuasive conclusion) often become so ingrained that they become a new kind of "common sense"—the obvious way to approach legal scholarship. As Terry Hutchinson and Nigel Duncan write, 'the doctrinal method is often so implicit and so tacit that many working within the legal paradigm consider it unnecessary to verbalise the process'.[116] Indeed, even that term – 'doctrinal method'[117] – may be unfamiliar to legal scholars who use it intuitively in every research paper they write.

Reliance on the doctrinal method is understandable. After all, it uses the exact same toolset as practitioners drafting written submissions and judges writing opinions to justify their decisions.[118] And as it is the *only* methodology taught to many law students, it is the one they will most likely choose when a research project presents itself. By the end of law school, the doctrinal method is a comfortable one that is well-accepted by lawyers in the profession, the judiciary, and academia. It is part of what might be thought of as a self-perpetuating system because, in an important sense, the entire goal of doctrinal analysis is to maintain the coherence of the legal system.[119] And because the system is self-perpetuating, it is also a closed one:

115 Eddie Cubillo, 'Outline of Evidence of Dr Eddie Cubillo', *Yoorrook Justice Commission* (15 December 2022) 7 [11]. In Aotearoa New Zealand see, Metiria Stanton Turei, 'Indigenising Aotearoa New Zealand's Legal Education' (2022) 2(2) *Legalities* 127.

116 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 99.

117 The Council of Australian Law Deans has defined the doctrinal method: 'Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials'. See Hutchinson and Duncan (n 116) 105.

118 One might quibble that practitioners are engaging in advocacy while scholars are engaging in objective analyses, but the tools of issue-spotting, synthesising authorities, and reaching persuasive outcomes remain the same.

119 See Westerman (n 2) 89.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

a formalist approach to law asks for no help and welcomes no solicitations from other disciplines. When law schools are trade schools producing plumbers (not Pericles), why should they concern themselves with anyone outside that trade? 'In formalism', Hanoch Dagan writes:

> law is governed by a set of fundamental and logically demonstrable principles. Two interrelated features of the formalist conception of law bear emphasis: the purported autonomy and closure of the legal world and the predominance of formal logic within this autonomous universe.[120]

Yet, a crucial question remains. *What if law is more than simply a system of rules to be analysed and applied with ruthless, mechanical logic?* If law *is* something more – such as a contingent social construct influenced by and embedded within a particular cultural context – then insights from outside the "sovereign" legal system become incredibly valuable for understanding it. Once we move beyond thinking of law as doctrine, entire realms of intellectual thought can be brought to bear in exploring the origins, meaning, effects, and implications of legal artifacts.[121] Some may find it exhilarating and others find it disconcerting, but there is no doubt that it alters our understanding of what law, as an academic discipline, is for and can achieve.

In Australia, a conservative profession, a legalistic judiciary, and a doctrinally-oriented academy can marginalise alternative and critical approaches to law. It is not often an article involving Queer Legal Theory will win the citation metric game or that a Marxist analysis will demonstrate "impact" for ERA purposes by being cited in the High Court.[122] But nonetheless, there is real value in thinking about law beyond doctrine. The old saying is that a legal education sharpens the mind by narrowing it. But as the contributions that follow clearly demonstrate, truly perceptive insights about law come from those who are still able to think broadly.

---

120 Hanoch Dagan, 'Law as an Academic Discipline' (2012) Tel Aviv University Law Faculty Papers (Working Paper No 171) 3.

121 Ibid 6 ('The demise of classical formalism opens up a rich, interdisciplinary research agenda for legal scholars').

122 Though note that at least one High Court judge has referred to Marx in discussing the legal consequences of colonisation, see: *Western Australia v Ward* (2002) 213 CLR 1, 231 [529] (McHugh J).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Chapter 1

Legal History

Shaunnagh Dorsett

I Introduction

As an area of scholarship, legal history has a (sometimes deserved) reputation as 'fusty'. It can be perceived as being an endeavour undertaken by earnest scholars, locked in dusty archives, obsessing over old court records. And it can sometimes be that. But it is also a dynamic and exciting area of scholarship; one which is frequently intertwined with feminist critique, environmental history, engagement with post-colonial legacies or international law (to name a few). It can draw on primary archival sources, diaries, letters, material objects, newspapers, cases and statutes or be based on textual analysis of any of these primary sources. It can be empirical or theoretical. In fact, there are endless ways we can do legal history and a vast array of sources on which we can draw. Perhaps once the province of law schools, legal history has become a truly interdisciplinary venture; legal historians are drawn from a range of home disciplines which are as likely to be history or cultural studies (to name but two of many) as law. And, increasingly, scholars engaged with contemporary problems, such as stolen wages, police violence or sovereignty claims are turning to history and the work of legal historians. Much of the dynamism of legal history comes from the engagement with law by scholars from these other disciplines. In Australia – and beyond – the interdisciplinarity of legal history underpins much of its vitality and is key to the shape of the discipline itself.

II Doing Legal History: An Overview and a (very) Short History

So what then is legal history? This collection opened with a besuited, bespectacled young lawyer poring over a stack of dusty books in a lonely corner of a large library. As Harry Hobbs and Jeremy Patrick remind us, law students are used to the exercise of trawling for precedent. Even if the means we use to do this has changed over time – online databases and AI engines rather than old books – we as scholars and practitioners nevertheless hope that there will be a precedent or fact that will help us argue our case. Even if the reality is quite a bit more complex, it is still true to say that precedent rules. This search for precedent can be confused with 'doing legal history'. Surely searching for old cases, statutes and similar materials and the facts they reveal is doing legal history. It's all about the past, right?

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Given the love of lawyers and law students of definitions, it may be uncomfortable to realise that there is no universally agreed definition of 'legal history'. To be fair this is the case for most discipline areas. For some, there is an assumption that we all just know what legal history 'is', or what 'doing' legal history entails, or at least we do not question it – it is about (legal) things that happened in the past. What few legal history texts there are, for example, generally do not offer any definition. For others, what we understand by 'legal history' is a matter which is 'deeply controversial'.[1] Indeed any understanding of the remit or shape of legal history might depend from which discipline or perspective you view it. Christopher Tomlin's neat and straightforward description might be enough to get us going:

> legal history is the study of the history of law – of legal discourse, and legal institutions, and legal cultures, and of the circumstances in which and by which they are formed.[2]

However, even to say that legal history is a 'history of law' begs questions; not least of which, as David Ibbetson has noted, is what we mean by 'law'.[3] For lawyers and law students, the answer may be one thing; for scholars from another discipline, it may perhaps be another. It might be easier to talk of who does legal history – or even why we do legal history – than attempt to define it beyond this. What we can say perhaps is that neither simply describing something that happened in the past, nor looking for a useful precedent, would really be considered doing legal history (or really any form of history).

Law is of course intimately tied to the past. We teach law through the past. Common law method relies on precedent. Common law method suggests an incremental, slow and orderly progress towards whatever our current law is, with the potential for hopefully a little change to result from whatever matter is now before the courts. Common law method 'preserve[s] a sense of a collective past' in tension with the recognition of 'a necessity for legal change'.[4] Policy considerations are key, but in the end, we cannot depart too far or too fast from what has come before. Students quickly learn that most significant reforms will require legislative intervention and that, on occasion, courts will even signal to the legislature that they – rather than the courts themselves – should move the law forward. This backward gaze, particularly in the core units of law which all students must endure, is reinforced by generational textbooks which provide detailed lines of authority, added to in each edition. Odd or anomalous developments are explained away or removed as superfluous to orderly progression. Problematically, this endless backward gaze also obfuscates what legal history offers to students and how doing legal history is different from a simple search for precedent.[5]

---

1 Mark Leeming, 'Lawyers' Uses of History, from Entick v Carrington to Smethurst v Commissioner of Police' (2020) 49 *Australian Bar Review* 199, 201.

2 Christopher Tomlins, 'Legal History/History of Law at Berkely', 26 August 2024, available at: <https://issuu.com/berkeleylaw/docs/legal_history_history_of_law_at_berkeley_august_2> (last accessed 17 September 2024), 1.

3 David Ibbetson, 'What is Legal History a History of?' in Andrew Lewis and Michael Lobban (eds), *Law and History: Current Legal Issues* (Oxford University Press, vol 6, 2003) 33, 33.

4 Lee Godden, '*Wik*: Legal Memory and History' (1997) 6 *Griffith Law Review* 122, 123.

5 On this point see also Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2022).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Law schools now rarely offer legal history as a topic to be studied.[6] Individual subjects – particularly foundational or first year subjects – may include some discussion of aspects of the evolution of our legal system (particularly a potted history of the common law) or of small topics of interest – but as an area of law for study it is rarely even offered as an elective. Paradoxically, as an area of scholarship it is healthy and on the rise. Much of this interest in legal history stems from scholars working outside law schools – in history, politics, anthropology, criminology, gender studies or cultural studies. Its very interdisciplinary nature means that it is not just an area of legal research endeavour primarily undertaken by those with legal training which draws on work from other disciplines; the shape of the scholarship (and of legal history itself) will owe much to the training and interests of the writer.

If legal history is rarely taught in law schools now, this is barely a decline. Its place in law schools has always been limited and uncertain. Until the 1920s it had little purchase in the academy although, as Stefan Petrow notes, there were some law schools which did have some kind of legal history subjects as early as the turn of the twentieth century, although these few taught 'the whole history of English law, whether it was relevant to Australia or not'.[7] While the teaching of legal history expanded somewhat from the 1920s to the 1960s (thereafter declining again), it remained a subject in many ways faithfully tied to its English heritage. Students were far more likely to learn about the history of the various English common law courts, or about the Statutes of Westminster and Magna Carta, than anything much about the development of law in Australia and how its development might in fact have diverged rather significantly from that of its progenitor.[8] This arguably resulted from both the prevalence of English trained lawyers in Australia's small number of small law schools,[9] and the lack of textbooks which might have aided in investigating our legal history. Finally, in 1982 Alex Castles published *An Australian Legal History*, a work which gave scholars an overview of *our* history and which became indispensable to legal historians.[10]

All of this is to say that for many years legal history in Australia was the remit largely of scholars in law schools. That shaped the kind of legal history that was recognised as such: it was largely doctrinal or institutional history, or even biographies of judges or other famous legal figures. It might unpack how a particular law functioned in the past and how it evolved into the current doctrine through a careful examination of case law and legislation. How did the doctrine of unjust enrichment develop as a doctrine? When and how was the Supreme Court established? Who was Chief Justice

6 As noted in 2023, only two Australian law schools now teach legal history as a formal and compulsory part of the LLB: Julie Copley, Marcus Harmes, Sarah McKibbin, Jeremy Patrick, 'Introduction: Arbiters of Justice: Historical Studies of Southern Queensland Lawgivers' (2023) 27 *Queensland History Journal* 527-59, 527.

7 Stefan Petrow, 'Overcoming "Intellectual Colonialism": Aspects of the Teaching of Legal History in Australia, c.1890-2005' [2006] *Australia and New Zealand Law and History E-Journal* 1, 8.

8 Australia was hardly the only place this happened: see Philip Girard, 'Who's Afraid of Canadian Legal History' (2007) 75 *University of Toronto Law Journal* 727, 737.

9 Petrow (n 7) 9.

10 Alex Castles, *An Australian Legal History* (Law Book Co, 1982). There were of course others working in the area: WJV Windeyer, John Bennett, Enid Campbell and others. But Castles' book was a key moment in the development of the discipline in Australia.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Forbes and what was his contribution? All of which are worthy questions. While this kind of more traditional legal history is still alive and well – perhaps most obviously seen in histories of private law – we have moved well beyond this, to understand that legal history is a highly contextual endeavour, in which legal history is now being written by scholars from various disciplinary perspectives, using legal, extra-legal and non-legal sources. We understand that the development of particular laws and doctrines cannot be divorced from the broader context of the social, political and cultural forces which led to them. Or, conversely, we may seek to understand the role of law in the development or shape of broader social, economic or political issues. This might encompass an examination of the phenomenon of vagrancy in colonial Australia;[11] the relationship between love and law and redress for being 'jilted' in nineteenth and twentieth century Australia;[12] a history of women doing business in the nineteenth century despite the impediments of the doctrine of coverture,[13] or even a history of credit card debt and how that little piece of plastic became so ubiquitous.[14] Just as important to legal historians as a consideration of *how* did some legal phenomenon come to look as it did, is *why* did it and in response to what internal and external forces?

Key to this change was the rise of the rise of social history in the 1960s and 1970s – which emphasised 'history from below' or the importance of understanding lived experience. Social history brought the relationships 'between law and class, race and gender to the fore'.[15] Within the legal academy, scholars began bringing the methods of social history into thinking about the histories of laws. And for many outside the legal academy, work by social historians, such as EP Thompson, highlighted that law and legal regulation played a vital role in framing the relations of peoples in and with society (broadly put).[16] By the late twentieth century legal historians, not just in Australia, but in Canada, New Zealand and beyond, were responding to these developments, as a result increasingly viewing our law as being much more than simply a 'pale inheritance' from England, recognising the plurality of our legal history and the importance of First Nations engagement in shaping our nation, and uncovering the ways in which our legal developments could also be borrowed from or based on innovations in places other than the England.[17]

---

11 Catharine Coleborne, *Vagrant Lives in Colonial Australasia Regulating Mobility and Movement 1840-1920* (Bloomsbury Academic, 2024).

12 Alecia Simmonds, *Courting: An Intimate History of Love and the Law* (La Trobe University Press, 2024).

13 Catherine Bishop, *Minding Her Own Business: Colonial Businesswomen in Sydney* (NewSouth, 2015). The doctrine of coverture meant that husbands were responsible for the maintenance of their wives and controlled their property; married women could not sue or be sued, enter into contracts independently and in all their economic dealings were assumed to be working on behalf of their husbands.

14 Sean H Vanatta, *Plastic Capitalism: Banks, Credit Cards, and the End of Financial Control* (Yale University Press, 2024).

15 On this and legal history, see Jim Phillips, 'Why Legal History Matters' (2010) 41 *Victoria University of Wellington Law Review* 293, 298.

16 See eg EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, 1975).

17 Bruce Kercher, 'Why the History of Australian Law is not English: Second Alex Castles Lecture in Legal History, October 2000' (2004) 7(2) *The Flinders Journal of Law Reform* 177.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

In 1993 the Australian and New Zealand Law and History Society was established. This is now the peak scholarly organisation for scholars working in law and history. The society grew out of a series of conferences begun a decade before. Importantly, these conferences and the society which followed were established by three interdisciplinary scholars whose academic home was not a law school and two of whom were not legal scholars in the formal sense. Ian Duncanson, Diane Kirkby and Christopher Tomlins, then all members of the La Trobe Legal Studies department, began the conferences in 1983. From the outset then, the peak society was and remains highly interdisciplinary. The very name – law and history, rather than legal history – signals this and explains much of the shape of law and history scholarship in Australia to this day. Reflecting the membership of the society and the conference attendees, what was once dubbed the 'new Australian legal histories' borrows from, or harnesses, a wide range of theories, concepts and methods from other disciplines (here reflecting laws more general 'borrowing' of interdisciplinary methods) and are often jurisprudentially or philosophically engaged, drawing on legal philosophy, feminist theory, environmental jurisprudence or engaging with post-colonial legacies.[18] Some of these, for example, feminist legal histories, or environmental legal history, are emerging as recognised areas of endeavour in their own right, as new 'sub-disciplines'. In paying attention, then, to race, gender, class, comparative analysis or even through the use of non-legal sources, such as literature, legal historians frequently also draw on the different methods, sources and perspectives covered by the other chapters in this book.

III Why Does Legal History Matter for Australia?

In many ways the question 'why does legal history matter for Australia?' is little different from asking 'Why legal history matters at all?'. But there are some particularly important Australian-inflected reasons why legal history is important for our nation (and which can also help us think about why we do legal history at all). Legal history can of course offer new perspectives on every area of law in which we might be interested – from asking what were the economic and social forces post-World War II that led to the particular banking regulations that facilitated the emergence of credit cards in the mid-twentieth century to considering why transactions in land have to be in writing – and it would be impossible to discuss them all here. Perhaps most obvious, however, is that legal history matters for Australia because after decades of ignoring, or perhaps underplaying, the role of law in colonisation, it is now an inescapable fact that law was complicit in, and foundational to, the (ongoing) process of colonisation. In great part, that acknowledgement has been the result of the interdisciplinary approaches to legal history noted above. Under the sway of work in fields such as settler colonial studies, cultural studies, gender studies, histories of work and labour and others, as well that of key scholars in law schools who drew on newly discovered sources from the early colonial period, the accepted narrative of our legal origins and of the idea that law was somehow just a neutral instrument

18 On the 'new Australian legal histories,' see the special edition of *Law and History Review*: (2003) 21(3) *Law and History Review*.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

in colonisation, has been fractured. Importantly, as Anna Clark has recently stated, 'the imperative to acknowledge Indigenous historical perspectives in Australia has become central to its history'.[19] And these perspectives tell a very different story of our law, its effects from its arrival to now and why we still need to 'reckon with law'.[20] Key here has been the work of First Nations scholars both within and without the academy, not only from law, but from a variety of disciplines and with a variety of concerns – John Maynard, Gary Foley, Christine Black, Megan Davis, Noel Pearson, Shino Kinoshi, Larissa Behrendt, to name a few.

Neither law nor (legal) history are neutral disciplines. What is kept in archives, what legal decisions are retained and remembered, what law book writers judge as important to include and not, are practices which shape a discipline and our understanding of events and law's role in those.[21] They may seem neutral – we cannot keep or include everything right? – but collection decisions are all shaped by people's perspectives, ideologies and positionality. These practices often serve to silence the stories of certain (often marginalised) peoples and groups and to not just privilege some accounts of our legal history over others, but to actively shape certain accounts which then become orthodoxy. For much of the late nineteenth and twentieth centuries the story of Australia's legal origins began in 1788 with the arrival of the First Fleet. That was certainly the version of our origins taught in law schools until very recently. It was the version I was taught in the 1980s. Unacknowledged was that First Nations peoples had inhabited Australia for over 50,000 years and that on the arrival of the first Europeans Australia was already a place of law and a place of legal plurality. The arrival of Europeans had a devastating impact across the entire continent and by the mid-nineteenth century Indigenous Australians had been displaced from country and decimated by disease. But equally, the arrival of the common law had a devastating effect on Indigenous laws. The settler revolution, and indeed settler colonialism, were not just accompanied by, but were underpinned by, law.[22] Accounts of both often fail to take into account just how central law was to these processes and that, across the globe, including in the Australian colonies, Indigenous peoples were not just physically displaced or eliminated, but so were their laws.

While it is now much more widely understood that Australia was a place or law, and of legal plurality, prior to 1788, for many years legal histories of Australia supposed the opposite. It was assumed that British law (and in particular the English common law) was the only law of the colony; Indigenous peoples had no laws

19 Anna Clark, 'What is History in a Settler Colonial Society? Mapping the Limits and Possibilities of Ethical Historiography using an Australian Case Study' (2024) 63(4) *History and Theory* 65, 85.

20 Shino Kinoshi, 'Reckoning with the Past' in Peter Cane, Lisa Ford, and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 740.

21 Perhaps the most famous work on this is Ann Laura Stoler's *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton University Press, 2008).

22 For a recent work on settler colonialism in Australian history, see Penny Edmonds and Jane Carey, 'Australian Settler Colonialism over the Long Nineteenth Century' in Edward Cavanagh and Lorenzo Veracini (eds), *The Routledge Handbook of the History of Settler Colonialism* (Routledge, 2017) 371. And for a work critiquing settler colonial studies from a First Nations perspective, see Shino Kinoshi 'First Nations Scholars, Settler Colonial Studies, and Indigenous History' (2019) 50 (3) *Australian Historical Studies* 285.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

recognisable as such. Histories of New South Wales were rarely situated within the broader frame of the British Empire, let alone part of a global history of encounter. Even if it was conceded that Australia's First Nations had laws recognisable as such to the British at European colonisation, the legal orthodoxy for many years was that they were long gone, extinguished along with any rights to land, by the forces of that colonisation. Rather, the Australian continent was, so the story went, one of no law, into which the common law arrived and became the only law of the land, and in which Britain's sovereignty was uninterrupted.[23] That view of our legal origins was only reinforced by the High Court's decision in *Mabo v Queensland (No 2)* ('*Mabo (No 2)*').[24] *Mabo (No 2)* finally and famously 'overturned' *terra nullius*. This was of course a very important moment in understanding Australia's legal history. However, legally, little flowed from it. Brennan J also held that on acquisition of sovereignty the common law had become the law of the new colony and of all within it. While native title rights might have survived annexation (or to put it another way, not been extinguished) the Court made it clear that native title was really an exception. It did not purport to suggest that Indigenous laws generally should be recognised.[25] This remains the view of the High Court. In 1788 Indigenous laws (to the extent they are recognised as such) were extinguished – or so the legal story goes.[26]

This narrative of the arrival of the common law in Australia was fractured by the work of legal historians, most notably Bruce Kercher. At the same time that the High Court was considering the case in *Mabo (No 2)*, at Macquarie University Bruce Kercher was uncovering early case law that suggested that this neat story of acquisition of sovereignty and the common law immediately becoming *the* law of the land might be just a bit too neat. Kercher presented several cases – *R v Ballard* and *R v Boatman* – from early New South Wales which challenged this account. He painted a picture of early New South Wales as a more pluralistic place, one in which it was not clear how the legal relations between Indigenous peoples and the common law might ultimately be shaped, and one in which it was not a given that Indigenous Australians would be considered to be within the ambit of the jurisdiction of the New South Wales Supreme Court.[27] He exposed the contingency of modern understandings. Kercher noted that this view had in part originated from a (famous) 1836 decision – *R v Murrell* – in which Burton J had held that the Court did in fact have jurisdiction over Indigenous Australians and that they had no laws recognisable as such. But, as Kercher explained, in doing so Burton J did not follow several earlier decisions in which that same Court had denied that it had jurisdiction over Indigenous accused (although it was ambivalent about whether Indigenous laws were really 'law').[28]

---

23 Shaunnagh Dorsett, 'Plural Legal Orders: Concept and Practice' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 19.

24 (1992) 175 CLR 1.

25 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

26 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152.

27 Bruce Kercher, 'R v Ballard, R v Murrell, R v Bonjon' (1998) 3(3) *Australian Indigenous Law Reporter* 410; Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7.

28 *R v Ballard or Barrett* [1829] NSWSupC 26; *R v Boatman or Jackass and Bulleye* [1832] NSWSupC 4.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Murrell had become the entrenched understanding of early colonial legal opinion for the simple reason that it was the only decision published and therefore available to later lawyers and scholars. The others, then, simply dropped from view. *Murrell* told us the common law was the only law of the colony.

Lost, then, was the contingency of our modern understandings of the legal relations between Indigenous peoples and their laws and the Australian legal system. The law *might* have developed differently. It was not inevitable that the courts *would* refuse to acknowledge indigenous jurisdictions or acknowledge legal plurality. As Jim Phillips tells us, one of the reasons legal history matters is because it reveals the contingency of modern legal constructs. The shape of any law or legal development is contingent on the shape of society generally, the practices of those who gatekeep legal knowledge, and the ideologies of its practitioners. Law is authored and contestable. As Russell Sandberg adds, not just different approaches, but feasible different approaches, might still be available if we understood better how we got to where we are.[29] Jim Phillips makes clear that 'contingency' is not the same thing as 'arbitrary'. In fact, it is the opposite of arbitrary. Legal changes are, as he puts it, 'rationally and logically connected to other kinds of developments'.[30] In order, therefore, to understand why some legal change happened, or why a doctrine is shaped the way it is, we would need to consider the intellectual milieu, personalities and economic and political imperatives in play at the time.

What might we draw on in order to uncover the contingency of legal developments? Let's take an early case like *Ballard* as an example. What might we draw on to understand the context of the decision? Most obviously there are official court records, including those that allow us to track a decision through various stages of litigation, from filing a complaint (civil) to laying an information (criminal) right through to – in the case of criminal matters – possible exercise of the prerogative of mercy. These records might also include judge's notebooks and letters – both between judges and with other government departments. Newspaper accounts of trials can be key. In the colonial period before law reporting, newspapers frequently gave detailed accounts of court proceedings and these are often the best record available of what happened in court that day. We can also look to diaries and letters of participants of those who attended court; official records and correspondence from London and the Colonial Office (the body which oversaw the colonies), which may explain relevant policy frameworks or in which the actual case was reported back to London; and biographies of people involved as well as further newspaper reports which may mention participants and which could shed light on their lives before and after the trial. Important also might be broader works of social, economic or intellectual history which explain relevant attitudes of the time to First Nations peoples. Investigations of more modern periods will be able to draw on further materials – such as internet archives – while commercial companies provide extensive (for pay) collections of materials for researchers.

This is clearly a much wider range of sources than lawyers, courts or even doctrinal scholars would usually draw on and moves us far beyond the idea of finding useful

29 Sandberg (n 5) 201.
30 Phillips (n 15) 300.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

precedents. All of these sources together would enable us to construct a nuanced understanding of the contingency and contestability of early Indigenous-settler legal relations in this specific context. Regardless, then, of whether these early cases are useful precedent as such, as law students and lawyers we can draw upon these sources in order to understand the nuance and complexities of our legal origins, to challenge and question the 'orthodoxies' often presented in legal decisions, and to understand how those decisions are the product of particular historical and legal practices.

IV Controversies and Criticisms

As noted at the outset, increasingly scholars engaged with contemporary problems turn to history and the work of legal historians. While this seems an obvious thing to do, to look at history to see how particular laws and legal practices came to be – how we got to where we are – it can also be deeply controversial. In 2013 Al Brophy made an argument for the importance of what he has labelled 'applied legal history'. According to Brophy, applied legal history 'is deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues'. He contended that a 'trend toward self-conscious engagement with the present is part of the turning to history in law'.[31] So why did Brophy feel he needed to make an argument for doing legal history that speaks to contemporary issues? What might be controversial about that? Brophy was keen to distinguish applied legal history from what is often called in American scholarship 'law office history'.[32] Law office history is a term that generally refers to history that is written by advocates looking to bolster or achieve a particular end. 'Law office history' originally arose in the context of interpretation of the United States Constitution. Scholars argued that law office historians and judges – largely those who subscribed to constitutional originalism – 'cherry picked' historic examples which favoured a particular constitutional interpretation. Those who critiqued this approach argued that history ought to be written by dispassionate scholars, searching for 'truth', rather than in order to advocate for a particular legal outcome. The assumption underlying arguments against applied legal history, then, is that it is simply some form of 'Law office history', rather than the deeply researched scholarship for which Brophy argues.

In turn, this concern allied to a broader historical debate. Thinking about the present with or through the past (or indeed visa-versa) is not confined to law office history; across the twentieth century historians generally struggled with or dismissed 'presentist' accounts of history – those in which there is a tendency to interpret the past in presentist terms, perhaps by assuming that attitudes to a particular matter in the past were the same as they are now or even to assume that the past is a 'bad place' (think slavery or attitudes to married women's property) and that we do better now. The labels 'presentist history' and 'law office history' both generally carry a connotation that that this is just not good history. In particular, law office history

31 Alfred L Brophy, 'Introducing Applied Legal History' (2013) 31 *Law and History Review* 233, 233.

32 The term is generally traced to Alfred H Kelly, 'Clio and the Court: An Illicit Love Affair' (1965) *Supreme Court Review* 119.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

or advocating history is assumed to 'pick and choose' historical data that supports a hoped for modern legal outcome, while ignoring any data which might be contrary or undermine this outcome. If humanities research is about searching for 'truth' (and this itself is contentious) then applied research seems to undermine this, particularly when it becomes intertwined with the political or ethical (or even legal) positions of scholars undertaking such research.

Does this mean, then, that we can never do legal history (or that we are not even really 'doing history') when the issue we are really concerned with is a modern one – or because we are looking to support a particular contemporary legal argument? Brophy argues for legal research which is more than pure scholarship for scholarship's sake; but which avoids the pitfalls that can occur with history intended to advocate. It would be quite odd to think that the present is not in dialogue with the past: think native title claims or other kinds of research into social and legal relations between First Nations and the colonies/Australian nation, as one example. Much of the best and most influential modern legal history brings the past into conversation with the present. The key, however, is *how* and *why* that research is undertaken, and here we return to Brophy's initial contention of deeply researched, serious scholarship – scholarship which does not 'cherry pick' sources and which accepts that a deep engagement with the past will often uncover deeply uncomfortable events, attitudes, policies and laws, and may lead to undesired conclusions. To start with the present and a particular political or legal position, and to search specifically for evidence in the past that supports that position is arguably not 'doing good history'. But to start with an interesting or important or contentious contemporary position or problem and seek to understand how we 'got to where we are now' by carefully considering all the evidence is exactly the kind of important legal history that we ought to be undertaking.[33] To give but one example, recent successful settlements in favour of Indigenous plaintiffs for stolen wages have only been possible because of careful examinations of past practices and the histories of Indigenous pastoralism, indigenous servants and accompanying wage theft.[34]

This brings us to our second controversy: how courts (and those who appear before them) use history or historical facts. One of the particular grumbles that legal historians sometimes have is that courts 'do history badly'. At the heart of the grumble is that rather than undertaking a proper examination of context, drawing on a full range of the kind of materials mentioned in the previous section, courts 'cherry pick' those which best suit the argument and the decision to which they wish to come, ignoring other sources or narratives which might tend to a contrary or different understanding. Or that, used as they are to a search for precedent, continuity and progression that, as Justice Mark Leeming puts it 'lawyers are so accustomed to emphasise continuity that their understanding of legal history may be affected'.[35] While Leeming might not say so specifically, the same might be said for judges.

To some extent what sources courts refer to depends on what material counsel bring forward. In bringing historical material before the court, counsel are most

33 Brophy (n 31) 237.

34 See *Street v Western Australia* [2024] FCA 1368.

35 Leeming (n 1) 200.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

commonly presenting these as evidencing some kind of historical 'fact'; an event happened this way; this was the relevant court practice at a particular time; this is the correct version of a decision (before formal law reporting cases were often reported multiple times); or this was the government policy that was applied. Counsel appear in order to represent clients and to make the best possible arguments for them and that of course includes putting forward the material which best supports their cases. As Leeming notes, 'legal history in the hands of a litigator is the opposite of some disinterested quest for greater understanding'.[36] It is, if you like, akin to law office history – historical investigation undertaken for the purposes of advocacy.

Some judges themselves have noted the difficulties that attend generally to using history and historical sources in reaching determinations. In *The Wik Peoples v Queensland*, Gummow J famously noted:

> There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms. … Even if any such taxonomy were to be devised, it might then be said of it that it was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflict.[37]

In other words, history is useful to courts as a mechanism to aid in or support legal arguments in the present. In some ways, then, this is a very particular instantiation of our first controversy. The legal question at the heart of *Wik* was the effect of the granting of particular pastoral leases on potential native title rights in the same area. In that case, the court determined, by a 4 to 3 majority, that pastoral leases did not extinguish native title, as they did not confer exclusive possession. This was an important legal question: as pastoral leases have at one time or other covered much of the Australian continent, had the court determined that they did completely extinguish native title then there would have been much less land left which could have been claimed as subject to native title. The majority drew on histories of imperial and local policy on pastoral leases and of the legislation under which they are granted in order to find that pastoral leases were a very specific form of statutory tenure, created for very specific purposes, and therefore only extinguished native title to the extent of the inconsistency between the particular lease and the particular native title rights being claimed. Both Gummow J (above) and Kirby J, however, noted the difficulty and artificiality of using history for this purpose. Kirby J examined the specific legislation under which the leases were granted and the leases themselves and he noted that none of the legislation expressly extinguished Aboriginal rights – largely because the government did not consider that such rights existed. He stated that:

> [t]here is an inescapable element of artificiality, in looking back over Australian legal history, which developed upon a particular hypothesis about Aboriginal legal rights, and endeavouring to reinterpret that history with the knowledge afforded by *Mabo [No 2]*.[38]

---

36 Ibid 201.

37 *The Wik Peoples v Queensland* (1996) 187 CLR 1, 182-83 ('*Wik*').

38 *Wik* (1996) 187 CLR 1, 230.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Notably, while both Kirby J and Gummow J clearly saw as important a broader more contextual approach to understanding the nature and effect of a pastoral lease (than say Brennan CJ who authored the minority judgment and who took a much more traditional approach relying mainly on statutory interpretation and precedent), they nevertheless drew on a much narrower range of sources than might a legal historian investigating the same question. Few counsel or judges are trained as historians. Even if they are, in these roles they are not acting as historians. Just as legal principles (and their application to the facts) can be contested, so of course can be historical events and the materials which support their investigation. Perhaps a feature of legal analysis is a search for factual certainty, which makes the application of law to facts more straightforward. A good example might be the idea that sovereignty was acquired over New South Wales in 1788. Even a cursory view of history makes clear that it cannot have been this simple or straightforward. This search for certainty can often lead to counsel and courts 'flattening' the complexity of historically-contested events.

The criticism of 'cherry picking' or that the use of history by courts is purpose driven should not suggest that courts simply pull random facts or create historical narratives in order to support arguments.[39] There are examples in every area of law of courts taking the time and space to provide a detailed narration of the legal background (likely but not always predominantly a doctrinal history) to particular legal doctrines or events. These narrations may in certain cases inform or even be a key part of the final reasoning of the court. *Wik* is such an example. But courts are not using history for the same purposes as scholars. Courts are not engaged as such in a disinterested quest for historical truth and nor should we expect them to be. After all, it can be argued that the job of courts is not to do history, it is to determine the rights of those before it, and to develop the law so as to be fit for the contemporary world. The shape of that narration, and what 'facts' are included and excluded, must inevitably be shaped by the purposes for which it is being made and by individual judges' and courts' views on their role in making law.[40] Conversely, however, that does not mean that we should not expect courts to at least take some care in their use of historical sources.

V Conclusion

So why do legal history? As this chapter has suggested, historico-legal scholarship can provide alternative perspectives on contemporary legal, economic or social positions, uncover different and untaken by-ways or even explain that some long-held legal positions are based on misunderstandings or incomplete context. Legal history has the power to disrupt accepted narratives. It can, for example, expose the complex origins of doctrines we take for granted, and which for almost a century have been core to what we teach students – often via generational textbooks – and shed light on the ways that these doctrines have been constructed and are contestable and contingent.[41] And

39 For a more nuanced view of what courts do with historical 'facts' and a suggested taxonomy, see Bradley Selway, 'Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129.

40 On the High Court's use of history and common law declaratory theory, see Godden (n 4).

41 On this see also Sandberg (n 5) 205.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedd y/

it can allow us to think of other ways law could develop and even perhaps give us the arguments to make that happen.

However, we can probably do no better than end with Mark Leeming's reminder as to why lawyers and judges should care about legal history:

> We need to understand legal history … in order to practise our profession. … But we are not bound by the past. We should pursue it … because it presents a feast of intellectual riches of intrinsic worth. It makes our profession civilised, more learned, and, not least, more fun.[42]

It may be the last of these that is one of the most compelling reasons to do legal history. Although we undertake historico-legal study for serious reasons – to understand our current law better and to think about how it could be shaped otherwise or perhaps simply as a disinterested scholarly endeavour searching for the 'truth'– legal history, drawing on so many different sources as it does, can also be a treasure hunt or a puzzle or simply a pleasurable activity for the intellectually curious. Researching our legal past can be slow, frustrating, painstaking, literally dusty and dirty, and also enormously fun.

Further Reading

Alfred L Brophy, 'Introducing Applied Legal History' (2013) 31 *Law and History Review* 233-240

Anna Clark, 'What is History in a Settler Colonial Society? Mapping the Limits and Possibilities of Ethical Historiography using an Australian Case Study' (2024) 63(4) *History and Theory* 65–84

Shaunnagh Dorsett, 'Plural Legal Orders: Concept and Practice' in Peter Cane, Lisa Ford and Mark McMillan (eds), *Cambridge Legal History of Australia* (Cambridge University Press, 2022) 19-39

Penny Edmonds and Jane Carey, 'Australian Settler Colonialism over the Long Nineteenth Century' in Edward Cavanagh, Lorenzo Veracini (eds), *The Routledge Handbook of the History of Settler Colonialism* (Routledge, 2017), 371-390

Tanya Josev, 'Australian Historians and Historiography in the Courtroom' (2020) 43 *Melbourne University Law Review* 1069-1099

Bruce Kercher, 'Why the History of Australian Law is not English: Second Alex Castles Lecture in Legal History, October 2000' (2004) 7(2) *The Flinders Journal of Law Reform* 177–204

Shino Kinoshi, 'Reckoning with the Past' in Peter Cane, Lisa Ford, and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 740-764

Mark Leeming, 'Lawyers' Uses of History, from *Entick v Carrington* to *Smethurst v Commissioner of Police*' (2020) 49 *Australian Bar Review* 199-226

Jim Phillips, 'Why Legal History Matters' (2010) 41 *Victoria University of Wellington Law Review* 293-316

Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2021) esp ch 8 (198-224)

42 Leeming (n 1) 226.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Chapter 2

The Point of Legal Philosophy

Jonathan Crowe

To forget one's purpose is the commonest form of stupidity.

– Friedrich Nietzsche, as quoted by Lon Fuller[1]

I Introduction

What is the point of legal philosophy? Many law students have posed this question, particularly while suffering through the indignities of a compulsory jurisprudence course. The point of this field of study may not be easy to grasp for those accustomed to studying the black letter law – with one eye, perhaps, fixed on a lucrative career in a commercial law firm. This chapter explores the question and proposes an answer. The answer I give, in brief, is that legal philosophy enables us to examine and better understand the point of law and, by extension, the point of being a lawyer. For those of us who engage with law in our studies, careers and lives – including law students, lawyers, legal academics, judges and others – these questions are also related to the broader issue of the point of life in general.

The response to the question of the point of legal philosophy sketched above is very broad – one might say *philosophical* – in character. There are other ways of responding to this question. For example, from a student's or academic's perspective, one might wonder how legal philosophy can be used as a tool to enhance legal scholarship. There are many examples of legal philosophy being employed by scholars to better understand legal doctrines. In Australia, for instance, academics have drawn on philosophy to shed light on contentious issues in constitutional law, such as the role of constitutional implications,[2] and private law, such as the scope of duties of care in the tort of negligence.[3]

---

1 'Das Vergessen der Absichten ist die häufigste Dummheit, die gemacht wird': Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1964) 95.

2 See eg Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Jonathan Crowe, 'The Narrative Model of Constitutional Implications: A Defence of *Roach v Electoral Commissioner*' (2019) 42 *University of New South Wales Law Journal* 91.

3 See eg Desmond Manderson, *Proximity, Levinas and the Soul of Law* (McGill-Queen's University Press, 2006).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

One might also ask whether legal philosophy has informed law reform or judicial decisions in the Australian context. Again, one can point here to examples such as the detailed survey of philosophical perspectives in the Australian Law Reform Commission's recent report on judicial impartiality[4] or references to prominent legal philosophers such as HLA Hart[5] and Ronald Dworkin[6] in High Court cases. Judges often seem to shy away from explicit philosophical discussions, even if they may be relevant to the legal point at hand.[7] However, the lack of express reference to legal philosophy does not necessarily mean a judge's conclusions are not informed by philosophical assumptions about, for example, the underlying purpose of a particular field of law.

More could be said about the role of legal philosophy in legal scholarship and doctrine, both in the Australian context and more generally. However, I am going to resist framing the discussion in this chapter primarily in those terms. This is because I think the main relevance of legal philosophy for law students and scholars, as well as lawyers and judges, lies not in its application to specific doctrinal questions, but in its ability to inform broader reflections on the purpose of law. In taking this broader approach to the subject-matter, I am practicing what I preach, by adopting a philosophical approach to examining the point of legal philosophy. This claim raises a further preliminary issue relevant to this chapter: namely, what exactly do we mean when we talk about *legal philosophy*?

I have suggested elsewhere that a fruitful way to understand the nature of legal philosophy is by reference to *philosophy* more generally.[8] The word 'philosophy' comes from the Greek *philosophia*, meaning 'love of wisdom'. More specifically, philosophy seeks greater understanding about concepts and ideas we take for granted in everyday life. As John Campbell puts it, '[p]hilosophy is thinking in slow motion. It breaks down, describes and assesses moves we ordinarily make at great speed – to do with our natural motivations and beliefs'.[9] Legal philosophy – also sometimes called legal theory or jurisprudence – applies this methodology to concepts and ideas about law. It seeks to explore more carefully our ideas about such topics as law's relationship to power and authority, the nature and extent of legal obligations and law's connection to justice and the common good.

Since legal philosophy involves stepping back from everyday legal concepts, it makes sense that its main influence might be found not in resolving points of legal doctrine, but rather in helping to shape and refine background understandings about

---

4 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report 138, December 2021) 49-63. See also Australian Law Reform Commission, *Conceptions of Judicial Impartiality in Theory and Practice* (Background Paper JI4, April 2021).

5 See, for example, *Al Kateb v Godwin* [2004] HCA 37, [265] (Hayne J).

6 See, for example, *Re Wakim* [1999] HCA 27, [40] (Gaudron J); *Al Kateb v Godwin* [2004] HCA 37, [69] (McHugh J).

7 This perhaps reflects the perception articulated by Michael Bryan that '[a]ny judge who announces that he or she will apply a "philosophy" of judging will rightly be accused of deciding cases, not according to the evidence, but according to preconceived views': Michael Bryan, 'Justice Callinan's Judgments in Private Law: Story Telling, Legal Coherence and Corrective Justice' (2008) 27 *University of Queensland Law Journal* 29, 29.

8 Jonathan Crowe, *Legal Theory* (Thomson Reuters, 4th ed, 2024) ch 1.

9 Steve Pyke, *Philosophers* (Oxford University Press, 1993) 22.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

the nature and purpose of law in general. These understandings will then inform our engagement with specific legal rules and cases, whether or not they are brought specifically to mind when resolving those questions. They will also inform the practical decisions people make when interacting with law in their everyday lives. Everyone faces decisions involving law from time to time, such as whether to follow a specific legal requirement. However, these decisions will be particularly prominent in the lives of law students and lawyers. It is to these existential implications of legal philosophy that the present chapter now turns.

The chapter will proceed along the general lines sketched in the opening paragraph. I will begin by considering how legal philosophy advances our understanding of the purpose of law, before extending this analysis to show how it illuminates the point of legal practice. I will highlight some challenges traditional views of legal ethics pose to remembering the point of being a lawyer. I will then connect these topics to the value of reflecting upon the meaning of one's work and life. I will argue that the inherent value of a balanced and integrated life makes these forms of reflection important to everyone's well-being. Legal philosophy, in short, is an opportunity to reflect upon the deeper ends of life in the law in a way that may otherwise be discouraged by the pressures of legal education and practice. It is a tool that can help us refocus, when needed, on those things that make life worth living.

II The Point of Law

Jurisprudence is replete with claims about the purpose or point of law. Aristotle, for example, held that the point of law corresponds with the point of society and, indeed, the point of life in general – namely, the pursuit of happiness or *eudaimonia*.[10] Aristotle famously regarded humans as 'political animals', meaning they naturally tend to form social groups.[11] Humans are distinguished from other animals by their capacity for speech, which enables them to communicate on matters concerning the good life. Participation in political institutions is an integral part of the good life for humans. Law, then, helps constitute the social structures that make human flourishing possible.

Contemporary legal theorists have advanced various related theses. Lon Fuller contended that the point of law is to order social action in accordance with rules – thereby making peaceful coexistence possible for individuals with diverse objectives and life plans.[12] Humans have many different – and sometimes conflicting – plans for their lives, but they must nonetheless agree upon shared rules if they are to cooperate and get along harmoniously in society. Governance structures that are not rule-based will fail to achieve this objective in various ways.[13] Law therefore benefits all members of society in allowing everybody a peaceful environment to pursue their different goals. It thereby respects the status of each member of the community as 'a self-determining agent'.[14]

---

10 Aristotle, *Nicomachean Ethics* (David Ross trans, Oxford University Press, 1998) bk 1, ch 7.
11 Aristotle, *The Politics* (T A Sinclair trans, Penguin, 1982) bk 1, ch 2.
12 Fuller (n 1) 122.
13 Ibid 33-38.
14 Ibid 166.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

John Finnis has more recently argued that the point of law is to coordinate society for the common good.[15] Finnis argues that human life is oriented towards certain intrinsic goods.[16] These goods capture everything it is valuable and worthwhile to pursue in our lives. The common good, as Finnis defines it, consists in ensuring the conditions necessary for all members of a society to participate in the intrinsic goods.[17] The role of law in this picture is to coordinate social behaviour so that people can work together effectively to bring the common good about. For people to do their part for the common good, they must be able to know what they are expected to contribute to society. This would not be possible, Finnis argues, without authoritative legal standards everyone can agree on.[18]

The legal philosophers discussed so far in this section – Aristotle, Fuller and Finnis – all belong broadly to the natural law tradition in jurisprudence. This tradition is characterised by a focus on the ways in which legal institutions help people lead flourishing lives by pursuing a vision of a good human life.[19] For Aristotle, for example, the good life is represented by *eudaimonia*, while for Finnis it involves pursuing intrinsic human goods. Legal positivism, the main rival to natural law theory in contemporary jurisprudence, denies that law must be understood by reference to this kind of moral purpose.[20] Rather, for legal positivists, what makes something a law is simply that it is enacted by a person or body – such as a legislature or judge – that society recognises as having the power to make laws.

Legal theorists within the natural law tradition have been somewhat more likely than their legal positivist counterparts to engage directly with the question of law's point. This reflects the orientation of the natural law tradition towards connecting questions about the nature of positive law with broader issues about human nature, political philosophy and ethics.[21] However legal positivists have by no means completely neglected law's purpose. The leading contemporary legal positivist, HLA Hart, identified minimum conditions necessary for the survival of a functioning society which it is law's purpose to safeguard. He termed these 'the minimum content of natural law'.[22] Absent these conditions, law will fail in its basic function of ensuring the survival of society.

Joseph Raz, the most prominent legal positivist after Hart, also advances sophisticated views on the function of law. Raz provides a list of the primary and secondary functions law plays in society.[23] The distinctive way law fulfils these functions, according to Raz's theory, is to provide its subjects with what he terms 'exclusionary reasons

15 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 276-277.

16 Ibid ch 4.

17 Ibid 155.

18 Ibid 232.

19 For discussion, see Jonathan Crowe and Constance Youngwon Lee, 'The Natural Law Outlook' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019).

20 For discussion, see Crowe (n 8) ch 4; Jonathan Crowe, 'Natural Law Theories' (2016) 11 *Philosophy Compass* 91, 92-93.

21 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 1-2.

22 HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 193.

23 Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) ch 9.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

for action'.[24] Exclusionary reasons are reasons to disregard other reasons that one would ordinarily have to consider when deciding how to act. Part of what it means for law to be authoritative is that it provides its subjects with reasons of this kind. When law succeeds in providing exclusionary reasons, it provides a service to members of the community, because they need no longer weigh up all their relevant reasons for action when deciding what to do. They can simply do what the law requires without assessing other kinds of considerations.

For my part, I have argued in other work that the purpose of law is to mark the boundaries of acceptable social conduct.[25] However, law does not set these boundaries in an arbitrary way, but does so – to echo Finnis's language – in order to advance the common good. The common good, as I use the term, captures the interest that every member of society has in living in an environment where all the members can lead fulfilling and meaningful lives.[26] Law advances this objective – as both Fuller and Finnis tell us – by serving as a locus of social coordination. Contrary to what Finnis and Raz argue, it does not do this by issuing authoritative pronouncements, but rather works alongside other moral and social norms to provide a framework for social action.[27]

We can see from the preceding discussion that the views of legal theorists on law's point are diverse, but there are some clear recurring themes, such as law's role in facilitating social coordination and the pursuit of the common good. The theorists we have canvassed also agree that law does not exist for no reason at all – or, indeed, purely to facilitate dominant social power structures – but has at least the potential to play a constructive and valuable social role.[28] Those whose work it is to ensure that law plays its function well, rather than simply being coopted as a tool of the powerful, therefore have a crucial role to play in advancing the interests of their fellow citizens and society at large.

How do we know what the point of law is? We must, as the theorists discussed previously would generally agree, engage in reasoned reflection on the social institutions and practices by which law is constituted. We must, in other words, pay close attention to the way that members of the community talk and think about the law. In so doing, we engage in what Neil MacCormick, describing Hart's methodology, called a *hermeneutic* exercise.[29] We are seeking to interpret social practices, paying attention to what Hart terms *the internal point of view* – namely, the meaning they hold for those who accept them as a guide for action, as opposed to detached external observers.[30] In other words, we are seeking to better understand what drives us as members of human communities.

What are the practical consequences of this picture? What, so to speak, is the point of reflecting on law's point? I will suggest shortly that this exercise has value for those contemplating a career in legal practice, both in terms of their approach to

---

24 Ibid 30.
25 Crowe (n 21) ch 9.
26 Ibid 88.
27 Ibid ch 10.
28 Other legal philosophers, by contrast, argue that the purpose of law is indeed to facilitate dominant social power structures. We will return to these perspectives later in this chapter.
29 Neil MacCormick, *HLA Hart* (Stanford University Press, 2nd ed, 2008) 53-54.
30 Hart (n 22) 89.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

their work and for wider existential reasons. However, for the purposes of the present section, I will focus on two kinds of practical consequences that flow from reflecting on law's purpose, according to some of the theorists referenced previously.

The first of these practical applications is drawn out by the work of Fuller. Fuller, as is well known, builds on his account of law's purpose to develop a theory of what he describes as 'the inner morality of law'.[31] Fuller describes eight principles of legality which must be observed, at least to some extent, if it is to be possible for law to fulfil its purpose.[32] For example, it is only possible for laws to effectively guide social action if they are publicised in advance. Otherwise, law's subjects will not know what it requires. For Fuller, then, an exploration of law's point enables us to recognise values which are inherent to the very concept of law and which must be honoured if law's purpose is to be fulfilled.

A second application can be drawn from the accounts of law's purpose advanced by natural law theorists. These authors, as we have seen, view law's purpose as promoting the common good. The notion of the common good, on this view, illuminates why it is that we have law in the first place. However, it also places limitations on both the content of law and the actions of legal officials. If the purpose of law is to advance the common good, then it would be perverse for either legal rules or legal officials to harm the common good. The natural law view of law's purpose therefore has the consequence that those who make and apply the law should strive to act in such a way as to bring the common good about.[33] However, to succeed in promoting the common good, they must first understand it.

The upshot of these theories, then, is that those whose role it is to shape and apply the law must not only have a technical grasp of legal doctrine, but also appreciate what law is for. Otherwise, they are in danger of developing law in a way that undermines its purpose. They may, like Fuller's hypothetical King Rex, ineptly undermine law's internal morality through the accretion of technical errors.[34] Or they may, by failing to direct their minds to the common good, not only fail to promote that end, but actively undermine it. Legal education has a role in play in guarding against these errors. It should encourage law students to reflect upon law's purpose, as well as its technical rules, lest the law students of today grow up to be the King Rexes or soulless legal technocrats of the future.

It is, for this reason, worthwhile for law students and academics, as well as lawyers and judges, to bring their mind explicitly to philosophical questions when engaging in research projects, giving advice or making decisions. These activities will often be guided implicitly by an understanding of law's objectives. However, unless these questions are brought expressly and carefully to mind – as legal philosophy encourages us to do – they may remain underdeveloped or disconnected from the substance of the activity in question. Legal philosophy, in this sense, helps us to ensure that our interactions with law in our lives do not become divorced from our underlying conception of law's purpose.

---

31 Fuller (n 1) 42.

32 Ibid 39.

33 For discussion, see Crowe (n 21) chs 11-12.

34 Fuller (n 1) 33-38.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

III The Point of Being a Lawyer

What is the point of being a lawyer? If you ask law students this question – in my experience, at least – you receive a variety of answers. Some students will openly aver the attractions of law's prestige as a profession, the expected pecuniary advantages it will bring them in due course, or the overriding role of their parents' advice in shaping their career choices. Others, however, will confess to a desire to help the vulnerable in the community or advance the cause of some important value, such as human rights or justice. Those choosing the latter responses are sometimes observed to cast a slightly self-conscious glance at their peers, as if to acknowledge the naivety of what they are about to say.

The more idealistic law students, however, are onto something. If we follow the broadly Aristotelian line of thought introduced at the start of this chapter, we might expect to find continuity between the point of being a lawyer, the point of the law in general and the point of human communities. According to the natural law perspective introduced previously, for example, human communities exist to further the common good of their members and law assists in that goal by coordinating social behaviour in accordance with shared rules. The point of being a lawyer, according to this perspective, is to play a particular role in maintaining a well-functioning legal system, bearing in mind the system's overarching objective of contributing constructively to the common good.

There is, however, a pitfall inherent in this picture. Lawyers, judges and other legal officials have defined roles to play within a legal system. These roles differ, for example, from those of legislators. According to the tripartite separation of powers, legislators make the law, judges interpret and apply the law, and the executive enforces the law. Lawyers, for their part, advise and represent the subjects of law when disputes arise, advocating their rights and interests before decision-makers.

This understanding of the roles played in the legal system by various actors has resulted in a conception of legal ethics as shaped by role morality. An ethical lawyer, on this view, is one who understands and performs the lawyer's role.[35] The lawyer's role, in turn, manifests itself in various duties owed to other actors in the legal system. For example, lawyers have a duty to the court and duties to their clients. They must represent their clients to the best of their ability, following instructions, respecting confidentiality and so on, while respecting their overarching duty not to subvert the legal process.

This picture is accurate, so far as it goes. Law, as discussed in the previous section, serves as a mechanism for social coordination. One way in which it does this is by implementing a kind of division of labour among the various legal actors. These defined roles instruct lawyers and legal officials how to do their share to maintain the legal system and thereby to promote the common good. However, it is important to note that, on this picture, the roles of legal actors do not exist for their own sake, but rather to serve the overarching objective of advancing the good of the community. It follows that when legal roles and the common good come into conflict, the common good must ultimately prevail.

---

35 For a helpful overview, see Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Various problems arise when law students or others are taught to observe the role morality of the legal system without paying heed to its underlying purpose. For example, it is widely believed that judges, when confronted with a clash between the law and justice, should stick to their role and apply the law as it stands, leaving any amendments in the hands of legislature.[36] In Australia, for instance, judges very rarely explicitly override or amend the law in the name of justice or morality. I have argued elsewhere, however, that this strong form of judicial deference rests on a mistake.[37] The role of a judge is, in the end, to promote the common good. If the law comes into conflict with the common good, then judges should bring them into dialogue to ensure that law fulfils its purpose.

Furthermore, judges should take account of the common good openly, rather than allowing it to covertly influence their judgments. Judges, like everyone else, are influenced by their moral views when making practical decisions.[38] If judges seek to hide the influence moral considerations have on their judgments, fearing that it will compromise their proper role, they may end up doing a disservice to Fuller's values of legality, by obscuring the true motivations for their decisions. We would end up with a legal system where judges decide for one set of reasons while purporting to be guided by another.

This kind of problem manifests itself in a different way when it comes to the role of a lawyer. The role of the lawyer is to represent their client, thereby contributing to the legal system. However, a problem arises when lawyers represent their clients in ways that conflict with the common good. For example, a defence barrister who aggressively and persistently questions the complainant in a rape trial, seeking to draw out minor inconsistencies in their testimony, while knowing that such fragmented testimony is a common symptom of trauma,[39] does not help the court discover the truth about the matter. Nor is such questioning necessary to provide the defendant with a fair and adequate opportunity to challenge the accusations made against them. Problems of this nature are prone to arise when role morality is elevated in legal ethics without attention to deeper values.

An overly myopic emphasis on role morality may also pose a threat to the well-being of lawyers and legal officials. Lawyers may get into the habit of compartmentalising their lives, playing one role at work and a very different one outside it. If

---

36 For academic defences of this perspective, see James Allan, 'An Unashamed Majoritarian' (2004) 27 *Dalhousie Law Journal* 537; James Allan, 'Human Rights: Can We Afford to Leave Them to Judges?' (2005) 16 *Commonwealth Judicial Journal* 4; Tom Campbell, 'Judicial Activism: Justice or Treason?' (2003) 10 *Otago Law Review* 307.

37 Crowe (n 21) ch 12.

38 For discussion, see Jonathan Crowe, 'The Role of Snap Judgements in Constitutional Deliberation: A Dialectical Equilibrium Model' in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018); Jonathan Crowe, 'Not-So-Easy Cases' (2019) 40 *Statute Law Review* 75.

39 See, for example, Daisy A Segovia, Deryn Strange and Melanie KT Takarangi, 'Trauma Memories on Trial: Is Cross-Examination a Safeguard against Distorted Analogue Traumatic Memories?' (2017) 25 *Memory* 95; Annie Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

pressed, they may find it challenging to integrate the two perspectives. The attitude to one's career represented by the adage 'that's just my job' threatens to create a kind of normative dissonance between the goals a person embraces in their career and their deeper personal values. It is not far-fetched to suggest that this kind of dissonance may be a significant factor in the high rates of psychological distress reported by law students and lawyers.[40]

IV The Meaning of Life

The point made at the end of the previous section raises deeper existential questions. We have so far considered the point of law and of being a lawyer. What, we might boldly venture to ask, is the point of life in general? Does it bear any relation to these previous discussions? Even philosophers, who are supposed to be interested in such questions, have largely tended to avoid them. However, Aristotle had a relatively straightforward answer. The point of life is to pursue *eudaimonia*, variously translated as happiness or the good life.[41] The point of life, in short, is to live life well. So far, so good – but what exactly does that mean? There is hardly universal agreement on what constitutes a good life.

I will focus here on one family of views about the good life that I believe to be broadly on the right track. According to this outlook, people construct their own personal versions of the good life by choosing among an array of fundamental human goods. These goods are categorised differently by different theorists, but they plausibly include such values as health, friendship, knowledge, recreation and aesthetic experience.[42] People can choose how to pursue and prioritise these goods in their lives in order to construct a model of a flourishing life that suits their interests, priorities and character.

People can find meaning in life by exercising these choices between different manifestations of value and thereby defining what type of person they want to be. For this reason, I have argued previously that the pursuit of meaning by choosing among human goods is itself a fundamental human value.[43] It is important to emphasise that the choices open to people in constructing a meaningful and flourishing life are not limited to choosing to prioritise, say, friendship over knowledge at a particular point in time. Each of the basic forms of human value itself comes in many different forms defined by the social environment. A person can, for example, pursue the value of

40 A particularly influential study is Norm Kelk et al, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (Brain and Mind Research Institute, 2009). For further discussion, see Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149; Wendy Larcombe and Katherine Fethers, 'Schooling the Blues: An Investigation of Factors Associated with Psychological Distress Among Law Students' (2013) 36 *University of New South Wales Law Journal* 390; Wendy Larcombe, Sue Finch and Rachel Sore, 'Who's Distressed? Not Only Law Students: Psychological Distress Levels in University Students Across Diverse Fields of Study' (2015) 37(2) *Sydney Law Review* 243.

41 Aristotle (n 10) bk 1, ch 7.

42 For discussion, see Crowe (n 21) ch 2.

43 Ibid 53-55.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

recreation in countless ways, forming connections with different subcommunities sharing the same interests.

The possibilities for self-definition offered by human goods are quite literally endless. In this respect, the picture of the good life just outlined resonates not only with Aristotle's vision of *eudaimonia*, but also with the emphasis placed by existentialist philosophers, such as Jean-Paul Sartre, on the indispensability of personal choice and responsibility in the pursuit of a meaningful existence.[44] The meaning of life, in a sense, is therefore for each person to create meaning in their own lives by purposefully shaping their life plans through interaction with the manifestations of human value.

The capacity for choice between different conceptions of a good life is, however, not unlimited. First, although the array of choices presented by human goods is extensive, there are also choices which do not make sense in this context. Some choices which do not correspond to any form of good are quite literally pointless, while others directly or indirectly set back the well-being of oneself or others. Sometimes, actions aimed at pursuing one or more of the goods may do so in unbalanced ways which pose a threat to well-being. Exercise, for example, is generally a valuable way of pursuing the good of health, but someone who becomes addicted to exercise may end up causing themselves harm.

I have suggested in other work that human well-being consists in pursuing the basic forms of value in a *balanced* and *integrated* way.[45] The notion of balance here captures the importance of not unreasonably prioritising particular forms of value at the expense of others. The notion of integration, meanwhile, represents the value in forming an overall picture of one's life that is consistent with the kind of person one wishes to be. A person's life might get out of balance, for example, if they spend all their time working and neglect their friends and family. Similarly, a person's life may lack integration if what they do at work cannot be easily reconciled with the values they prioritise in other contexts.

Plausibly, the high levels of psychological distress reported by law students and lawyers are not unrelated to these two challenges. Studying law is hard work and many legal workplaces expect their new recruits to demonstrate their commitment by working long hours. These threats to a balanced life are exacerbated if law students and lawyers find it difficult to reconcile their study or work with their personal values. The kind of compartmentalisation encouraged by some versions of role morality in legal practice risks entrenching a fragmented, rather than integrated, conception of one's life. Someone who finds themselves in this position may feel themselves drifting away from their core values.

Neglecting the opportunity to reflect upon purposes can therefore pose a threat to psychological, as well as existential, well-being. A person who lacks this opportunity may drift into a course of study and a career without a clear sense of what

---

44 For an overview, see Jonathan Crowe, 'The Authentic Judge: French Existentialism and the Judicial Role' (2019) 47 *Australian Bar Review* 41.

45 Jonathan Crowe, 'What is Wellness? The Role of Human Values' (2020) 45 *Alternative Law Journal* 261. See also Jonathan Crowe, 'Defining Wellness in Legal Education: A Reply to Kawamata' (2023) 48 *Alternative Law Journal* 140.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

they are doing. They may then find themselves in a situation where they struggle to balance their work with the things that make their life meaningful. They may also find that their work is at odds with the type of person they wish to be. Someone in this position may feel trapped, helpless or unmoored. They may struggle to confront existential questions such as 'Who am I really?' and 'What type of person do I want to be?' Like Friedrich Nietzsche's madman proclaiming the death of God, they 'feel the breath of empty space'.[46]

V Sceptical Responses

However, what if empty space is all there is? There are certainly those who would deny that law has any determinate or unified purpose – or that this purpose is a benign one. Brian Leiter, for example, has cast doubt on whether law has a definable function – or, indeed, any essential properties at all – because the roles it plays in social life are 'hostage to changing human ends and purposes'.[47] All we can say about the purpose of law and other human artifacts, on this view, is that they have the functions humans choose to impose on them from time to time. Leslie Green similarly cautions against defining law in terms of its functions for essentially this reason.[48] The ends law serves in different societies, he contends, are too multifaceted and diverse to make such an analysis illuminating.

Critical legal theorists of different stripes, for their part, would question the idea that law's function is benign. If law has a purpose, these critics might argue, it is to perpetuate dominant social power structures at the expense of the marginalised and vulnerable. Law, on this view, has functions such as maintaining capitalist class structures, upholding the patriarchy and perpetuating institutionalised racism. Any other purported function of law is a smokescreen designed to justify the existing social order. Law, stripped bare, is a machine for reproducing power. It legitimises the dominant order by cloaking it in the veneer of legitimacy afforded by concepts like the common good.

A few points can be made in response to these perspectives. First, if the purpose of law depends on what use humans make of it from time to time, then it is up to human communities to decide what function law should have. We can choose, if we wish, to work towards a vision of law that aligns with our understanding of the common good. We can, by this process, give law meaning, in the same way that we can give our individual lives meaning by choosing our personal projects. There is therefore no necessary inconsistency between the claim that law's purpose is contingent on changing human purposes and the purposive vision of life in the law articulated earlier in this chapter.

The important critiques of law advanced by various critical legal theories are also not necessarily at odds with the idea that law's purpose is to advance the common good. We might coherently acknowledge that law does often serve to perpetuate existing social power structures, while also going on to say that, to the extent that it

---

46 Friedrich Nietzsche, *The Gay Science* (Walter Kaufmann trans, Vintage, 1974) [125].

47 Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31 *Oxford Journal of Legal Studies* 663, 666-667.

48 Leslie Green, 'The Functions of Law' (1998) 12 *Cogito* 117, 120-121.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

does this, it fails in its purpose of promoting human flourishing for all members of society. The purposive idea of law I have outlined, if developed in this way, becomes a powerful tool for challenging law's oppressive elements. It allows us to say, for example, that a law that fails in its purpose is not merely a bad law, but fails according to a standard internal to the concept of law itself.[49] This undermines its legality, as well as its justice.

It is, of course, important to acknowledge that purposive views of law have not always embraced this critical potential – and indeed have sometimes advanced socially regressive ideas under the cloak of concepts such as the common good. Finnis, for example, as well as being a leading contemporary proponent of natural law theory, is also well known for his homophobic and socially conservative positions.[50] However, there are also those who have embraced law's purpose in the name of social progress – such as Martin Luther King Jr, for example, whose writings have been characterised (along with those of other civil rights authors) as articulating a form of 'Black Natural Law'.[51]

VI Legal Philosophy, the Universe and Everything

We began this chapter by asking, 'What is the point of legal philosophy?' I suggested first that legal philosophy, at its best, is an opportunity to reflect upon the point of law. Law does not exist for no reason, but to serve the common good. I then connected this idea to the point of being a lawyer. A lawyer serves the legal system by playing a particular socially defined role. However, this role only make sense if it is placed in the context of law's purpose. A lawyer who plays their role without paying attention to this backdrop may be led down a path where the role conflicts with the ends it is supposed to serve. This risks creating normative dissonance both in the life of that lawyer and in the legal system more broadly.

I then talked about the meaning of life. I considered the view that life's meaning comes from engaging with an array of human goods in such a way as to construct a personal narrative about one's existence. Life's meaning comes from shaping the kind of person you wish to be. However, it is important to do this in a balanced and integrated manner. Otherwise, the shape of a person's life can end up posing a threat to their psychological and existential well-being. The neglect of purposes, in this context, can become not just a form of stupidity, as Nietzsche put it, but also a form of self-harm. I concluded by considering some sceptical and critical responses to the idea of law's purpose, showing how they can help to inform more nuanced and progressive versions of the purposive outlook.

---

49 Fuller (n 1) 42.

50 See, for example, John Finnis, 'The Rights and Wrongs of Abortion: A Reply to Judith Thomson' (1973) 2 *Philosophy and Public Affairs* 117; John Finnis, 'Law, Morality and "Sexual Orientation"' (1994) 69 *Notre Dame Law Review* 1049. For criticism, see Jonathan Crowe, 'Natural Law and Authoritarianism' in Richard Nate, Marko Trajkovic and Martha Egan, *Perspectives on Authoritarianism and Totalitarianism from Literature, Philosophy, Law and History* (Königshausen and Neumann, 2025).

51 Vincent Lloyd, 'Black Natural Law' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

The opportunity to reflect on purposes is valuable. It is conducive to a meaningful and flourishing life. It may be possible to live a comfortable life without pondering such deeper questions – but such a life is risky, because it may produce an unbalanced or fragmented existence. The study of legal philosophy is an opportunity for law students and lawyers to put their lives in context. It is a chance to think about what they are doing and why they are doing it. This kind of reflection, if taken seriously, may lead them to make choices in life that enhance their pursuit of meaning and flourishing.

Sometimes, life becomes unhealthy. At such times, we need the resources to identify what is not working in our lives and make a change. This type of existential reflection is inherently difficult. Not all of us can be like Rainer Maria Rilke and realise by looking at a classical sculpture that 'you must change your life'.[52] It is easier, as David Bowie put it, to 'never leave the stream / of warm impermanence' rather than 'turn to face the strange'.[53] At difficult times like these, we need all the resources we can get. Legal philosophy may not save too many lives, but it can't hurt to have the habit of reflecting on purposes when you're not sure where your life is going. Drag yourself away from social media and read a bit of Fuller from time to time. As the toucan said about Guinness: it's good for you.

Further Reading

Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) chs 9-10

Jonathan Crowe, 'What is Wellness? The Role of Human Values' (2020) 45 *Alternative Law Journal* 261

Jonathan Crowe, *Legal Theory* (Thomson Reuters, 4th ed, 2024) ch 1

Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1964) ch 2

HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) ch 9

Martin Luther King Jr, 'Letter from Birmingham Jail' in *A Testament of Hope: The Essential Writings of Martin Luther King Jr* (James M Washington ed, Harper Collins, 1986)

Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) ch 2

52 Rainer Maria Rilke, 'Archaic Torso of Apollo' in *The New Poems: The Other Part* (Len Krisak trans, Boydell & Brewer, 2015) 173-174.

53 David Bowie, 'Changes', *Hunky Dory* (RCA Records, 1971).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Chapter 3

Comparative Law

Theunis Roux

I Overview

Does comparative law go 'beyond doctrine'? The answer depends in part on what is meant by that term. If we understand doctrine to encompass not just formal legal norms, but also the conventions of legal reasoning that support the interpretation of those norms,[1] we might be inclined to say, 'not necessarily'. For then there appears to be at least one version of comparative law that is very much doctrinal, viz, that version that involves the legal researcher, practising lawyer or judge referring to foreign law in the course of an argument about how a legal norm in their own legal system ought to be interpreted.[2] In this guise, comparative law is arguably a mode of doctrinal reasoning like any other. To be sure, the extent of its use and its doctrinal significance will vary from legal system to legal system. But, in principle, comparative law in this form is the same species of thing as arguing from precedent or applying the rules of statutory interpretation. It is a tool deployed in the quintessentially doctrinal exercise of making the law 'the best that it can be'.[3]

On another view, this conclusion leaves out a vital step. The meaning and import of a foreign legal norm cannot be ascertained by recourse to doctrine alone, even on the broad definition just given. That is because any reference to a foreign legal norm must necessarily be sensitive to the context in which it is embedded. Foreign legal norms, on this view, exist within clusters of shared meaning that must be understood in all their cultural distinctiveness if comparison is to be meaningful.[4] That being so, the comparative lawyer, even one who purports to be working within the interpretive practices of their own legal tradition, must perforce make use of other disciplines – including history, political science, and sociology – to contextualise

1 On this question, see Mátyás Bódig, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Edward Elgar, 2021); Jason NE Varuhas, 'Mapping Doctrinal Methods' in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar, 2023) 70.

2 Susan Kiefel, 'The Significance of Comparative Law to Common Law Judges: An Australian Perspective' in Katharine Boele-Woelki and Diego P Fernández Arroyo (eds), *Current Issues of Comparative Law – Questions actuelles de droit compare* (Springer, 2019) 3, 9 (comparative law 'forms part of the judicial method, the purpose of which is to deepen one's understanding of our laws in order to answer a novel and difficult question').

3 Ronald Dworkin, *Law's Empire* (Belknap Press, 1986).

4 Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

the norms to which they are referring. That interpretive step necessarily takes them beyond doctrine.

Or does it? If doctrine encompasses the reasoning methods through which the contextualisation of a foreign legal norm occurs, the key question, proponents of the first view might respond, is not whether the comparative lawyer must have recourse to other disciplines, but whether such recourse could still in some sense be said to be doctrinally controlled. Provided the perspective remains that of the legal-professional insider participating in the construction of doctrine, the mere fact that the comparative lawyer draws on other disciplines does not mean that they have ceased to reason doctrinally. What matters is the extent to which those other disciplines are subordinated to law's purposes. Law, after all, is a 'parasitic discipline' that invariably makes use of the conceptual frameworks of other disciplines.[5] If that is all that is happening when a comparative lawyer contextualises a foreign legal norm, it may be business as usual.

The resolution of these competing views hinges on questions about the legal-systemic role of the legal academic, legal practitioner and judge that can only be briefly addressed here.[6] It is easy to accept, for example, that a barrister's rough-and-ready enlistment of a foreign legal norm or a judge's cursory summary of an aspect of foreign law might be entirely doctrinal. Neither of these role players has the time to offer a fully worked-out contextualisation of the norm on which they are drawing. The legal academic doing comparative law, on the other hand, may have time for deeper reflection of this kind and perhaps even mastery of other disciplines. One of the functions legal academics have, after all, is to be vanguardists and systematisers – utilising their institutional advantage as non-practising lawyers to push the law to new insights. What counts as an acceptable reference to foreign law for the legal academic might therefore be different from the standard applied to a barrister or judge. At a certain point, the legal academic doing comparative law might so immerse themselves in the perspective of another discipline that it no longer makes sense to think of them as reasoning doctrinally.

Whatever view one takes of this threshold issue, doctrinally-oriented comparative law is clearly just one way in which comparative law can be pursued, and nowadays perhaps not even the most important one. In a world where a great deal of law is transnational or global,[7] the practice of comparative law is about much more than improving legal regulation within a single system. Rather, comparative law encompasses all the various ways in which, and the purposes for which, comparison between legal systems occurs. So, for example, comparative law might be used to support the drafting of an international treaty in terms of which signatory states agree to align their regulatory frameworks.[8] Or legal comparison might be pursued for its own sake, as an exercise in generating scholarly knowledge about the functioning of law and legal institutions under specified conditions. When comparative law is used

---

5 Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25 *Journal of Law & Society* 71.

6 See further, Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24 *Legal Education Review* 173.

7 Mathias Siems, *Comparative Law* (Cambridge University Press, 2nd ed, 2018) 310.

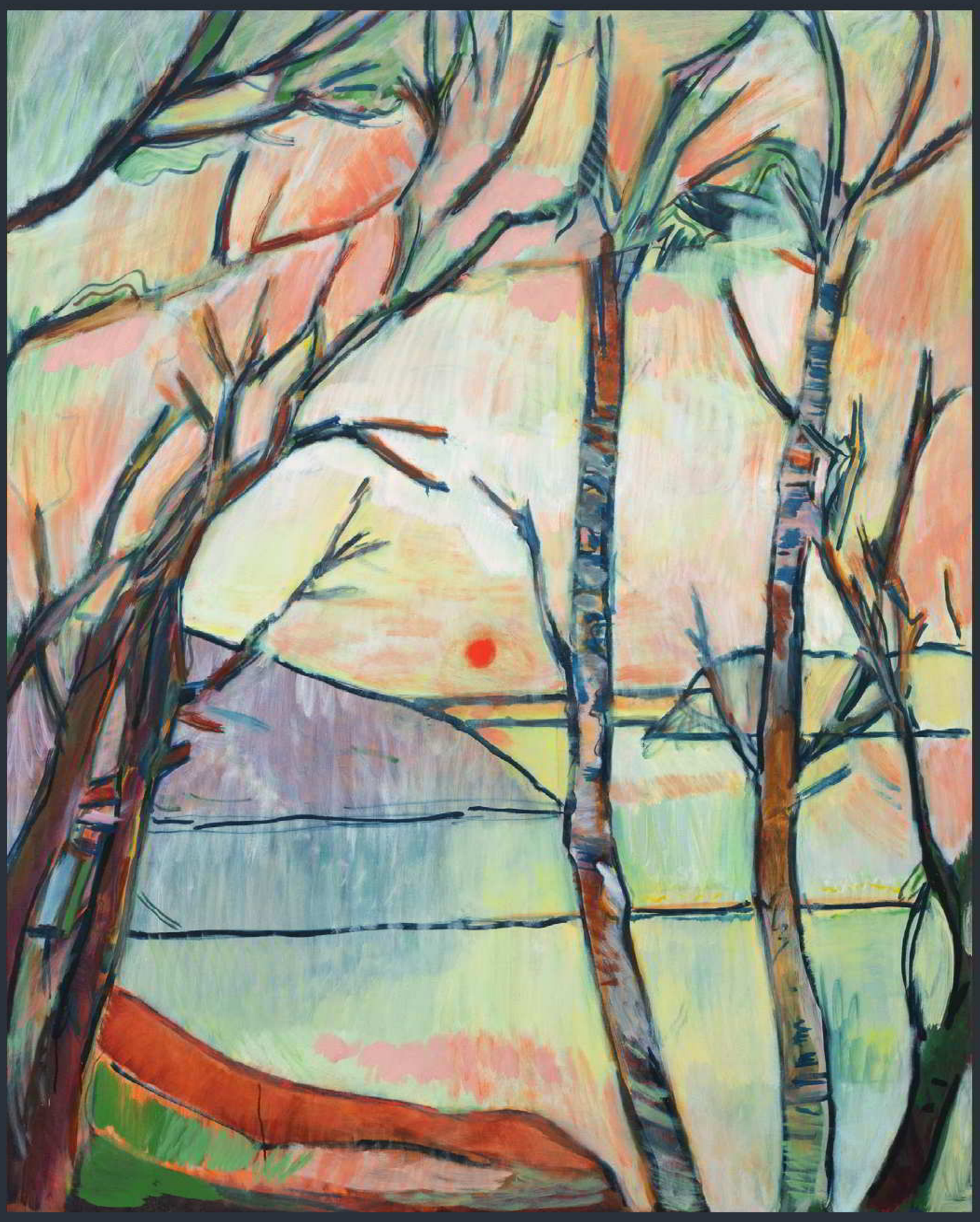
8 Ibid 5.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Harry Hobbs and Jeremy Patrick

BEYOND DOCTRINE

Alternative and Critical Approaches to Law



THE FEDERATION PRESS

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedd y/

BEYOND DOCTRINE

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

BEYOND DOCTRINE

Alternative and Critical Approaches to Law

Editors

Harry Hobbs

Jeremy Patrick

Foreword

Margaret Thornton

THE FEDERATION PRESS

2025

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Published in Sydney by
The Federation Press
PO Box 6178, Alexandria, NSW, 2015.
8 Birmingham St, Alexandria, NSW, 2015.
Ph (02) 9552 2200. Fax (02) 9552 1681.
E-mail: info@federationpress.com.au
Website: http://www.federationpress.com.au



A catalogue record for this book is available from the National Library of Australia

ISBN 978 1 76002 562 5 (pbk)
ISBN 978 1 76002 563 2 (ePDF)

© The Federation Press

This publication is copyright. Other than for the purposes of and subject to the conditions prescribed under the Copyright Act, no part of it may in any form or by any means (electronic, mechanical, microcopying, photocopying, recording or otherwise) be reproduced, stored in a retrieval system or transmitted without prior written permission. Inquiries should be addressed to the publisher.

Typeset by The Federation Press, Alexandria, NSW.
Printed by Pegasus Media & Logistics, Blacktown, NSW.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Foreword

Margaret Thornton

As someone who has long advocated a broadening of the law curriculum, I am particularly pleased to have been invited to write the Foreword to this splendid collection.

The 'Priestley 11', in conjunction with a positivist pedagogy that is expected to produce 'right' answers, is a powerful arbiter of what is taught in Australian law schools. Despite being a prerequisite to admission to practice, its content has changed little in the last century even though Australia has become an increasingly heterogeneous society. Although not all students intend to practise law when they graduate, they like to qualify for admission 'just in case'. The fact that almost all satisfy the requirements invests the Priestley 11 with considerable power in resisting critique.

Despite the obstacle presented by the Priestley 11, significant portions of my career have been expended in law schools where colleagues have sought to convey to students that law is much more than a technocratic system of rules. They have argued that law can only be understood 'in context' by paying attention to history and philosophy, as well as other contemporary socio-legal perspectives. From time to time, this has incurred opposition from traditional legal academics, as well as from the practising profession, who felt that critical perspectives undermined the Priestley 11. Even senior university administrators have argued that a focus on anything other than conventional doctrinalism would alienate law firms and discourage them from employing the law school's graduates. This opposition has been so profound that it even resulted in notable sociolegal scholars being made redundant at law schools, such as Macquarie and La Trobe, despite their reputation for innovative scholarship.

Of course, once a progressive course has been set in motion, it is not easily deflected by the rearguard action of a few self-appointed gatekeepers. What is more, new ways of thinking are fostered by academic research, where independent interests have traditionally been pursued without fear or favour. Thus, while the law curriculum has been constrained by the Priestley 11 in terms of teaching, law schools have rarely imposed formal restrictions on independent research by undergraduate students, doctoral candidates, or academics.

Even though one might feel equivocal about the entry of competition policy into higher education, the introduction of rankings around the millennial turn resulted in a burgeoning of creative legal scholarship that included interdisciplinary research. The formation of interdisciplinary teams proved to be a positive by-product of the increase in grant income as black letter law projects no longer fitted the research bill: 'A mere compilation', said one humanities scholar dismissively of a doctrinal law application that I recall from my time on the Australian Research Council.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

A further corollary of the sea change that emerged from the introduction of rankings was its impact on legal publishing, which resulted in a proliferation of law journals, many of which reflected the new interdisciplinary turn. These new journals, furthermore, were interested in original and imaginative contributions, not more of the same. Hence, creative, and innovative scholarship, of the kind evinced by the contributors to this volume, began to appear and to be acknowledged as legitimate.

I would also add that it is pleasing to see explicit acknowledgement of Australian scholarship in the collection. While not wishing to sound ethnocentric, I rue what I term 'Northernhemispherism', one of the less attractive dimensions of the rankings phenomenon. This entails the favouring of British, North American, and European publications over those from Australasia and the Global South. Rankings are often biased because the global ordering is determined by downloads, which tend to be judged by the prestige of a scholar's home institution, preferably Oxbridge or an Ivy League university. As a result, 'Northernhemispherism' invariably outranks scholarship from Australasia and the Global South, regardless of how innovative it might be.

University administrators, seduced by rankings, tend to assume that the 'international', that is, the Northern Hemisphere, publication of an article or book will enhance their institution's ranking in the latest league table. One colleague, for example, was told by their dean to include some American content in an article on family law to facilitate publication in a journal that would attract the 'international' descriptor. This was despite the fact that this academic was more interested in publishing in an Australian journal in order to engage with local experts and practitioners in domestic family law scholarship. I had an even more bizarre experience when I was on the editorial board of a British book series, where I had been led to believe that my role was to bring innovative Australian scholarship to the board's attention. However, when I delivered an original manuscript by an Indigenous scholar, the board rejected it on the ground that it was 'too Australian'; I felt that I had no option but to resign.

It is therefore wonderful to see the way Indigenous scholarship has been seriously engaged with in this collection, along with multiple other critical sociolegal perspectives not included in the Priestley 11 but central to an understanding of the constitution of contemporary society. These essays clearly underscore the fact that law, far from being a technocratic and esoteric body of knowledge disconnected from society, is central to its understanding. The collection will be a wonderful resource for lawyers, law students and anyone with an interest in the role of law in society. Hopefully, it might even nudge the admitting authorities into considering bringing the Priestley 11 into the 21st century!

I congratulate the editors for having the foresight to propose such an innovative collection as well as the energy to bring it to fruition; I also congratulate the contributors for their insightful and original scholarly essays; and finally, a bouquet must go to Federation Press for agreeing to publish the collection.

Margaret Thornton

The Australian National University, Canberra, July 2025

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Contents

Foreword by Margaret Thornton *v*

Acknowledgments *ix*

About the Contributors *x*

Introduction 1
Harry Hobbs and Jeremy Patrick

1 Legal History 19
Shaunnagh Dorsett

2 The Point of Legal Philosophy 32
Jonathan Crowe

3 Comparative Law 45
Theunis Roux

4 A Field by any Other Name, or the Field FKA Law and Humanities 59
Alice Palmer

5 Qualitative Research Methods 75
Terry Hutchinson and Harry Hobbs

6 Quantitative Empirical Legal Studies 93
Alysia Blackham

7 Law and Economics 106
Guy Suttner

8 Marxist Approaches to Law 125
Michael Head

9 Legal Realism 141
James Gilchrist Stewart

10 Critical Race Theory 154
Thalia Anthony

11 Feminist Legal Theory 174
Ann Genovese and Heather Douglas

12 Decolonialism 189
Dorothea Anthony

13 Aboriginal Legal Traditions 208
Kristopher Wilson

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

14 Queer Legal Theory 221
Claerwen O'Hara

15 Postmodernism and Poststructuralism 236
Matthew Mitchell and Flynn Pervan

16 Disability Studies and the Law 254
Darren O'Donovan

17 Earth Jurisprudence 271
Costa Avgoustinos

Conclusion: Law Beyond Doctrine 287
Harry Hobbs and Jeremy Patrick

Index *291*

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Acknowledgments

If all work is a collective endeavour, then that must be particularly so for edited collections. Harry and Jeremy gratefully acknowledge the contributors, without whom this book would not exist. We thank them for their enthusiasm in initially accepting our invitation to contribute to this volume, and their care and attention in producing a clear and thorough introduction to their methodological approach to law. We extend our thanks to Margaret Thornton, for her thoughtful and engaging foreword that introduces the collection. We would also like to acknowledge Federation Press for their interest and attention in this project. In particular, we thank Trisha Valliappan for her encouragement and Jay Cruikshank for his careful editing.

On a personal note, Harry thanks Annabel and Frankie Johnson for their support and patience. Though Frankie may prefer *The Gruffalo* to *Beyond Doctrine* for at least the next few years, Harry nonetheless looks forward to attempting to introduce it into the bedtime routine.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

About the Contributors

Dr Dorothea Anthony is a Senior Lecturer in the School of Law at the University of Wollongong. She researches predominantly in the areas of human rights and international law, adopting critical perspectives based on her examination of the historical, political, and economic underpinnings of the law. Her work has been published in the *Australian Journal of Human Rights*, *Melbourne Journal of International Law*, *Global Encyclopedia of Territorial Rights*, *Asian Yearbook of International Law*, *European Journal of Legal Education*, and *The Laws of Australia*. Dorothea has taught public and private international law, corporate law, administrative law, legal ethics, and legal research and writing.

Dr Thalia Anthony is a Professor of Law at the University of Technology Sydney. She researches the impacts of colonial laws, past and present, on First Nations communities. Thalia had worked with Aboriginal women in prison and the community to build collective strengths outside of the carceral system. Her research is published in *Indigenous People, Crime and Punishment*, *Decolonising Criminology* and *Unsettling Colonial Automobility*. She is recognised by *The Conversation* as one of Australia's most influential thinkers. Her research is commonly cited in the media; in UN documents; in Supreme Court decisions; and in parliamentary debates.

Dr Costa Avgoustinos is a Lecturer in the Faculty of Law at the University of Technology Sydney (UTS), teaching Constitutional Law, Administrative Law, and Ethics, Law and Justice. His main area of research is Climate Change and (its impacts on) the Constitution, which was the subject of his PhD thesis completed at the University of New South Wales (UNSW). Costa has also been involved in various research projects with colleagues at UTS and other organisations on a range of topics, such as legal protections for First Nations children in foster care, sex workers' rights in NSW, and 'Democracy in Schools' programs.

Dr Alysia Blackham is a Professor at Melbourne Law School, The University of Melbourne, Australia. She is an internationally renowned expert on age discrimination law and the consequences of ageing for workplaces. Her research focuses on the intersection of employment law, equality law and public law, using empirical evidence to cast new light on legal problems.

Dr Jonathan Crowe is Head of School and Dean of the School of Law and Justice at the University of Southern Queensland, where he also holds a Research Chair in Law and Justice. He previously taught at Bond University and the University of Queensland, and has held visiting positions at Georgetown University and the

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

University of Texas at Austin. He is the author or editor of 11 books and well over 120 book chapters and journal articles, primarily on legal philosophy, ethics and public law. He co-edits the *Journal of Legal Philosophy.*

Dr Shaunnagh Dorsett is Distinguished Professor of Law at the University of Technology Sydney. She is an Honorary Fellow of the American Society for Legal History, a member of the Board of the European Society for Comparative Legal History, and a member of the editorial Committee of *The Journal of Legal History.* She is co-founder of the Legal Histories of Empire conference series. She is the author of a number of books and edited collections including, most recently, *Navigating Legalities: Legal Histories of Empire* (Routledge 2024), edited with Lyndsay Campbell.

Dr Heather Douglas AM is a Professor at the Melbourne Law School, The University of Melbourne and Deputy Director of the ARC Centre of Excellence for the Elimination of Violence Against Women (CEVAW). She researches in criminal law with a focus on legal responses to domestic and family violence. Recent books include a collection edited with Nicole Watson, *Legal Education Through an Indigenous Lens: Decolonising the Law School* (Routledge, 2025) and a collection edited with Kate Fitz-Gibbon, Leigh Goodmark and Sandra Walklate, *The Criminalization of Violence Against Women: Comparative Perspectives* (OUP, 2024). Heather is also the author of *Women, Intimate Partner Violence and the Law* (OUP, 2021). Heather's heritage is Scottish and Irish.

Dr Ann Genovese is a Professor at the Melbourne Law School, The University of Melbourne. She teaches and researches in the fields of Australian history and historiography, feminist history and theory, and jurisprudence, with a focus on archival sources and techniques that show (and contest the orthodoxies) of how Australian people have lived with laws. Her work has been integral to the establishment of an emergent practice – jurisography. Her books include *Australian Critical Decisions: Remembering the Koowarta and Tasmanian Dam Case* (Routledge, 2017); *The Court As Archive* (ANU Press, 2019) (with Rubenstein and Luker); and *Feminist Jurisography: Law, History, Writing* (Routledge, 2022). Ann's heritage is Italo-Australian.

Dr Michael Head is a Professor at the School of Law, Western Sydney University and a correspondent for the *World Socialist Web Site*. His most recent books include *Democracy, Protest and the Law: Defending a Democratic Right* (Routledge 2024), *Domestic Military Powers, Law and Human Rights: Calling out the Armed Forces* (Routledge 2020), *The Legal Power to Launch War: Who Decides*? (with Kristian Boehringer) *(*Routledge 2019) and *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (Ashgate 2016).

Dr Harry Hobbs is an Associate Professor in the Faculty of Law and Justice at the University of New South Wales. Harry holds an ARC Discovery Early Career Research

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Award investigating Indigenous-State treaty-making. He has written widely on treaty in leading Australian and international legal journals, such as the *Sydney Law Review* and the *University of Toronto Law Journal*. He is also the co-author of the leading Australian book on the topic: *Treaty* (Federation Press, 2nd ed, 2020) (with George Williams), and an edited volume: *Treaty-Making 250 Years Later* (Federation Press, 2021) (with Alison Whittaker and Lindon Coombes). Alongside this work, Harry examines the phenomenon of micronations and the growth of sovereign citizens and pseudolaw adherents in Australia and their impact on the administration of justice.

Dr Terry Hutchinson currently serves as an Adjunct Professor within the School of Law and Justice at Southern Cross University. Prior to this, Dr Hutchinson held the position of Associate Professor in Law at Queensland University of Technology, being a member of Faculty 1987-2016, and a Visiting Fellow 2017. Her publications on legal research methodologies including *Researching and Writing in Law* (Thomson Reuters, 4th ed, 2018) are widely cited internationally.

Dr Matthew Mitchell is a Lecturer in Criminology at Deakin University. Matthew's research is situated at the intersection of queer criminology and socio-legal studies, focusing on LGBTQ people's interactions with legal systems, gendered and sexuality-related harm, and technology-facilitated violence. He is an expert in qualitative research methods and critical theory, with a particular interest in discourse and legal case analysis. His forthcoming monograph, *Governing Gender: Transgender Children, Hormones, and the Law* (Bristol University Press, 2026), examines how Australian law regulates transgender young people's access to gender-affirming care.

Dr Darren O'Donovan is Senior Lecturer in Administrative Law at La Trobe Law School, Melbourne. He has written extensively on rights, oversight and public administration, with a particular focus on the National Disability Insurance Scheme and social security law. His work has a socio-legal focus and emphasises the centrality of non-judicial review bodies and first instance decision-makers to delivering administrative justice.

Dr Claerwen O'Hara is a Lecturer at Melbourne Law School, a member of the editorial board of the *Australian Feminist Law Journal*, and Co-Chair of the Australian and New Zealand Society of International Law (ANZSIL) Gender, Sexuality and International Law Interest Group. Their research spans the fields of international human rights law and international economic law, with a particular focus on queer and feminist approaches to international law, alternative internationalisms, and law and political economy. They have recently edited two books on queer approaches to international law with Dr Tamsin Phillipa Paige: *Queer Encounters with International Law: Lives, Communities, Subjectivities* (Routledge, 2024) and *Queer Engagements with International Law: Times, Spaces, Imaginings* (Routledge, 2024). Claerwen is

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

currently working on their first monograph, *Consensus in International Law: Critical History, Queer Reimaginings*, which is under contract with Oxford University Press.

Dr Alice Palmer is a Senior Lecturer at Melbourne Law School (MLS) where she teaches on the intersections between environment, development and human rights law as well as legal methods and reasoning. Palmer's research crosses practical and theoretical aspects of environmental and international laws, with a particular focus on visual images as forms and features of law. At MLS, Palmer is a Program Director of the Art and Law Program of the Institute for International Law and the Humanities (IILAH), and a Deputy Director of the Melbourne Centre for Law and the Environment (MCLE). Her prize-winning book, *Natural Perception: Environmental Images and Aesthetics in International Law*, was published by Cambridge University Press in 2023.

Dr Jeremy Patrick is a Senior Lecturer in the University of Southern Queensland School of Law and Justice, where he developed and teaches a core course on alternative approaches to legal scholarship. Jeremy has studied and taught law in the United States, Canada, and Australia. His scholarship draws upon legal history, comparative law, and legal realism, and is primarily in the areas of constitutional law and law and religion. His monographs and edited collections include *The Impact of Law's History: What's Past is Prologue* (Palgrave MacMillan, 2022), *Faith or Fraud? Fortune-telling, Spirituality, and the Law* (UBC Press, 2020), and *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016). He is a founding co-editor of the *Australian Journal of Law and Religion*.

Dr Flynn Pervan is an Associate Lecturer in Criminology at Deakin University. His work spans historical and theoretical criminology, with a particular emphasis on disciplinary histories, and the historiographical and methodological work of Michel Foucault and Gilles Deleuze.

Dr Theunis Roux is Professor of Law and Head of the School of Global and Public Law at UNSW Sydney. Before relocating to Australia in 2019, he was the founding Director of the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), now affiliated to the University of Johannesburg. He researches in the area of comparative constitutional law, with a particular interest in the law and politics of constitutionalism in the Global South. He is the author of *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (Cambridge University Press, 2013) and *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018). His most recent significant publication is 'Grand Narratives of Transition: The Quest for Democratic Constitutionalism in India and South Africa' (2024) 57 VRÜ/WCL 5.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Dr James Stewart is a Senior Lecturer in law at the RMIT University School of Law. James' research and teaching focuses on critical legal histories, private law, and legal theory. He has published a number of works on critical legal studies and cultural interactions with law.

Guy Suttner lives in Sydney on the land of the Wangal people. He graduated from UNSW with a Bachelor of Laws (Hons I) and a Bachelor of Arts.

Dr Kristopher Wilson is an Associate Professor in Law at Flinders University. Kris' research covers cybersecurity, computer-related crime, Indigenous traditional knowledge in a digital context, Indigenous legal relations, and cultural and intellectual property protection. Most recently, Kris was a contributor to the 1970 UNESCO and 1995 UNIDROIT Conventions on Stolen or Illegally Transferred Cultural Property (Oxford University Press, 2024) and he is a collaborator on the Indigenous peoples and cultural heritage international research and capacity-building initiative in the second phase (2023-2027) of the UNESCO Chair program. He is currently co-editing a two-volume special issue titled 'Decolonising Cultural Property' for the *International Journal of Cultural Property*, and is a co-editor of a forthcoming book with Palgrave on Indigenous Research Methodologies. Kris is a descendant of the Arabunna and Dieri Peoples.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Introduction

*Harry Hobbs and Jeremy Patrick**

I Law Conventionally Understood

If you were to ask a layperson how they think a difficult legal case is won, they may very well form an image of a besuited, spectacled young lawyer poring over a stack of dusty books in a lonely corner of a large library. The hour is well past midnight when suddenly the eureka moment comes: the all-but-forgotten case from 1872! The never-repealed statute from the reign of King Henry VIII! The unstated premise in the layperson's imagination is that "law" is simply an enormous collection of statutes and cases, and the lawyer that finds the most apt (and potentially obscure) authority will necessarily triumph.

Law students in Australia will have a *slightly* different view. They know that legal research is done on computers, often using expensive, subscription-only databases. But they very well may still hold the same underlying view of law: that challenging legal issues are resolved by adducing authorities until a judge is persuaded by their inexorable weight and declares victory for the side able to produce the most robust argument. Law students will be taught a more sophisticated set of concepts to convey this notion: "precedent", "controlling authorities", a case that can be "distinguished" vs one that is "on all four corners", and the "rule of law", among others. Having been infused with the belief that "law" is a rational, systematic, and effective way to resolve disputes, law students understandably take formal legal doctrine seriously. If nothing else, they will be tested repeatedly on their ability to resolve hypothetical factual scenarios by applying formal legal rules (the so-called "ILAC" or "IRAC" method of problem-solving).[1]

Many graduating law students (though not as many as is commonly assumed) will go on to become practising lawyers and put this doctrinal understanding of law into effect: researching internal memos for their supervising partner, writing client advice letters, drafting submissions, and so forth. A small percentage might become academics in a system of Australian legal education that is heavily influenced by the profession and its demand that the curriculum produce "practice-ready" students. Teaching traditional approaches to law, it will be second nature for most of these academics to produce traditional legal scholarship. An even smaller percentage of

* We thank Maxine Evers and Pauline Collins for their valuable comments on an earlier draft.

1 ILAC: Introduction, Law, Application, Conclusion; IRAC: Introduction, Rule, Application, Conclusion.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

law graduates may someday become judges in an Australian judiciary known for a deeply legalistic, technocratic, and institutionalist mindset towards resolving legal issues. In each of these areas – legal education, legal scholarship, and judicial opinion writing – the understanding of law as doctrine reigns supreme.

But there is another way to think about law. Instead of law being a "closed" system that can only be understood through traditional legal research and analysis, law can be conceptualised as an "open" system in which insights, approaches, and influences from other disciplines can be brought to bear.[2] Laws around sexual assault can be accurately described by any good doctrinal criminal lawyer, but feminist legal scholarship offers deep critiques and proposals for reform. Doctrinal public law scholars presented valuable evaluations of the legal effect the Aboriginal and Torres Strait Islander Voice would have (if it were enacted at the referendum),[3] but critical race, Indigenous, and post-colonialist scholars were able to offer something more and different than just technical legal analysis. And where the establishment-oriented legal profession, professoriate, and judiciary pledge allegiance to the "rule of law", a Marxist or modern-day legal realist may remind us of the deep inequalities of wealth, privilege, and status perpetually maintained by the capitalist system and the legal framework that supports it. In short, when law is understood as more than simply a body of rules, but instead as a vital social construct deeply embedded in the history, culture, and values of a people, it makes perfect sense to examine it from a wide range of perspectives.

The purpose of *Beyond Doctrine: Alternative and Critical Approaches to Law* is to highlight different perspectives, reminding readers that "law" is far more than a dry, sterile collection of mechanically applied rules. Our hope is that by broadening the vision of legal education, our legal system itself can be reimagined. Each of the seventeen chapters in this collection provides an introduction to a different way of approaching legal issues, and each is written by one or more experts with a background in and focus specifically on Australian law.

This collection is the first of its kind in Australia, but that fact alone raises an interesting question: why has it taken so long? The remainder of this introduction answers that question. Below, Part II outlines the history of legal education in Australia, tracing its colonial roots in the apprenticeship model all the way to modern law schools. Part III dives deeper into law schools and examines a central tension in their purpose: are they essentially trade schools to prepare graduates for legal practice or are they part of the classic Enlightenment project to produce well-rounded citizens schooled in the liberal arts and humanities? In a memorable phrase, are law schools designed to produce 'plumbers' or 'Pericles'?[4] This discussion includes the growing presence of Indigenous understandings of law in Australian law school curricula.

---

2 See Pauline C Westerman, 'Open or Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart, 2011) ch 5.

3 *Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023* (Cth). On the Voice proposal see Harry Hobbs, 'Special Issue on the Aboriginal and Torres Strait Islander Voice' (2023) 34(2) *Public Law Review* 95-164.

4 William Twining, 'Pericles and the Plumber' (1967) 83(3) *Law Quarterly Review* 396.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Part IV then moves the focus beyond legal education and into legal scholarship to discuss both the dominance of the doctrinal methodology and a range of alternatives.

II A Brief History of Legal Education in Australia

For more than 65,000 years, legal education on this continent concerned the instruction and maintenance of the laws of Aboriginal and Torres Strait Islander peoples and societies. While each community developed their own distinctive body of norms and rules to regulate disputes and promote positive relationships, the First Laws of this continent share foundational commonalities. Holistic and pervasive, Aboriginal laws are broader than Western understandings of 'law'; they encompass notions of culture, of living in a proper manner, and of following the way of the ancestors.[5] These laws are intimately connected to the tracts of Country that each community is connected to and is responsible for. But law does not only 'flow … from the living heart' of Country, it sustains that Country.[6] In the indelible words of Kombumerri and Munaljahlai legal scholar Christine Black, 'the Land is the source of Law'.[7] Aboriginal law is Country, but it is also based on precepts of relationality, respect, and autonomy.[8]

The source, content and shape of Aboriginal law differs from Western law, but legal education requires the same deep grounding in study. Like an apprenticeship, individuals are taught or initiated into the system by highly trained elders who serve as guardians of the law. In ritual and ceremony, senior Elders pass the law down through means of songlines, stories, paintings, and dance, giving meaning to sites and connecting people to Country.[9] Some laws are public, but others are secret. The relationship a person has with Country and community – their gender, their family, their skin group, their level of initiation – can determine the scope of their instruction.

Colonial dispossession and European settlement undermined traditional authority and dislocated members from their community, their Country, and their law. Yet, Aboriginal law continues to be lived, sung, and told on and through the land.[10] Indeed, given the law 'is of Country', it 'cannot be eliminated'.[11] Adapting and responding to accommodate and utilise non-Indigenous law and practice, Aboriginal

5 Marcia Langton and Aaron Corn, *Law: The Way of the Ancestors* (Thames and Hudson, 2023) 36.

6 Ambelin Kwaymullina and Blaze Kwaymullina, 'Learning to Read the Signs: Law in an Indigenous Reality' (2010) 34 *Journal of Australian Studies* 195, 202-3.

7 Christine Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2010).

8 Mary Spiers Williams, 'Challenging Settler State Legal Fantasies: Basic Precepts of First Law' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 61, 74; Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Humanities* 181.

9 James Gurrwanngu Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2 *Northern Territory Law Journal* 236, 240-243.

10 Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015).

11 Williams (n 8) 76.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

law 'exists as a real force, influencing or controlling the acts and lives' of Indigenous peoples across the continent.[12]

Nevertheless, given colonisation saw the English common law 'transposed and imported'[13] to this land as a settler 'birthright',[14] to speak of legal education in Australia today is to speak of the instruction and preparation of graduates for entry into the practice of Australian law. In this part, we provide a short overview of the changing model of Australian legal education over the last two centuries, tracing the development from the apprentice to the university graduate. This history is important. As Linda Martin has noted, the 'vital structural and intellectual components of our legal tradition were firmly entrenched during the nineteenth century'.[15] As we will see, despite major changes, the judiciary and profession continues to exercise significant control over legal education.

A The Colonial Apprenticeship Model

The legal profession first began to emerge in England during the thirteenth century. Education followed an apprenticeship model, with aspirants attached to courts.[16] Gradually, responsibility for training was assumed by practitioners, carried out within one of several guilds of lawyers in London, known as the Inns of Court. The four Inns operated in a similar manner to the universities of Cambridge and Oxford but taught the 'law of the land' as opposed to canon or Roman law. Within the Inns, students practised moots, attended lectures (or, given their content and tone, more strictly 'readings'), and dined with colleagues. Senior members of the Inn were responsible for selecting candidates for admission.

By the mid-eighteenth century, responsibility for legal education shifted from the Inns to university-affiliated law schools that took a broader view of the subject. Nonetheless, the profession retained a substantial role. A university law degree did not entitle one to practice: solicitors were required to serve five years as an articled clerk to an established attorney before admission, while aspiring barristers were expected to undertake a pupillage under the guidance of a senior practitioner.[17]

Legal education in the Australian colonies initially followed the apprenticeship model.[18] In the absence of both the Inns and law schools, however, the authority

12 Australian Law Reform Commission, 'Recognition of Aboriginal Customary Laws' (Report No 31, 1986) vol 1, 79 [103].

13 David Lieberman, 'English Legal Culture in the Late Eighteenth Century: Institutions and Values' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 40, 44.

14 Alex Castles, 'The Reception and Status of English Law in Australia' (1963) 1 *Adelaide Law Review* 1. See further *R v Murrell* [1836] NSWSC 35. See, Bruce Kercher, *Australia: R v Ballard, R v Murrell and R v Bonjon* (1998) 3(3) *Australian Indigenous Law Reporter* 410.

15 Linda Martin, 'From Apprenticeship to Law School: A Social History of Legal Education in Nineteenth Century New South Wales' (1986) 9 *UNSW Law Journal* 111, 111.

16 John Baker, *Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 165-184.

17 Ibid 183.

18 Michael Coper, 'Law Reform and Legal Education: Uniting Separate Worlds' (2008) 39 *University of Toledo Law Review* 233, 234.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

responsible for admission served 'as a significant pedagogical force in the colony'.[19] That authority was the profession. While 'no formal educational qualifications were necessary', applicants seeking to become solicitors were required to serve five years as an articled clerk to an established practitioner and then submit to the examination of Supreme Court judges on their character and legal knowledge.[20]

Reflecting a wider political contest between emancipists (freed convicts) and exclusives (free men), the only avenue to the New South Wales Bar required men to seek admission in Great Britain or Ireland: there was no path for local lawyers. This did not change until passage of the *Barristers Admissions Act 1848* (Imp). The Act established a Board consisting of three judges of the Supreme Court of New South Wales, the Attorney-General, and two barristers who would determine whether a candidate would be admitted. Once again, although no formal qualifications were necessary, it was recognised that legal professionals should have a broad 'liberal and legal education'[21] beyond the simple recitation of doctrine and principles. To be admitted, a candidate needed to pass an examination in Greek, Latin, Mathematics, Law and any other branch of knowledge the Board deemed appropriate.[22] Without an accompanying training program,[23] applicants would undertake their own private course of study. A similar Board was established for solicitors in 1877.

The establishment of the Board ensured the profession remained firmly in charge of legal education. As the initial development of legal instruction at the University of Sydney demonstrates, the profession exercised this power by maintaining its 'proprietorial role in managing legal education' throughout the colony.[24] In 1850, the University of Sydney was incorporated. While a Faculty of Law was inaugurated in 1855 (becoming the first law school in Australia),[25] no teaching commenced until 1859 when John Hargrave, Solicitor-General and Member of the Legislative Council, was appointed Reader in General Jurisprudence. Hargrave's lectures were liberal rather than vocational in orientation; a review of his notes reveals a focus on the study of 'abstract law' as 'a high and noble science'.[26] Evidently, the Board was unimpressed. Although legislation exempted Arts graduates from the humanities section of the Bar exam,[27] the Board refused to recognise the jurisprudence examination set by Hargrave.[28] Martin notes the reasons for

19 Martin (n 15) 120.
20 Ibid 115.
21 Ibid.
22 *Barristers Admissions Act 1848* (Imp) 11 Vic 58. Note that the Board could admit practitioners from England without examination: David Barker, *A History of Australian Legal Education* (Federation Press, 2017) 30.
23 Committee on the Future of Tertiary Education in Australia, *Tertiary Education in Australia: Report of the Committee on the Future of Tertiary Education in Australia to the Australian Universities Commission* (1964) (the 'Martin Report') vol 2, 52 [11.9].
24 JM Bennett, 'Out of Nothing…' in John and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 29, 29.
25 See Nickolas James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965, 966-67.
26 Martin (n 15) 122.
27 *Sydney University Graduates Act 1857* (NSW) s 1, 2.
28 Martin (n 15) 126; Barker (n 22) 31.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

this refusal were 'not clear',[29] though Hargrave himself had doubts over the efficacy and practical utility of academic legal training. In the face of division and ambivalence, lectures were discontinued in 1869, with the faculty becoming 'almost entirely an examining body'.[30] The divide between the Admissions Board and the University was maintained until 1890, when Pitt Cobbett was appointed the first chair and a full academic program commenced.[31]

The same tension was not present in Victoria. The University of Melbourne began teaching in 1855. Low student enrolments prompted the introduction of legal instruction in 1857.[32] By 'happy accident', the University Chancellor Redmond Barry was also a judge of the Supreme Court of Victoria, which was responsible for the colony's admissions rules. Barry ensured that the Board's rules exempted graduates from the Supreme Court's law exams,[33] ensuring a small but steady stream of enrolments.

B Rise of the Law Schools

The establishment of law schools in Sydney and Melbourne marked the first period in the 'growth of modern-day Australian legal education'.[34] Nonetheless, growth was slow. It took several decades for the remaining colonies and later states to institute their own law schools housed within universities, beginning with Adelaide in 1883, before Hobart (1893), Perth (1927) and Brisbane (1936) followed.[35] As David Barker notes, the formation of law schools in Australia during this early phase was characterised by 'long-drawn out' processes.[36] In part, these delays can be attributed to unease within the profession over the emergence of law as an academic discipline,[37] and uncertainty within the academy that a professional school belonged within a university. The emerging law schools themselves wrestled with this tension: should their objective be to impart a broad and liberal education or to prepare graduates for practice?[38]

This tension also manifested itself in the institutional setting within which Australian law schools operated. These schools were small, with limited resources and few ongoing staff. Indeed, prior to World War II, law schools 'were run primarily by part-time practitioner teachers, led by a full time professor who acted as Dean'.[39] In the immediate post-WWII period, Australia could only count 'around fifteen

29 Martin (n 15) 126.

30 Ibid 128; John Mackinolty, 'Before the Beginning 1850-1890: Mr Justice William Charles Windeyer, Dean, 1883-1891' in John and Judy Mackinolty (eds), *A Century Down Town: Sydney University Law School's First Hundred Years* (Sydney University Law School, 1991) 13, 20.

31 Bennett (n 24) 38.

32 James (n 25) 966-67.

33 John Waugh, *First Principles: The Melbourne Law School 1857-2007* (Miegunyah Press, 2007) 7.

34 Susan Bartie, 'Towards a History of Law as an Academic Discipline' (2014) 38 *Melbourne University Law Review* 444, 474.

35 James (n 25) 966-67.

36 Barker (n 22) 42.

37 In each jurisdiction, it was necessary to secure the support of the relevant Admissions Board to ensure graduates would be entitled to practice: ibid.

38 See discussion in Victor Windeyer, 'Learning the Law' (1961) 35 *Australian Law Journal* 102.

39 Susan Bartie, 'A Full Day's Work: A Study of Australia's First Legal Scholarly Community' (2010) 29(1) *University of Queensland Law Journal* 67, 67.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

full-time teachers'.[40] This was not seen as a problem, but as 'one of the great strengths of legal education'.[41] Pitt Cobbett, the first Dean of the Sydney Law School explained that drawing heavily from the profession would provide 'an ample guarantee that the teaching would have a sufficiently practical bias'.[42] Almost seventy years later, Dean of the University of Tasmania Law School, Norman Dunbar, reiterated this view, noting that law schools should remain primarily a 'professional institution'.[43] In some cases, the site of the law school accentuated this connection: Sydney Law School's location in the heart of the city's legal district, far removed from university grounds, 'was no accident' and spoke to the profession's desire to 'ensure … that legal education would remain practice-based'.[44] In terms of pedagogy, the approach of early Australian law schools was strictly expositional and lecture-based, treating law as a system of formal principles and rules that needed to be memorised by students and then regurgitated in exams.[45]

The apprenticeship model persisted, particularly in New South Wales. As Justice Kevin Lindgren recalled, given there was only one university in the State, 'most people outside the Sydney Metropolitan area' sought entry by undertaking articles and examinations, rather than the Bachelor of Laws (LLB).[46] Indeed, in 1962 only 59 per cent of the state's solicitors and 50 per cent of barristers were university graduates.[47] This did not change quickly; it was not until 1968, that university graduates comprised a majority of yearly admissions, while in 1978, almost one-third of admittees did not possess a degree.[48]

In this respect, New South Wales was an outlier.[49] By 1962, the overwhelming majority of persons admitted to practice in other jurisdictions had obtained an LLB. In Queensland, the number of graduate solicitors stood at 71 per cent, in South Australia, 88 per cent, while in Victoria, Western Australia, and Tasmania at least 95 per cent of the profession were university graduates.[50] Even so, as Michael Chesterman and David Weisbrot note, these law schools 'were generally viewed as adjuncts to the legal profession rather than truly academic institutions dedicated to liberal educational aims'.[51] The manner and content of their instruction may not have

40 Coper (n 18).
41 Barker (n 22) 60.
42 Martin (n 15) 141.
43 Norman Dunbar, 'Common Sense in the Law School' (1961) 1 *University of Tasmania Law Review* 541.
44 Martin (n 15) 142-3.
45 James (n 25) 967.
46 Kevin Lindgren, 'Reflections on Legal Education' (2006) 9 *Newcastle Law Review* 67, 67.
47 Martin Report (n 23) 70.
48 Committee of Inquiry into Legal Education in New South Wales, *Legal Education in New South Wales* (1979) (the 'Bowen Report') 184, Table 7-A.
49 Zelman Cowen and David Derham, 'Australian Legal Education: A Dissent' (1956) 9 *Journal of Legal Education* 53, 54. Cf PB Carter, 'Australian Legal Education: Miscellaneous Comments' (1955) 8 *Journal of Legal Education* 179, 181.
50 Martin Report (n 23) 70.
51 Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 711.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

amounted to much more than 'the uncritical transmission of legal doctrine'.[52] As the memorable words of the 1964 Martin Report on the Future of Tertiary Education in Australia, declared: 'Law, it has been said, can be taught under a gum tree, and, for much of Australia's history it might as well have been so taught'.[53]

It was not until the expansion of law schools from the 1960s onwards that this model came under some pressure. Between 1960 and 1980, six law schools were established to service a larger generation of school leavers and an expanding economy.[54] These new schools liberalised the legal profession, opening places for individuals capable of completing a law degree but who may not have been able to secure an articled clerkship. Expansion helped ensure that 'universities became the dominant providers of legal education' in Australia.[55] The growth of these schools and the emergence of professional law teachers also prompted new thinking about legal education.[56] Major reports during this period recognised the need to broaden legal education 'beyond the parroting of a set of rules',[57] to include 'an understanding of the role of the law in society'.[58]

The close relationship between legal education and the profession ensured that legal scholarship largely remained 'predominantly positivist'.[59] Nevertheless, cracks were beginning to emerge. Susan Bartie's close study of scholarly book reviews during this period reveals a cohort of legal academics that argued their students needed to 'to be equipped with knowledge of politics, sociology and philosophy', and that law should be conceived as 'an instrument of social policy'.[60] This period coincided with more fundamental changes to the apprenticeship model. Increasing criticism centred on the system of articled clerks, with many noting that busy practitioners had little time (and perhaps inclination or capacity) to instruct their clerks appropriately.[61] In New South Wales, the requirement to undertake articles was abolished in 1974,[62] in favour of a course of practical legal training. All other states have since introduced a similar practical legal training pre-admission requirement, though Victoria still offers an alternative.[63]

---

52 James (n 25) 965; Mary Keyes and Richard Johnstone, 'Changing Legal Education: Rhetoric, Reality, and Prospects for the Future' (2004) 26(4) *Sydney Law Review* 537, 539.

53 Martin Report (n 23) 57.

54 Barker (n 22) 65-97.

55 Bartie (n 34) 476.

56 Coper (n 18) 233.

57 Dennis Pearce, 'The Past is a Different Country' in Kevin Lindgren, Francois Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2017) 49, 51.

58 David Barker, 'The Bowen Report' in Kevin Lindgren, Francois Kunc and Michael Coper (eds), *The Future of Australian Legal Education* (Thomson Reuters, 2017) 57, 61.

59 Chesterman and Weisbrot (n 51) 710; Erwin Griswold, 'Observations on Legal Education in Australia' (1952) 5 *Journal of Legal Education* 139, 145. For legal positivists, the existence of law depends on social facts, not on its ethical or moral content.

60 Bartie (n 39) 84.

61 Martin Report (n 23) 55 [11.28]; Report of the Committee on Legal Education, *Report of the Committee on Legal Education* (1971) ('Ormrod Report') [14].

62 Paul Cooper, 'Training Solicitors: The Expectations of the Profession' (1985) 3(1) *Journal of Professional Legal Education* 57, 58

63 Victorian Legal Admissions Board, 'Supervised Legal Training' <www.lawadmissions.vic.gov.au/qualifications-and-training/supervised-legal-training> (15 March 2024).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

The shift towards formal programs of education accelerated with the 'unprecedented and unexpected' law school expansion from the late 1980s.[64] Higher education reforms instituted by Education Minister John Dawkins abolished the distinction between education providers and transformed Australia's universities into 'a mass education system'.[65] Since 1989, 26 law schools have been established, bringing the total in Australia to 38. And yet, the 'avalanche'[66] of university-affiliated law schools has not entirely displaced alternative routes. In New South Wales, for instance, the Legal Profession Admission Board, the successor organisation of the historically split Barristers and Solicitors Admissions Boards, continues to offer a Diploma in Law that satisfies the academic requirements for admission.[67] Even here, however, the encroachment of professional education is visible. Since 1962, a formal course of tuition has been provided by practitioners and academics.[68] Graduates are low but relatively steady.[69]

From a traditional apprenticeship model to rote education in textbook legal principles by part-time teachers to modern and sophisticated curricula taught by full-time academics, legal education in Australia is still heavily influenced by the judiciary and the profession. The right to practise as a lawyer in an Australian jurisdiction is conferred by the relevant Supreme Court, exercised by an admissions board. Law schools must obtain accreditation from these admitting authorities, and this means the content of their core curriculum must satisfy the expectations of the judiciary and profession. As we explore below, this regulatory structure encourages a focus on doctrine and accentuates the key tension inherent within legal education.

III Competing Visions of Legal Education

In 1967, William Twining's celebrated lecture 'Pericles and the Plumber' was published in the *Law Quarterly Review*.[70] As summarised by Daniel Goldsworthy, '[Twining's] lecture, and its title, are an allusion to the tension between the contrasting views

64 Barker (n 22) 99.

65 Margaret Thornton, 'The Law School, the Market and the New Knowledge Economy' (2019) 10(7) *German Law Journal* 641, 641.

66 Barker (n 22) 99–126.

67 The Australian National Institute of Management and Commerce also offers an LLB degree that is accredited in New South Wales: Australian National Institute of Management and Commerce, 'Bachelor of Laws (LLB)' <www.imc.edu.au/future-students/school-of-law/bachelor-of-laws> (9 April 2024).

68 Bowen Report (n 48) 155–156.

69 In 2021-22, 126 students graduated, a slight uptick from 108 and 109 in 2019-20 and 2020-21: NSW Legal Profession Admission Board, *Annual Report 2021-22* (2022) 9. Although not directly comparable, 3,816 students graduated with an LLB or JD from a NSW or ACT law school in 2018: Council of Australian Law Deans, '2018 Data Regarding Law School Graduate Numbers and Outcomes' (2019) <https://cald.asn.au/wp-content/uploads/2019/07/Updated-Factsheet-Law_Students_in_Australia-20-04-2019.pdf>. For discussion, see, Harry Hobbs and George Williams, 'The Participation of Indigenous Australians in Legal Education, 2001-2018' (2019) 42(4) *UNSW Law Journal* 1294, 1315.

70 Twining (n 4).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

that legal education is an intellectual field of study on one hand, and on the other that it is essentially practical, vocational training in preparation for legal practice'.[71] Over fifty years later, the tension remains—at least in Australia. In 2020, Margaret Thornton noted that:

> [t]he discipline of law is still somewhat schizophrenic about whether it should prioritise academic or professional norms … This problem has been accentuated in Australia because of the close links between legal education and the legal profession.[72]

The tension reveals fundamental and abiding differences about the nature of law and the role and status of lawyers. If lawyers are practical skill-based problem solvers – essentially a fancy type of tradie that wears suits instead of Hi-Vis – thinking of law school as a type of trade school makes perfect sense. If lawyers are (to use dated gendered terms) "learned men" or "men of letters" devoted to a "life of the mind" requiring deep and wide-ranging intellectual thought, then thinking of law schools as centres of academic learning is what makes sense instead. In what follows, this central tension is explored.

A Law Schools as Trade Schools

The predominant conception of law schools in Australian history has been as a type of professional trade school. Medical schools pump out doctors, nursing schools pump out nurses, and law schools pump out lawyers. After all, what is it that a lawyer does, if they do not practise law? Whereas other trades involve tangible tools—plumbers with their plungers and builders with their hammers—lawyers have intangible tools in the form of a vast body of doctrine (the common law) which continually "works itself pure" and, sooner or later, provides an answer to every conceivable legal question.

The colonial-era advocates of formal legal education in Australia were not Oxford dons or German theorists, but pragmatic lawyers and business leaders who knew that the old apprenticeship model was no longer up to the task. From the earliest days of Australian legal education, the judiciary and the profession influenced what and how was taught in Australian law schools:

> From its evolution in New South Wales, and subsequently in the later colonies, the training of lawyers was very much a practical exercise with control being exercised by the judiciary as to the educational requirements which were mostly practical. The establishment of the early law schools gave rise to controversy from other established university disciplines which considered that law teaching was not an academic discipline but was more a practical vocation which had no place in a university.[73]

Universities did come to accept law schools, of course, but:

---

71 Daniel Goldsworthy, 'The Future of Legal Education in the 21st Century' (2020) 41(1) *Adelaide Law Review* 243, 244.

72 Margaret Thornton, 'The Challenge for Law Schools of Serving Multiple Masters' (2020) 62(2) *Australian Universities' Review* 5, 5.

73 Barker (n 22) 49.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

> the professional authorities considered, and made it abundantly clear, that they should not accord recognition for professional entry purposes to a university law degree unless it was perceived to have a substantial 'hard law' content in subjects directly related to private practice.[74]

When an eminent American scholar visited several Australian law schools in the early 1950s, he noted 'the profession in Australia is too much concerned with practical instruction, and that it would make an important contribution to legal education if it would give the universities a considerably freer hand in the development of their programs'.[75] In a rejoinder defending the Australian way of legal education, the then-Dean of Melbourne Law School wrote that:

> [l]aw learning and study which gets out of touch with law practice and administration can become a very arid thing, and it is our belief that this association between law school and law profession is to be cherished. So far as we know, no English school has it, and many American schools lack it.[76]

The conception of law school as a type of trade school was no historical accident, but a conscious choice maintained despite criticism. Indeed, when there was later movement in some law schools towards teaching law as a social practice with ideological implications,[77] the profession and judiciary pushed back hard. The most decisive move towards retrenchment of law schools as trade schools was the 1992 Law Admissions Consultative Committee (LACC) Report.[78] The latter became famous for articulating the so-called "Priestley 11" core areas of knowledge that a law school would have to teach in order for its graduates to be admitted to legal practice.[79]

As Thornton notes:

> It is notable that the Priestley 11 ignored the broadening of the curriculum that had been occurring with the modernisation of the teaching of law and the embrace of social liberalism from the 1970s onwards … Second generation law schools, such as Monash, the University of NSW and Macquarie, were interested in the study of law in its social context and law as an instrument of social justice; they were particularly keen to break away from the 'trade school' image of the past.

---

74 Chesterman and Weisbrot (n 51) 712. As Nickolas James writes, 'The approach of the first Australian law schools to teaching law was strictly formalist and doctrinal. Legal education was little more than the "imparting of information in the form of legal principles, rules and propositions…to be committed to memory for examination purposes". The legal profession controlled both the content of the curriculum and its teaching': James (n 25) 967, quoting Martin Report (n 23) 57 [11.37].

75 Griswold (n 59) 145.

76 Cowen and Derham (n 49) 54.

77 James (n 25) 969.

78 A good overview of these reports is provided in Robert French, 'Legal Education in Australia – A Never Ending Story' (4 July 2011) (Conference Paper) 18-22.

79 *Legal Profession Uniform Admission Rules 2015* (NSW) sch 1 ('Admission Rules'). The Priestley 11 areas of knowledge are 'Criminal Law and Procedure, Torts, Contracts, Property, Equity, Company Law, Administrative Law, Federal and State Constitutional Law, Civil Dispute Resolution, Evidence and Ethics and Professional Responsibility'. The Priestley 11 knowledge areas were named after Justice Priestley, former New South Wales Court of Appeal judge and chair of the LACC, who determined the compulsory subjects for an Australian law degree.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

> However, these trends exerted no discernible effect on the LACC. Even non-doctrinal subjects with a long tradition of being taught in universities, such as jurisprudence and legal history, did not appear in the Priestley 11. The expectation that the primary role of the law curriculum was to prepare students for private practice lingered on.[80]

From an outsider's perspective, perhaps the most surprising outcome is that now, over thirty years later, the "Priestley 11" remains almost completely unchanged. Despite early, frequent, and continuing criticism,[81] inertia has effectively locked it in place. In 2024, legal education in Australia is still largely centred, like it was in 1952, around traditional common law subjects taught by the lecture method, with students memorising and applying formal rules of legal doctrine.[82] Alternative ways of thinking about the law can still be taught, but mostly at the margins in the form of voluntary electives.[83] And to be fair, most law schools (and the increasingly-corporatised and managerialist universities they are part of[84]) are not exactly straining at the bit to break free from the dictates of the professional admitting authorities. Universities are under enormous social and government pressure to produce 'job ready' graduates.[85] A key marketing tool for universities is statistics on the percentage of graduates in gainful employment within a year of graduating, while students-as-consumers understandably expect their investment of time and debt to have a tangible payoff.[86]

---

80 Thornton (n 72) 9.

81 See French (n 78) 23 (discussing the 'unanimously negative' response of key stakeholders in 1998, and the Australian Law Reform Commission criticism that the Priestley 11 is formed from stagnant and outdated conceptions of what practicing lawyers need to know); Goldsworthy (n 71) 249 (discussing the 'vast technological progress' since the Priestley 11 that has shaped the legal profession in ways it could not foresee).

82 See Griswold (n 59) 148 ('Much of the teaching appears to be by what we would call the "lecture method", that is, by direct authoritative laying-down by the instructor, with the student dutifully copying and committing'.) Even if the goal is to produce 'practice-ready' graduates, an argument could be made that the core curriculum as taught in most Australian law schools is not very good at achieving this. However, the rise of clinical legal education, work placement, skills competitions (eg mooting), co-curricular programs, Practical Legal Training courses (after graduation), and so forth helps to fill in potential gaps.

83 Stephen Parker, 'Legal Education in Australia: The Perfect Storm' (2002) 43 *South Texas Law Review* 535, 539 ('In practical terms, these admission subjects constitute about two-thirds of the degree, leaving one-third for elective subjects'). See further Alex Steel, *Good Practice Guide (Bachelor of Laws): Law in Broader Contexts* (Australian Learning and Teaching Council, 2013).

84 See Thornton (n 72) 7.

85 Ibid 6. An interesting discussion, in the Canadian context, is provided by Harry Arthurs, who writes 'Unfortunately, producing practice ready lawyers is something law schools cannot do. The problem is that no one knows what practice ready lawyers look like. We lack information about what legal practitioners do, what knowledge or competencies they actually need or use, what breadth and depth of knowledge qualify new graduates as "ready" to practice, or how long they will remain "ready" before what they learned at law school becomes obsolete'. Harry W Arthurs, 'The Future of Law School: Three Visions and a Prediction' (2014) 51(4) *Alberta Law Review* 705, 706. Additional complications are that a sizable percentage of law graduates will have careers outside of practice, and that technological changes (such as AI) can quickly change the nature of core legal tasks.

86 See Pauline Collins, 'Australian Legal Education at a Crossroads' (2016) 58(1) *Australian Universities' Review* 30, 30 (discussing the expense of legal education and the stress it places on students to find gainful employment quickly).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

In this way, law is like most of the humanities in Australia: under pressure to produce off-the-rack employees, not necessarily well-rounded and broadly-educated citizens.

B Law Schools as places of Liberal Education

Law as a subject of study may not have come to Australian universities until the 1850s, but it has a rich, deep, and long-standing connection with joint intellectual enterprise since the very origins of universities in medieval Europe. When students at a medieval university completed their six-year-long Master of Arts degree (comprising the classic subjects of grammar, logic, rhetoric, geometry, astronomy, music, and arithmetic) only then could they pursue study in one of the 'higher faculties': law, theology, or medicine.[87] In this conception, law was a noble and elevated field, equal to the study of the human body and second only to the study of God Himself. Lawyers were not shabbily-dressed, ink-stained loophole-searching word-wranglers (straight out of a Dickens novel) but instead wise and learned men: philosophers, governors, advisors, and statesmen – veritable Platonic Guardians. Law was an erudite branch of knowledge subject to rational classification, study, and articulation. In time, many would even think of it as a science.

Law thus fit easily into the evolving conception of the university as a crucial gateway for young men (as they mostly were until the past century) to become sober, well-rounded, and civic-minded members of the community. A "liberal education" acquainted students with everything from history to literature to mathematics. In the European and eventually American universities, law was a serious subject of intellectual thought to be studied by serious men, not simply a set of practical skills to be learned prior to entering a trade. In the United States specifically, law transitioned from a subject for undergraduates to a postgraduate degree. The assumption being that the broad, liberal education gained during a student's first degree (requiring compulsory courses in subjects like economics, political science, logic, history, and more) would set them up well for studying the complexities of law.[88]

But in Australia, as discussed above, this conception of legal education as part of a broad liberal education never gained widespread adherence. The "law school as trade school" model, heavily influenced by the profession, became the standard. Some scholars point to a brief span starting in the 1960s where critical approaches to law gained a brief foothold (and high visibility) in some law schools:

> In the newer law schools, in particular the traditional underpinnings of the common law and of bourgeois law in general, were assailed by Marxists and other political radicals. The debates were fought out chiefly in classrooms and in staff common rooms, but it also had a more public dimension, not only by virtue of published scholarship but also because law teachers publicly associated themselves with politically radical causes.[89]

---

87 Charles Haskins, *The Rise of Universities* (Cornell University Press, 1923) 27, 34.

88 The rise of joint-degree programs in Australia (eg 'Law & Commerce', etc) are a partial response by universities to supplement what would otherwise be a university law program that includes nothing but law. See Chesterman and Weisbrot (n 51) 715.

89 Ibid.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Similarly, the early 1970s saw some law academics adopt Feminist approaches to law[90] and the 1980s saw some allegiance to the Critical Legal Studies movement.[91] Law or legal studies programs at La Trobe and Macquarie were notable for stepping out of line of the mainstream approach to understanding law.[92]

Still, whatever effects these changes may have had on legal scholarship, the judiciary and profession maintained its dominance over the curriculum and thus legal education in general.[93] Writing in 1987, Chesterman and Weisbrot noted that:

> much of mainstream legal education in Australia continues, despite the events of the 1960s and 1970s, to operate according to a generally traditional, practice-oriented approach. New or restructured courses which embody a radical or critical approach must generally operate at the periphery.[94]

With some exceptions – like several law schools making courses in legal history, dispute resolution and jurisprudence compulsory – the situation seems largely unchanged today. In the eyes of the judiciary and the profession, and the seemingly-unchangeable standards of the Priestley 11, what makes a good lawyer is a sound understanding of traditional core legal topics like torts and contracts – not "theoretical" topics like legal realism, quantitative empirical studies, or comparative law. In Australia today, it is perfectly possible – and indeed probable – that most university law graduates will not have taken a single university course on any subject outside of the law program,[95] and that most of the subjects they take within the law program will be doctrinal in nature. If the dilemma is 'Pericles' or 'plumbers', the preference in Australia is clearly for the latter.

Yet if legal education at first appears unchanged (and unchangeable), appearances can be deceiving. Over the last decade, increasing effort has been exerted to internationalise the curriculum to facilitate global legal practice,[96] promote alternative dispute resolution skills to prepare graduates for the legal sector,[97] and introduce courses on artificial intelligence and the law in anticipation of the significant changes disruptive technologies will have on legal practice.[98] Other changes are occurring too. In the next section we discuss the burgeoning drive to bring Indigenous content into the law curriculum.

---

90 See James (n 25) 969-70.
91 Ibid 970.
92 Ibid 970-71.
93 Ibid 972 ('A widespread critical legal education movement failed to take hold in Australia.').
94 Chesterman and Weisbrot (n 51) 721.
95 Although this is not correct for students studying a double or combined degree.
96 See, for example, Robert French, 'Horses for Courses' (International Legal Services Advisory Council National Symposium, 16 March 2012).
97 Kathy Douglas, 'The Teaching of ADR in Australian Law Schools: Promoting Non-Adversarial Practice in Law' (2011) 22(1) *Australasian Dispute Resolution Journal* 49.
98 See, for example, Lyria Bennett Moses and Michael Guihot, *Artificial Intelligence, Robots and the Law* (LexisNexis, 2020).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

C Indigenous Content

In recent years, there has been a concerted push to embed Indigenous knowledges and perspectives into the law curriculum.[99] In 2020, for example, the Council of Australian Law Deans (CALD) urged all Australian law schools to 'work in partnership with First Nations peoples to give priority to the creation of culturally competent and culturally safe courses and programs'.[100] Embedding cultural competency is aimed at reducing the alienation, isolation, and racism that Indigenous students can feel in law school, and ultimately improving outcomes for Indigenous students which continue to lag those of their non-Indigenous colleagues.[101] Indeed, as CALD explained, these programs emerge out of a recognition that 'systemic discrimination … permeates the Australian legal system'.[102] But cultural competency has broader benefits. Non-Indigenous students may develop an understanding of Indigenous cultures, histories, and contemporary realities, enhancing 'critical reflexivity'.[103] It can also bring vocational advantages. As the 2010 Behrendt review notes, the teaching of Indigenous knowledges can equip graduates with the capabilities to 'meet the needs of Indigenous communities'.[104]

The patient work of Indigenous and non-Indigenous academics has led to the introduction of Indigenous content across the law degree in a number of faculties. However, while we agree with Ambelin Kwaymullina, that the 'question for law schools is no longer so much *whether* law curriculum will be Indigenised, but rather *when* and *how*',[105] ongoing challenges remain. In many – perhaps most curriculums – Indigenous content remains 'fragmented' and 'tokenistic'.[106] In other cases, non-Indigenous academics may currently feel unable to effectively teach or lead discussion on Indigenous laws and jurisprudence.[107] Genuinely embedding Indigenous knowledges into the curriculum is not only an implementation challenge, however, but might reflect the deeper divide on the purpose of legal education

---

99 Universities Australia, *Indigenous Strategy 2017-2020*.

100 CALD, 'Discrimination and Structural Bias against First Nations Peoples' (Media Release, 3 December 2020). See further Sally Kift and Kana Nakano *Reimagining the Professional Regulation of Australian Legal Education* (2021) 59: 'In 2020, CALD revised its *Australian Law School Standards* to include a positive statement that law curriculum will seek to develop these Indigenous knowledges and understandings and to foster Indigenous cultural competency'.

101 See, for example, Nicole Watson, 'Indigenous People in Legal Education: Staring into a Mirror Without Reflection' (2005) 6(8) *Indigenous Law Bulletin* 4, 5; Phil Falk, 'Law School and the Indigenous Student Experience' (2005) 6(8) *Indigenous Law Bulletin* 8, 10; Heather Douglas and Cate Banks, '"From a Different Place Altogether": Indigenous Students and Cultural Exclusion at Law School' (2000–1) 15 *Australian Journal of Law and Society* 42. See, generally, Hobbs and Williams (n 69) 1300-1303.

102 CALD (n 100).

103 Annette Gainsford, Marcus Smith and Alison Gerard, 'Accrediting Indigenous Australian Content and Cultural Competency with the Bachelor of Laws' (2021) 31(1) *Legal Education Review* 59, 65.

104 Larissa Behrendt et al, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander Peoples: Final Report* (Report, July 2012) 94.

105 Ambelin Kwaymullina, 'Teaching for the 21st Century: Indigenising Law Curriculum at UWA' (2020) 29 *Legal Education Review* 1, 30 (emphasis in original).

106 Eddie Cubillo, 'Indigenous Programs at Law School' *Law Institute Journal* (July 2022) 30, 31.

107 Ibid.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

between trade school and liberal education. In 2019, the Indigenous Cultural Competence for Legal Academics Program found some schools were reluctant to change the law curriculum, perceiving Indigenous knowledges as a 'periphery' issue, that is 'antithetical' to the core curriculum.[108]

The status and place of Aboriginal law – let alone the relationship between Indigenous Australians and the state – is and should be central to the practice and training of legal education in Australia. After all, law and lawyers have been central in the maintenance of colonisation, and the accompanying denial of Aboriginal and Torres Strait Islander peoples' rights and interests in this country. A more robust response is required. In 2015, the Truth and Reconciliation Commission (TRC) of Canada released its final report. Established for the purpose of documenting the history and continuing legacy of the Canadian Indian residential school system on Indigenous students and families, the Commission issued 94 calls to action. Recognising that the process of reconciliation must be societal and broad-based if it is to be effective, many of its recommendations were directed to civil society and non-government organisations. Two were directed to law societies and law schools. The TRC recommended lawyers 'receive appropriate cultural competency training'[109] and 'all law students … take a course in Aboriginal people and the law'.[110] Over the last decade, development has been slow but important steps have been taken. Several law societies now require practising lawyers' complete Indigenous cultural competency training,[111] while some law schools have introduced mandatory courses on Indigenous rights, law, and state-relations.[112]

Similar developments are occurring across the Tasman Sea. The New Zealand Council of Legal Education prescribes qualifications for admission to the legal profession. Recent amendments now require the study of tikanga Māori (Māori Laws and philosophy). From 1 January 2025, students must complete a compulsory subject on Tikanga Māori, and compulsory law subjects must also incorporate relevant material on Tikanga Māori.[113] A complaint by a prominent barrister that these requirements, among other concerns, impinge upon students' freedom of thought was ultimately dismissed.[114]

---

108 Marcelle Burns, Anita Lee Hong and Asmi Wood, *Indigenous Cultural Competency for Legal Academics Program: Final Report* (Australian Government Department of Education and Training, 2019) 18. Available at: <https://ltr.edu.au/resources/ID14-3906_Burns_FinalReport_2019.pdf>.

109 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (2015) Call to Action 27.

110 Ibid, Call to Action 28.

111 See, for example, Law Society of British Columbia, *Law Society Rules* (July 2023) r 3-28.1 'Indigenous intercultural course'.

112 CBC News, '28. Require All Law Students to Take a Course in Aboriginal People and the Law', *CBC News Beyond 94* (22 June 2023) <www.cbc.ca/newsinteractives/beyond-94/require-all-law-students-to-take-a-course-in-aboriginal-people-and-the-law>.

113 Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022 (NZ); *Lawyers and Conveyancers Act 2006* (NZ).

114 New Zealand House of Representatives, Regulations Review Committee, *Complaint about the Professional Examinations in Law (Tikanga Māori Requirements) Amendment Regulations 2022* (March 2025).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Developments in Canada and Aotearoa New Zealand suggests that legal education in Australia remains incomplete. We agree with Eddie Cubillo that the Law Council of Australia should 'adopt a 12th Priestley unit' on Indigenous history and law.[115] However, if recent years have seen real progress in embedding Indigenous perspectives in some law school curricula, continuing progress is not inevitable. With the defeat of the Voice referendum, some commentators have noticed signs of a general majoritarian societal "pushback" or retrenchment against other efforts at reform. The only matter that seems certain is that the next few years will be telling ones.

IV On the Value of Law Beyond Doctrine

Mainstream legal scholarship occupies a fascinating position in academia in that, in contrast to other disciplines, legal scholars rarely discuss *how* or *why* they do what they do. Whereas research papers in other fields almost inevitably feature a "methodology" section, mainstream legal scholarship simply takes it for granted that legal research is legal research, *simpliciter*. The tools taught in a first-year course on legal research and writing (spotting the relevant issues, looking up the relevant rules and authorities, and applying them to reach a persuasive conclusion) often become so ingrained that they become a new kind of "common sense"—the obvious way to approach legal scholarship. As Terry Hutchinson and Nigel Duncan write, 'the doctrinal method is often so implicit and so tacit that many working within the legal paradigm consider it unnecessary to verbalise the process'.[116] Indeed, even that term – 'doctrinal method'[117] – may be unfamiliar to legal scholars who use it intuitively in every research paper they write.

Reliance on the doctrinal method is understandable. After all, it uses the exact same toolset as practitioners drafting written submissions and judges writing opinions to justify their decisions.[118] And as it is the *only* methodology taught to many law students, it is the one they will most likely choose when a research project presents itself. By the end of law school, the doctrinal method is a comfortable one that is well-accepted by lawyers in the profession, the judiciary, and academia. It is part of what might be thought of as a self-perpetuating system because, in an important sense, the entire goal of doctrinal analysis is to maintain the coherence of the legal system.[119] And because the system is self-perpetuating, it is also a closed one:

115 Eddie Cubillo, 'Outline of Evidence of Dr Eddie Cubillo', *Yoorrook Justice Commission* (15 December 2022) 7 [11]. In Aotearoa New Zealand see, Metiria Stanton Turei, 'Indigenising Aotearoa New Zealand's Legal Education' (2022) 2(2) *Legalities* 127.

116 Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 *Deakin Law Review* 83, 99.

117 The Council of Australian Law Deans has defined the doctrinal method: 'Doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials'. See Hutchinson and Duncan (n 116) 105.

118 One might quibble that practitioners are engaging in advocacy while scholars are engaging in objective analyses, but the tools of issue-spotting, synthesising authorities, and reaching persuasive outcomes remain the same.

119 See Westerman (n 2) 89.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

a formalist approach to law asks for no help and welcomes no solicitations from other disciplines. When law schools are trade schools producing plumbers (not Pericles), why should they concern themselves with anyone outside that trade? 'In formalism', Hanoch Dagan writes:

> law is governed by a set of fundamental and logically demonstrable principles. Two interrelated features of the formalist conception of law bear emphasis: the purported autonomy and closure of the legal world and the predominance of formal logic within this autonomous universe.[120]

Yet, a crucial question remains. *What if law is more than simply a system of rules to be analysed and applied with ruthless, mechanical logic?* If law *is* something more – such as a contingent social construct influenced by and embedded within a particular cultural context – then insights from outside the "sovereign" legal system become incredibly valuable for understanding it. Once we move beyond thinking of law as doctrine, entire realms of intellectual thought can be brought to bear in exploring the origins, meaning, effects, and implications of legal artifacts.[121] Some may find it exhilarating and others find it disconcerting, but there is no doubt that it alters our understanding of what law, as an academic discipline, is for and can achieve.

In Australia, a conservative profession, a legalistic judiciary, and a doctrinally-oriented academy can marginalise alternative and critical approaches to law. It is not often an article involving Queer Legal Theory will win the citation metric game or that a Marxist analysis will demonstrate "impact" for ERA purposes by being cited in the High Court.[122] But nonetheless, there is real value in thinking about law beyond doctrine. The old saying is that a legal education sharpens the mind by narrowing it. But as the contributions that follow clearly demonstrate, truly perceptive insights about law come from those who are still able to think broadly.

---

120 Hanoch Dagan, 'Law as an Academic Discipline' (2012) Tel Aviv University Law Faculty Papers (Working Paper No 171) 3.

121 Ibid 6 ('The demise of classical formalism opens up a rich, interdisciplinary research agenda for legal scholars').

122 Though note that at least one High Court judge has referred to Marx in discussing the legal consequences of colonisation, see: *Western Australia v Ward* (2002) 213 CLR 1, 231 [529] (McHugh J).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Chapter 1

Legal History

Shaunnagh Dorsett

I Introduction

As an area of scholarship, legal history has a (sometimes deserved) reputation as 'fusty'. It can be perceived as being an endeavour undertaken by earnest scholars, locked in dusty archives, obsessing over old court records. And it can sometimes be that. But it is also a dynamic and exciting area of scholarship; one which is frequently intertwined with feminist critique, environmental history, engagement with post-colonial legacies or international law (to name a few). It can draw on primary archival sources, diaries, letters, material objects, newspapers, cases and statutes or be based on textual analysis of any of these primary sources. It can be empirical or theoretical. In fact, there are endless ways we can do legal history and a vast array of sources on which we can draw. Perhaps once the province of law schools, legal history has become a truly interdisciplinary venture; legal historians are drawn from a range of home disciplines which are as likely to be history or cultural studies (to name but two of many) as law. And, increasingly, scholars engaged with contemporary problems, such as stolen wages, police violence or sovereignty claims are turning to history and the work of legal historians. Much of the dynamism of legal history comes from the engagement with law by scholars from these other disciplines. In Australia – and beyond – the interdisciplinarity of legal history underpins much of its vitality and is key to the shape of the discipline itself.

II Doing Legal History: An Overview and a (very) Short History

So what then is legal history? This collection opened with a besuited, bespectacled young lawyer poring over a stack of dusty books in a lonely corner of a large library. As Harry Hobbs and Jeremy Patrick remind us, law students are used to the exercise of trawling for precedent. Even if the means we use to do this has changed over time – online databases and AI engines rather than old books – we as scholars and practitioners nevertheless hope that there will be a precedent or fact that will help us argue our case. Even if the reality is quite a bit more complex, it is still true to say that precedent rules. This search for precedent can be confused with 'doing legal history'. Surely searching for old cases, statutes and similar materials and the facts they reveal is doing legal history. It's all about the past, right?

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Given the love of lawyers and law students of definitions, it may be uncomfortable to realise that there is no universally agreed definition of 'legal history'. To be fair this is the case for most discipline areas. For some, there is an assumption that we all just know what legal history 'is', or what 'doing' legal history entails, or at least we do not question it – it is about (legal) things that happened in the past. What few legal history texts there are, for example, generally do not offer any definition. For others, what we understand by 'legal history' is a matter which is 'deeply controversial'.[1] Indeed any understanding of the remit or shape of legal history might depend from which discipline or perspective you view it. Christopher Tomlin's neat and straightforward description might be enough to get us going:

> legal history is the study of the history of law – of legal discourse, and legal institutions, and legal cultures, and of the circumstances in which and by which they are formed.[2]

However, even to say that legal history is a 'history of law' begs questions; not least of which, as David Ibbetson has noted, is what we mean by 'law'.[3] For lawyers and law students, the answer may be one thing; for scholars from another discipline, it may perhaps be another. It might be easier to talk of who does legal history – or even why we do legal history – than attempt to define it beyond this. What we can say perhaps is that neither simply describing something that happened in the past, nor looking for a useful precedent, would really be considered doing legal history (or really any form of history).

Law is of course intimately tied to the past. We teach law through the past. Common law method relies on precedent. Common law method suggests an incremental, slow and orderly progress towards whatever our current law is, with the potential for hopefully a little change to result from whatever matter is now before the courts. Common law method 'preserve[s] a sense of a collective past' in tension with the recognition of 'a necessity for legal change'.[4] Policy considerations are key, but in the end, we cannot depart too far or too fast from what has come before. Students quickly learn that most significant reforms will require legislative intervention and that, on occasion, courts will even signal to the legislature that they – rather than the courts themselves – should move the law forward. This backward gaze, particularly in the core units of law which all students must endure, is reinforced by generational textbooks which provide detailed lines of authority, added to in each edition. Odd or anomalous developments are explained away or removed as superfluous to orderly progression. Problematically, this endless backward gaze also obfuscates what legal history offers to students and how doing legal history is different from a simple search for precedent.[5]

---

1 Mark Leeming, 'Lawyers' Uses of History, from Entick v Carrington to Smethurst v Commissioner of Police' (2020) 49 *Australian Bar Review* 199, 201.

2 Christopher Tomlins, 'Legal History/History of Law at Berkely', 26 August 2024, available at: <https://issuu.com/berkeleylaw/docs/legal_history_history_of_law_at_berkeley_august_2> (last accessed 17 September 2024), 1.

3 David Ibbetson, 'What is Legal History a History of?' in Andrew Lewis and Michael Lobban (eds), *Law and History: Current Legal Issues* (Oxford University Press, vol 6, 2003) 33, 33.

4 Lee Godden, '*Wik*: Legal Memory and History' (1997) 6 *Griffith Law Review* 122, 123.

5 On this point see also Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2022).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Law schools now rarely offer legal history as a topic to be studied.[6] Individual subjects – particularly foundational or first year subjects – may include some discussion of aspects of the evolution of our legal system (particularly a potted history of the common law) or of small topics of interest – but as an area of law for study it is rarely even offered as an elective. Paradoxically, as an area of scholarship it is healthy and on the rise. Much of this interest in legal history stems from scholars working outside law schools – in history, politics, anthropology, criminology, gender studies or cultural studies. Its very interdisciplinary nature means that it is not just an area of legal research endeavour primarily undertaken by those with legal training which draws on work from other disciplines; the shape of the scholarship (and of legal history itself) will owe much to the training and interests of the writer.

If legal history is rarely taught in law schools now, this is barely a decline. Its place in law schools has always been limited and uncertain. Until the 1920s it had little purchase in the academy although, as Stefan Petrow notes, there were some law schools which did have some kind of legal history subjects as early as the turn of the twentieth century, although these few taught 'the whole history of English law, whether it was relevant to Australia or not'.[7] While the teaching of legal history expanded somewhat from the 1920s to the 1960s (thereafter declining again), it remained a subject in many ways faithfully tied to its English heritage. Students were far more likely to learn about the history of the various English common law courts, or about the Statutes of Westminster and Magna Carta, than anything much about the development of law in Australia and how its development might in fact have diverged rather significantly from that of its progenitor.[8] This arguably resulted from both the prevalence of English trained lawyers in Australia's small number of small law schools,[9] and the lack of textbooks which might have aided in investigating our legal history. Finally, in 1982 Alex Castles published *An Australian Legal History*, a work which gave scholars an overview of *our* history and which became indispensable to legal historians.[10]

All of this is to say that for many years legal history in Australia was the remit largely of scholars in law schools. That shaped the kind of legal history that was recognised as such: it was largely doctrinal or institutional history, or even biographies of judges or other famous legal figures. It might unpack how a particular law functioned in the past and how it evolved into the current doctrine through a careful examination of case law and legislation. How did the doctrine of unjust enrichment develop as a doctrine? When and how was the Supreme Court established? Who was Chief Justice

6 As noted in 2023, only two Australian law schools now teach legal history as a formal and compulsory part of the LLB: Julie Copley, Marcus Harmes, Sarah McKibbin, Jeremy Patrick, 'Introduction: Arbiters of Justice: Historical Studies of Southern Queensland Lawgivers' (2023) 27 *Queensland History Journal* 527-59, 527.

7 Stefan Petrow, 'Overcoming "Intellectual Colonialism": Aspects of the Teaching of Legal History in Australia, c.1890-2005' [2006] *Australia and New Zealand Law and History E-Journal* 1, 8.

8 Australia was hardly the only place this happened: see Philip Girard, 'Who's Afraid of Canadian Legal History' (2007) 75 *University of Toronto Law Journal* 727, 737.

9 Petrow (n 7) 9.

10 Alex Castles, *An Australian Legal History* (Law Book Co, 1982). There were of course others working in the area: WJV Windeyer, John Bennett, Enid Campbell and others. But Castles' book was a key moment in the development of the discipline in Australia.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Forbes and what was his contribution? All of which are worthy questions. While this kind of more traditional legal history is still alive and well – perhaps most obviously seen in histories of private law – we have moved well beyond this, to understand that legal history is a highly contextual endeavour, in which legal history is now being written by scholars from various disciplinary perspectives, using legal, extra-legal and non-legal sources. We understand that the development of particular laws and doctrines cannot be divorced from the broader context of the social, political and cultural forces which led to them. Or, conversely, we may seek to understand the role of law in the development or shape of broader social, economic or political issues. This might encompass an examination of the phenomenon of vagrancy in colonial Australia;[11] the relationship between love and law and redress for being 'jilted' in nineteenth and twentieth century Australia;[12] a history of women doing business in the nineteenth century despite the impediments of the doctrine of coverture,[13] or even a history of credit card debt and how that little piece of plastic became so ubiquitous.[14] Just as important to legal historians as a consideration of *how* did some legal phenomenon come to look as it did, is *why* did it and in response to what internal and external forces?

Key to this change was the rise of the rise of social history in the 1960s and 1970s – which emphasised 'history from below' or the importance of understanding lived experience. Social history brought the relationships 'between law and class, race and gender to the fore'.[15] Within the legal academy, scholars began bringing the methods of social history into thinking about the histories of laws. And for many outside the legal academy, work by social historians, such as EP Thompson, highlighted that law and legal regulation played a vital role in framing the relations of peoples in and with society (broadly put).[16] By the late twentieth century legal historians, not just in Australia, but in Canada, New Zealand and beyond, were responding to these developments, as a result increasingly viewing our law as being much more than simply a 'pale inheritance' from England, recognising the plurality of our legal history and the importance of First Nations engagement in shaping our nation, and uncovering the ways in which our legal developments could also be borrowed from or based on innovations in places other than the England.[17]

---

11 Catharine Coleborne, *Vagrant Lives in Colonial Australasia Regulating Mobility and Movement 1840-1920* (Bloomsbury Academic, 2024).

12 Alecia Simmonds, *Courting: An Intimate History of Love and the Law* (La Trobe University Press, 2024).

13 Catherine Bishop, *Minding Her Own Business: Colonial Businesswomen in Sydney* (NewSouth, 2015). The doctrine of coverture meant that husbands were responsible for the maintenance of their wives and controlled their property; married women could not sue or be sued, enter into contracts independently and in all their economic dealings were assumed to be working on behalf of their husbands.

14 Sean H Vanatta, *Plastic Capitalism: Banks, Credit Cards, and the End of Financial Control* (Yale University Press, 2024).

15 On this and legal history, see Jim Phillips, 'Why Legal History Matters' (2010) 41 *Victoria University of Wellington Law Review* 293, 298.

16 See eg EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, 1975).

17 Bruce Kercher, 'Why the History of Australian Law is not English: Second Alex Castles Lecture in Legal History, October 2000' (2004) 7(2) *The Flinders Journal of Law Reform* 177.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

In 1993 the Australian and New Zealand Law and History Society was established. This is now the peak scholarly organisation for scholars working in law and history. The society grew out of a series of conferences begun a decade before. Importantly, these conferences and the society which followed were established by three interdisciplinary scholars whose academic home was not a law school and two of whom were not legal scholars in the formal sense. Ian Duncanson, Diane Kirkby and Christopher Tomlins, then all members of the La Trobe Legal Studies department, began the conferences in 1983. From the outset then, the peak society was and remains highly interdisciplinary. The very name – law and history, rather than legal history – signals this and explains much of the shape of law and history scholarship in Australia to this day. Reflecting the membership of the society and the conference attendees, what was once dubbed the 'new Australian legal histories' borrows from, or harnesses, a wide range of theories, concepts and methods from other disciplines (here reflecting laws more general 'borrowing' of interdisciplinary methods) and are often jurisprudentially or philosophically engaged, drawing on legal philosophy, feminist theory, environmental jurisprudence or engaging with post-colonial legacies.[18] Some of these, for example, feminist legal histories, or environmental legal history, are emerging as recognised areas of endeavour in their own right, as new 'sub-disciplines'. In paying attention, then, to race, gender, class, comparative analysis or even through the use of non-legal sources, such as literature, legal historians frequently also draw on the different methods, sources and perspectives covered by the other chapters in this book.

III Why Does Legal History Matter for Australia?

In many ways the question 'why does legal history matter for Australia?' is little different from asking 'Why legal history matters at all?'. But there are some particularly important Australian-inflected reasons why legal history is important for our nation (and which can also help us think about why we do legal history at all). Legal history can of course offer new perspectives on every area of law in which we might be interested – from asking what were the economic and social forces post-World War II that led to the particular banking regulations that facilitated the emergence of credit cards in the mid-twentieth century to considering why transactions in land have to be in writing – and it would be impossible to discuss them all here. Perhaps most obvious, however, is that legal history matters for Australia because after decades of ignoring, or perhaps underplaying, the role of law in colonisation, it is now an inescapable fact that law was complicit in, and foundational to, the (ongoing) process of colonisation. In great part, that acknowledgement has been the result of the interdisciplinary approaches to legal history noted above. Under the sway of work in fields such as settler colonial studies, cultural studies, gender studies, histories of work and labour and others, as well that of key scholars in law schools who drew on newly discovered sources from the early colonial period, the accepted narrative of our legal origins and of the idea that law was somehow just a neutral instrument

18 On the 'new Australian legal histories,' see the special edition of *Law and History Review*: (2003) 21(3) *Law and History Review*.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

in colonisation, has been fractured. Importantly, as Anna Clark has recently stated, 'the imperative to acknowledge Indigenous historical perspectives in Australia has become central to its history'.[19] And these perspectives tell a very different story of our law, its effects from its arrival to now and why we still need to 'reckon with law'.[20] Key here has been the work of First Nations scholars both within and without the academy, not only from law, but from a variety of disciplines and with a variety of concerns – John Maynard, Gary Foley, Christine Black, Megan Davis, Noel Pearson, Shino Kinoshi, Larissa Behrendt, to name a few.

Neither law nor (legal) history are neutral disciplines. What is kept in archives, what legal decisions are retained and remembered, what law book writers judge as important to include and not, are practices which shape a discipline and our understanding of events and law's role in those.[21] They may seem neutral – we cannot keep or include everything right? – but collection decisions are all shaped by people's perspectives, ideologies and positionality. These practices often serve to silence the stories of certain (often marginalised) peoples and groups and to not just privilege some accounts of our legal history over others, but to actively shape certain accounts which then become orthodoxy. For much of the late nineteenth and twentieth centuries the story of Australia's legal origins began in 1788 with the arrival of the First Fleet. That was certainly the version of our origins taught in law schools until very recently. It was the version I was taught in the 1980s. Unacknowledged was that First Nations peoples had inhabited Australia for over 50,000 years and that on the arrival of the first Europeans Australia was already a place of law and a place of legal plurality. The arrival of Europeans had a devastating impact across the entire continent and by the mid-nineteenth century Indigenous Australians had been displaced from country and decimated by disease. But equally, the arrival of the common law had a devastating effect on Indigenous laws. The settler revolution, and indeed settler colonialism, were not just accompanied by, but were underpinned by, law.[22] Accounts of both often fail to take into account just how central law was to these processes and that, across the globe, including in the Australian colonies, Indigenous peoples were not just physically displaced or eliminated, but so were their laws.

While it is now much more widely understood that Australia was a place or law, and of legal plurality, prior to 1788, for many years legal histories of Australia supposed the opposite. It was assumed that British law (and in particular the English common law) was the only law of the colony; Indigenous peoples had no laws

19 Anna Clark, 'What is History in a Settler Colonial Society? Mapping the Limits and Possibilities of Ethical Historiography using an Australian Case Study' (2024) 63(4) *History and Theory* 65, 85.

20 Shino Kinoshi, 'Reckoning with the Past' in Peter Cane, Lisa Ford, and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 740.

21 Perhaps the most famous work on this is Ann Laura Stoler's *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton University Press, 2008).

22 For a recent work on settler colonialism in Australian history, see Penny Edmonds and Jane Carey, 'Australian Settler Colonialism over the Long Nineteenth Century' in Edward Cavanagh and Lorenzo Veracini (eds), *The Routledge Handbook of the History of Settler Colonialism* (Routledge, 2017) 371. And for a work critiquing settler colonial studies from a First Nations perspective, see Shino Kinoshi 'First Nations Scholars, Settler Colonial Studies, and Indigenous History' (2019) 50 (3) *Australian Historical Studies* 285.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

recognisable as such. Histories of New South Wales were rarely situated within the broader frame of the British Empire, let alone part of a global history of encounter. Even if it was conceded that Australia's First Nations had laws recognisable as such to the British at European colonisation, the legal orthodoxy for many years was that they were long gone, extinguished along with any rights to land, by the forces of that colonisation. Rather, the Australian continent was, so the story went, one of no law, into which the common law arrived and became the only law of the land, and in which Britain's sovereignty was uninterrupted.[23] That view of our legal origins was only reinforced by the High Court's decision in *Mabo v Queensland (No 2)* ('*Mabo (No 2)*').[24] *Mabo (No 2)* finally and famously 'overturned' *terra nullius*. This was of course a very important moment in understanding Australia's legal history. However, legally, little flowed from it. Brennan J also held that on acquisition of sovereignty the common law had become the law of the new colony and of all within it. While native title rights might have survived annexation (or to put it another way, not been extinguished) the Court made it clear that native title was really an exception. It did not purport to suggest that Indigenous laws generally should be recognised.[25] This remains the view of the High Court. In 1788 Indigenous laws (to the extent they are recognised as such) were extinguished – or so the legal story goes.[26]

This narrative of the arrival of the common law in Australia was fractured by the work of legal historians, most notably Bruce Kercher. At the same time that the High Court was considering the case in *Mabo (No 2)*, at Macquarie University Bruce Kercher was uncovering early case law that suggested that this neat story of acquisition of sovereignty and the common law immediately becoming *the* law of the land might be just a bit too neat. Kercher presented several cases – *R v Ballard* and *R v Boatman* – from early New South Wales which challenged this account. He painted a picture of early New South Wales as a more pluralistic place, one in which it was not clear how the legal relations between Indigenous peoples and the common law might ultimately be shaped, and one in which it was not a given that Indigenous Australians would be considered to be within the ambit of the jurisdiction of the New South Wales Supreme Court.[27] He exposed the contingency of modern understandings. Kercher noted that this view had in part originated from a (famous) 1836 decision – *R v Murrell* – in which Burton J had held that the Court did in fact have jurisdiction over Indigenous Australians and that they had no laws recognisable as such. But, as Kercher explained, in doing so Burton J did not follow several earlier decisions in which that same Court had denied that it had jurisdiction over Indigenous accused (although it was ambivalent about whether Indigenous laws were really 'law').[28]

---

23 Shaunnagh Dorsett, 'Plural Legal Orders: Concept and Practice' in Peter Cane, Lisa Ford and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 19.

24 (1992) 175 CLR 1.

25 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

26 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Love v Commonwealth; Thoms v Commonwealth* (2020) 270 CLR 152.

27 Bruce Kercher, 'R v Ballard, R v Murrell, R v Bonjon' (1998) 3(3) *Australian Indigenous Law Reporter* 410; Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7.

28 *R v Ballard or Barrett* [1829] NSWSupC 26; *R v Boatman or Jackass and Bulleye* [1832] NSWSupC 4.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Murrell had become the entrenched understanding of early colonial legal opinion for the simple reason that it was the only decision published and therefore available to later lawyers and scholars. The others, then, simply dropped from view. *Murrell* told us the common law was the only law of the colony.

Lost, then, was the contingency of our modern understandings of the legal relations between Indigenous peoples and their laws and the Australian legal system. The law *might* have developed differently. It was not inevitable that the courts *would* refuse to acknowledge indigenous jurisdictions or acknowledge legal plurality. As Jim Phillips tells us, one of the reasons legal history matters is because it reveals the contingency of modern legal constructs. The shape of any law or legal development is contingent on the shape of society generally, the practices of those who gatekeep legal knowledge, and the ideologies of its practitioners. Law is authored and contestable. As Russell Sandberg adds, not just different approaches, but feasible different approaches, might still be available if we understood better how we got to where we are.[29] Jim Phillips makes clear that 'contingency' is not the same thing as 'arbitrary'. In fact, it is the opposite of arbitrary. Legal changes are, as he puts it, 'rationally and logically connected to other kinds of developments'.[30] In order, therefore, to understand why some legal change happened, or why a doctrine is shaped the way it is, we would need to consider the intellectual milieu, personalities and economic and political imperatives in play at the time.

What might we draw on in order to uncover the contingency of legal developments? Let's take an early case like *Ballard* as an example. What might we draw on to understand the context of the decision? Most obviously there are official court records, including those that allow us to track a decision through various stages of litigation, from filing a complaint (civil) to laying an information (criminal) right through to – in the case of criminal matters – possible exercise of the prerogative of mercy. These records might also include judge's notebooks and letters – both between judges and with other government departments. Newspaper accounts of trials can be key. In the colonial period before law reporting, newspapers frequently gave detailed accounts of court proceedings and these are often the best record available of what happened in court that day. We can also look to diaries and letters of participants of those who attended court; official records and correspondence from London and the Colonial Office (the body which oversaw the colonies), which may explain relevant policy frameworks or in which the actual case was reported back to London; and biographies of people involved as well as further newspaper reports which may mention participants and which could shed light on their lives before and after the trial. Important also might be broader works of social, economic or intellectual history which explain relevant attitudes of the time to First Nations peoples. Investigations of more modern periods will be able to draw on further materials – such as internet archives – while commercial companies provide extensive (for pay) collections of materials for researchers.

This is clearly a much wider range of sources than lawyers, courts or even doctrinal scholars would usually draw on and moves us far beyond the idea of finding useful

29 Sandberg (n 5) 201.
30 Phillips (n 15) 300.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

precedents. All of these sources together would enable us to construct a nuanced understanding of the contingency and contestability of early Indigenous-settler legal relations in this specific context. Regardless, then, of whether these early cases are useful precedent as such, as law students and lawyers we can draw upon these sources in order to understand the nuance and complexities of our legal origins, to challenge and question the 'orthodoxies' often presented in legal decisions, and to understand how those decisions are the product of particular historical and legal practices.

IV Controversies and Criticisms

As noted at the outset, increasingly scholars engaged with contemporary problems turn to history and the work of legal historians. While this seems an obvious thing to do, to look at history to see how particular laws and legal practices came to be – how we got to where we are – it can also be deeply controversial. In 2013 Al Brophy made an argument for the importance of what he has labelled 'applied legal history'. According to Brophy, applied legal history 'is deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues'. He contended that a 'trend toward self-conscious engagement with the present is part of the turning to history in law'.[31] So why did Brophy feel he needed to make an argument for doing legal history that speaks to contemporary issues? What might be controversial about that? Brophy was keen to distinguish applied legal history from what is often called in American scholarship 'law office history'.[32] Law office history is a term that generally refers to history that is written by advocates looking to bolster or achieve a particular end. 'Law office history' originally arose in the context of interpretation of the United States Constitution. Scholars argued that law office historians and judges – largely those who subscribed to constitutional originalism – 'cherry picked' historic examples which favoured a particular constitutional interpretation. Those who critiqued this approach argued that history ought to be written by dispassionate scholars, searching for 'truth', rather than in order to advocate for a particular legal outcome. The assumption underlying arguments against applied legal history, then, is that it is simply some form of 'Law office history', rather than the deeply researched scholarship for which Brophy argues.

In turn, this concern allied to a broader historical debate. Thinking about the present with or through the past (or indeed visa-versa) is not confined to law office history; across the twentieth century historians generally struggled with or dismissed 'presentist' accounts of history – those in which there is a tendency to interpret the past in presentist terms, perhaps by assuming that attitudes to a particular matter in the past were the same as they are now or even to assume that the past is a 'bad place' (think slavery or attitudes to married women's property) and that we do better now. The labels 'presentist history' and 'law office history' both generally carry a connotation that that this is just not good history. In particular, law office history

31 Alfred L Brophy, 'Introducing Applied Legal History' (2013) 31 *Law and History Review* 233, 233.

32 The term is generally traced to Alfred H Kelly, 'Clio and the Court: An Illicit Love Affair' (1965) *Supreme Court Review* 119.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

or advocating history is assumed to 'pick and choose' historical data that supports a hoped for modern legal outcome, while ignoring any data which might be contrary or undermine this outcome. If humanities research is about searching for 'truth' (and this itself is contentious) then applied research seems to undermine this, particularly when it becomes intertwined with the political or ethical (or even legal) positions of scholars undertaking such research.

Does this mean, then, that we can never do legal history (or that we are not even really 'doing history') when the issue we are really concerned with is a modern one – or because we are looking to support a particular contemporary legal argument? Brophy argues for legal research which is more than pure scholarship for scholarship's sake; but which avoids the pitfalls that can occur with history intended to advocate. It would be quite odd to think that the present is not in dialogue with the past: think native title claims or other kinds of research into social and legal relations between First Nations and the colonies/Australian nation, as one example. Much of the best and most influential modern legal history brings the past into conversation with the present. The key, however, is *how* and *why* that research is undertaken, and here we return to Brophy's initial contention of deeply researched, serious scholarship – scholarship which does not 'cherry pick' sources and which accepts that a deep engagement with the past will often uncover deeply uncomfortable events, attitudes, policies and laws, and may lead to undesired conclusions. To start with the present and a particular political or legal position, and to search specifically for evidence in the past that supports that position is arguably not 'doing good history'. But to start with an interesting or important or contentious contemporary position or problem and seek to understand how we 'got to where we are now' by carefully considering all the evidence is exactly the kind of important legal history that we ought to be undertaking.[33] To give but one example, recent successful settlements in favour of Indigenous plaintiffs for stolen wages have only been possible because of careful examinations of past practices and the histories of Indigenous pastoralism, indigenous servants and accompanying wage theft.[34]

This brings us to our second controversy: how courts (and those who appear before them) use history or historical facts. One of the particular grumbles that legal historians sometimes have is that courts 'do history badly'. At the heart of the grumble is that rather than undertaking a proper examination of context, drawing on a full range of the kind of materials mentioned in the previous section, courts 'cherry pick' those which best suit the argument and the decision to which they wish to come, ignoring other sources or narratives which might tend to a contrary or different understanding. Or that, used as they are to a search for precedent, continuity and progression that, as Justice Mark Leeming puts it 'lawyers are so accustomed to emphasise continuity that their understanding of legal history may be affected'.[35] While Leeming might not say so specifically, the same might be said for judges.

To some extent what sources courts refer to depends on what material counsel bring forward. In bringing historical material before the court, counsel are most

33 Brophy (n 31) 237.

34 See *Street v Western Australia* [2024] FCA 1368.

35 Leeming (n 1) 200.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

commonly presenting these as evidencing some kind of historical 'fact'; an event happened this way; this was the relevant court practice at a particular time; this is the correct version of a decision (before formal law reporting cases were often reported multiple times); or this was the government policy that was applied. Counsel appear in order to represent clients and to make the best possible arguments for them and that of course includes putting forward the material which best supports their cases. As Leeming notes, 'legal history in the hands of a litigator is the opposite of some disinterested quest for greater understanding'.[36] It is, if you like, akin to law office history – historical investigation undertaken for the purposes of advocacy.

Some judges themselves have noted the difficulties that attend generally to using history and historical sources in reaching determinations. In *The Wik Peoples v Queensland*, Gummow J famously noted:

> There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms. … Even if any such taxonomy were to be devised, it might then be said of it that it was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflict.[37]

In other words, history is useful to courts as a mechanism to aid in or support legal arguments in the present. In some ways, then, this is a very particular instantiation of our first controversy. The legal question at the heart of *Wik* was the effect of the granting of particular pastoral leases on potential native title rights in the same area. In that case, the court determined, by a 4 to 3 majority, that pastoral leases did not extinguish native title, as they did not confer exclusive possession. This was an important legal question: as pastoral leases have at one time or other covered much of the Australian continent, had the court determined that they did completely extinguish native title then there would have been much less land left which could have been claimed as subject to native title. The majority drew on histories of imperial and local policy on pastoral leases and of the legislation under which they are granted in order to find that pastoral leases were a very specific form of statutory tenure, created for very specific purposes, and therefore only extinguished native title to the extent of the inconsistency between the particular lease and the particular native title rights being claimed. Both Gummow J (above) and Kirby J, however, noted the difficulty and artificiality of using history for this purpose. Kirby J examined the specific legislation under which the leases were granted and the leases themselves and he noted that none of the legislation expressly extinguished Aboriginal rights – largely because the government did not consider that such rights existed. He stated that:

> [t]here is an inescapable element of artificiality, in looking back over Australian legal history, which developed upon a particular hypothesis about Aboriginal legal rights, and endeavouring to reinterpret that history with the knowledge afforded by *Mabo [No 2]*.[38]

---

36 Ibid 201.

37 *The Wik Peoples v Queensland* (1996) 187 CLR 1, 182-83 ('*Wik*').

38 *Wik* (1996) 187 CLR 1, 230.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Notably, while both Kirby J and Gummow J clearly saw as important a broader more contextual approach to understanding the nature and effect of a pastoral lease (than say Brennan CJ who authored the minority judgment and who took a much more traditional approach relying mainly on statutory interpretation and precedent), they nevertheless drew on a much narrower range of sources than might a legal historian investigating the same question. Few counsel or judges are trained as historians. Even if they are, in these roles they are not acting as historians. Just as legal principles (and their application to the facts) can be contested, so of course can be historical events and the materials which support their investigation. Perhaps a feature of legal analysis is a search for factual certainty, which makes the application of law to facts more straightforward. A good example might be the idea that sovereignty was acquired over New South Wales in 1788. Even a cursory view of history makes clear that it cannot have been this simple or straightforward. This search for certainty can often lead to counsel and courts 'flattening' the complexity of historically-contested events.

The criticism of 'cherry picking' or that the use of history by courts is purpose driven should not suggest that courts simply pull random facts or create historical narratives in order to support arguments.[39] There are examples in every area of law of courts taking the time and space to provide a detailed narration of the legal background (likely but not always predominantly a doctrinal history) to particular legal doctrines or events. These narrations may in certain cases inform or even be a key part of the final reasoning of the court. *Wik* is such an example. But courts are not using history for the same purposes as scholars. Courts are not engaged as such in a disinterested quest for historical truth and nor should we expect them to be. After all, it can be argued that the job of courts is not to do history, it is to determine the rights of those before it, and to develop the law so as to be fit for the contemporary world. The shape of that narration, and what 'facts' are included and excluded, must inevitably be shaped by the purposes for which it is being made and by individual judges' and courts' views on their role in making law.[40] Conversely, however, that does not mean that we should not expect courts to at least take some care in their use of historical sources.

V Conclusion

So why do legal history? As this chapter has suggested, historico-legal scholarship can provide alternative perspectives on contemporary legal, economic or social positions, uncover different and untaken by-ways or even explain that some long-held legal positions are based on misunderstandings or incomplete context. Legal history has the power to disrupt accepted narratives. It can, for example, expose the complex origins of doctrines we take for granted, and which for almost a century have been core to what we teach students – often via generational textbooks – and shed light on the ways that these doctrines have been constructed and are contestable and contingent.[41] And

39 For a more nuanced view of what courts do with historical 'facts' and a suggested taxonomy, see Bradley Selway, 'Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129.

40 On the High Court's use of history and common law declaratory theory, see Godden (n 4).

41 On this see also Sandberg (n 5) 205.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedd y/

it can allow us to think of other ways law could develop and even perhaps give us the arguments to make that happen.

However, we can probably do no better than end with Mark Leeming's reminder as to why lawyers and judges should care about legal history:

> We need to understand legal history … in order to practise our profession. … But we are not bound by the past. We should pursue it … because it presents a feast of intellectual riches of intrinsic worth. It makes our profession civilised, more learned, and, not least, more fun.[42]

It may be the last of these that is one of the most compelling reasons to do legal history. Although we undertake historico-legal study for serious reasons – to understand our current law better and to think about how it could be shaped otherwise or perhaps simply as a disinterested scholarly endeavour searching for the 'truth'– legal history, drawing on so many different sources as it does, can also be a treasure hunt or a puzzle or simply a pleasurable activity for the intellectually curious. Researching our legal past can be slow, frustrating, painstaking, literally dusty and dirty, and also enormously fun.

Further Reading

Alfred L Brophy, 'Introducing Applied Legal History' (2013) 31 *Law and History Review* 233-240

Anna Clark, 'What is History in a Settler Colonial Society? Mapping the Limits and Possibilities of Ethical Historiography using an Australian Case Study' (2024) 63(4) *History and Theory* 65–84

Shaunnagh Dorsett, 'Plural Legal Orders: Concept and Practice' in Peter Cane, Lisa Ford and Mark McMillan (eds), *Cambridge Legal History of Australia* (Cambridge University Press, 2022) 19-39

Penny Edmonds and Jane Carey, 'Australian Settler Colonialism over the Long Nineteenth Century' in Edward Cavanagh, Lorenzo Veracini (eds), *The Routledge Handbook of the History of Settler Colonialism* (Routledge, 2017), 371-390

Tanya Josev, 'Australian Historians and Historiography in the Courtroom' (2020) 43 *Melbourne University Law Review* 1069-1099

Bruce Kercher, 'Why the History of Australian Law is not English: Second Alex Castles Lecture in Legal History, October 2000' (2004) 7(2) *The Flinders Journal of Law Reform* 177–204

Shino Kinoshi, 'Reckoning with the Past' in Peter Cane, Lisa Ford, and Mark McMillan (eds), *The Cambridge Legal History of Australia* (Cambridge University Press, 2022) 740-764

Mark Leeming, 'Lawyers' Uses of History, from *Entick v Carrington* to *Smethurst v Commissioner of Police*' (2020) 49 *Australian Bar Review* 199-226

Jim Phillips, 'Why Legal History Matters' (2010) 41 *Victoria University of Wellington Law Review* 293-316

Russell Sandberg, *Subversive Legal History: A Manifesto for the Future of Legal Education* (Routledge, 2021) esp ch 8 (198-224)

42 Leeming (n 1) 226.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Chapter 2

The Point of Legal Philosophy

Jonathan Crowe

To forget one's purpose is the commonest form of stupidity.

– Friedrich Nietzsche, as quoted by Lon Fuller[1]

I Introduction

What is the point of legal philosophy? Many law students have posed this question, particularly while suffering through the indignities of a compulsory jurisprudence course. The point of this field of study may not be easy to grasp for those accustomed to studying the black letter law – with one eye, perhaps, fixed on a lucrative career in a commercial law firm. This chapter explores the question and proposes an answer. The answer I give, in brief, is that legal philosophy enables us to examine and better understand the point of law and, by extension, the point of being a lawyer. For those of us who engage with law in our studies, careers and lives – including law students, lawyers, legal academics, judges and others – these questions are also related to the broader issue of the point of life in general.

The response to the question of the point of legal philosophy sketched above is very broad – one might say *philosophical* – in character. There are other ways of responding to this question. For example, from a student's or academic's perspective, one might wonder how legal philosophy can be used as a tool to enhance legal scholarship. There are many examples of legal philosophy being employed by scholars to better understand legal doctrines. In Australia, for instance, academics have drawn on philosophy to shed light on contentious issues in constitutional law, such as the role of constitutional implications,[2] and private law, such as the scope of duties of care in the tort of negligence.[3]

---

1 'Das Vergessen der Absichten ist die häufigste Dummheit, die gemacht wird': Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1964) 95.

2 See eg Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150; Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Jonathan Crowe, 'The Narrative Model of Constitutional Implications: A Defence of *Roach v Electoral Commissioner*' (2019) 42 *University of New South Wales Law Journal* 91.

3 See eg Desmond Manderson, *Proximity, Levinas and the Soul of Law* (McGill-Queen's University Press, 2006).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

One might also ask whether legal philosophy has informed law reform or judicial decisions in the Australian context. Again, one can point here to examples such as the detailed survey of philosophical perspectives in the Australian Law Reform Commission's recent report on judicial impartiality[4] or references to prominent legal philosophers such as HLA Hart[5] and Ronald Dworkin[6] in High Court cases. Judges often seem to shy away from explicit philosophical discussions, even if they may be relevant to the legal point at hand.[7] However, the lack of express reference to legal philosophy does not necessarily mean a judge's conclusions are not informed by philosophical assumptions about, for example, the underlying purpose of a particular field of law.

More could be said about the role of legal philosophy in legal scholarship and doctrine, both in the Australian context and more generally. However, I am going to resist framing the discussion in this chapter primarily in those terms. This is because I think the main relevance of legal philosophy for law students and scholars, as well as lawyers and judges, lies not in its application to specific doctrinal questions, but in its ability to inform broader reflections on the purpose of law. In taking this broader approach to the subject-matter, I am practicing what I preach, by adopting a philosophical approach to examining the point of legal philosophy. This claim raises a further preliminary issue relevant to this chapter: namely, what exactly do we mean when we talk about *legal philosophy*?

I have suggested elsewhere that a fruitful way to understand the nature of legal philosophy is by reference to *philosophy* more generally.[8] The word 'philosophy' comes from the Greek *philosophia*, meaning 'love of wisdom'. More specifically, philosophy seeks greater understanding about concepts and ideas we take for granted in everyday life. As John Campbell puts it, '[p]hilosophy is thinking in slow motion. It breaks down, describes and assesses moves we ordinarily make at great speed – to do with our natural motivations and beliefs'.[9] Legal philosophy – also sometimes called legal theory or jurisprudence – applies this methodology to concepts and ideas about law. It seeks to explore more carefully our ideas about such topics as law's relationship to power and authority, the nature and extent of legal obligations and law's connection to justice and the common good.

Since legal philosophy involves stepping back from everyday legal concepts, it makes sense that its main influence might be found not in resolving points of legal doctrine, but rather in helping to shape and refine background understandings about

---

4 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Report 138, December 2021) 49-63. See also Australian Law Reform Commission, *Conceptions of Judicial Impartiality in Theory and Practice* (Background Paper JI4, April 2021).

5 See, for example, *Al Kateb v Godwin* [2004] HCA 37, [265] (Hayne J).

6 See, for example, *Re Wakim* [1999] HCA 27, [40] (Gaudron J); *Al Kateb v Godwin* [2004] HCA 37, [69] (McHugh J).

7 This perhaps reflects the perception articulated by Michael Bryan that '[a]ny judge who announces that he or she will apply a "philosophy" of judging will rightly be accused of deciding cases, not according to the evidence, but according to preconceived views': Michael Bryan, 'Justice Callinan's Judgments in Private Law: Story Telling, Legal Coherence and Corrective Justice' (2008) 27 *University of Queensland Law Journal* 29, 29.

8 Jonathan Crowe, *Legal Theory* (Thomson Reuters, 4th ed, 2024) ch 1.

9 Steve Pyke, *Philosophers* (Oxford University Press, 1993) 22.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

the nature and purpose of law in general. These understandings will then inform our engagement with specific legal rules and cases, whether or not they are brought specifically to mind when resolving those questions. They will also inform the practical decisions people make when interacting with law in their everyday lives. Everyone faces decisions involving law from time to time, such as whether to follow a specific legal requirement. However, these decisions will be particularly prominent in the lives of law students and lawyers. It is to these existential implications of legal philosophy that the present chapter now turns.

The chapter will proceed along the general lines sketched in the opening paragraph. I will begin by considering how legal philosophy advances our understanding of the purpose of law, before extending this analysis to show how it illuminates the point of legal practice. I will highlight some challenges traditional views of legal ethics pose to remembering the point of being a lawyer. I will then connect these topics to the value of reflecting upon the meaning of one's work and life. I will argue that the inherent value of a balanced and integrated life makes these forms of reflection important to everyone's well-being. Legal philosophy, in short, is an opportunity to reflect upon the deeper ends of life in the law in a way that may otherwise be discouraged by the pressures of legal education and practice. It is a tool that can help us refocus, when needed, on those things that make life worth living.

II The Point of Law

Jurisprudence is replete with claims about the purpose or point of law. Aristotle, for example, held that the point of law corresponds with the point of society and, indeed, the point of life in general – namely, the pursuit of happiness or *eudaimonia*.[10] Aristotle famously regarded humans as 'political animals', meaning they naturally tend to form social groups.[11] Humans are distinguished from other animals by their capacity for speech, which enables them to communicate on matters concerning the good life. Participation in political institutions is an integral part of the good life for humans. Law, then, helps constitute the social structures that make human flourishing possible.

Contemporary legal theorists have advanced various related theses. Lon Fuller contended that the point of law is to order social action in accordance with rules – thereby making peaceful coexistence possible for individuals with diverse objectives and life plans.[12] Humans have many different – and sometimes conflicting – plans for their lives, but they must nonetheless agree upon shared rules if they are to cooperate and get along harmoniously in society. Governance structures that are not rule-based will fail to achieve this objective in various ways.[13] Law therefore benefits all members of society in allowing everybody a peaceful environment to pursue their different goals. It thereby respects the status of each member of the community as 'a self-determining agent'.[14]

---

10 Aristotle, *Nicomachean Ethics* (David Ross trans, Oxford University Press, 1998) bk 1, ch 7.
11 Aristotle, *The Politics* (T A Sinclair trans, Penguin, 1982) bk 1, ch 2.
12 Fuller (n 1) 122.
13 Ibid 33-38.
14 Ibid 166.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

John Finnis has more recently argued that the point of law is to coordinate society for the common good.[15] Finnis argues that human life is oriented towards certain intrinsic goods.[16] These goods capture everything it is valuable and worthwhile to pursue in our lives. The common good, as Finnis defines it, consists in ensuring the conditions necessary for all members of a society to participate in the intrinsic goods.[17] The role of law in this picture is to coordinate social behaviour so that people can work together effectively to bring the common good about. For people to do their part for the common good, they must be able to know what they are expected to contribute to society. This would not be possible, Finnis argues, without authoritative legal standards everyone can agree on.[18]

The legal philosophers discussed so far in this section – Aristotle, Fuller and Finnis – all belong broadly to the natural law tradition in jurisprudence. This tradition is characterised by a focus on the ways in which legal institutions help people lead flourishing lives by pursuing a vision of a good human life.[19] For Aristotle, for example, the good life is represented by *eudaimonia*, while for Finnis it involves pursuing intrinsic human goods. Legal positivism, the main rival to natural law theory in contemporary jurisprudence, denies that law must be understood by reference to this kind of moral purpose.[20] Rather, for legal positivists, what makes something a law is simply that it is enacted by a person or body – such as a legislature or judge – that society recognises as having the power to make laws.

Legal theorists within the natural law tradition have been somewhat more likely than their legal positivist counterparts to engage directly with the question of law's point. This reflects the orientation of the natural law tradition towards connecting questions about the nature of positive law with broader issues about human nature, political philosophy and ethics.[21] However legal positivists have by no means completely neglected law's purpose. The leading contemporary legal positivist, HLA Hart, identified minimum conditions necessary for the survival of a functioning society which it is law's purpose to safeguard. He termed these 'the minimum content of natural law'.[22] Absent these conditions, law will fail in its basic function of ensuring the survival of society.

Joseph Raz, the most prominent legal positivist after Hart, also advances sophisticated views on the function of law. Raz provides a list of the primary and secondary functions law plays in society.[23] The distinctive way law fulfils these functions, according to Raz's theory, is to provide its subjects with what he terms 'exclusionary reasons

15 John Finnis, *Natural Law and Natural Rights* (Oxford University Press, 2nd ed, 2011) 276-277.

16 Ibid ch 4.

17 Ibid 155.

18 Ibid 232.

19 For discussion, see Jonathan Crowe and Constance Youngwon Lee, 'The Natural Law Outlook' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019).

20 For discussion, see Crowe (n 8) ch 4; Jonathan Crowe, 'Natural Law Theories' (2016) 11 *Philosophy Compass* 91, 92-93.

21 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 1-2.

22 HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 193.

23 Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) ch 9.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

for action'.[24] Exclusionary reasons are reasons to disregard other reasons that one would ordinarily have to consider when deciding how to act. Part of what it means for law to be authoritative is that it provides its subjects with reasons of this kind. When law succeeds in providing exclusionary reasons, it provides a service to members of the community, because they need no longer weigh up all their relevant reasons for action when deciding what to do. They can simply do what the law requires without assessing other kinds of considerations.

For my part, I have argued in other work that the purpose of law is to mark the boundaries of acceptable social conduct.[25] However, law does not set these boundaries in an arbitrary way, but does so – to echo Finnis's language – in order to advance the common good. The common good, as I use the term, captures the interest that every member of society has in living in an environment where all the members can lead fulfilling and meaningful lives.[26] Law advances this objective – as both Fuller and Finnis tell us – by serving as a locus of social coordination. Contrary to what Finnis and Raz argue, it does not do this by issuing authoritative pronouncements, but rather works alongside other moral and social norms to provide a framework for social action.[27]

We can see from the preceding discussion that the views of legal theorists on law's point are diverse, but there are some clear recurring themes, such as law's role in facilitating social coordination and the pursuit of the common good. The theorists we have canvassed also agree that law does not exist for no reason at all – or, indeed, purely to facilitate dominant social power structures – but has at least the potential to play a constructive and valuable social role.[28] Those whose work it is to ensure that law plays its function well, rather than simply being coopted as a tool of the powerful, therefore have a crucial role to play in advancing the interests of their fellow citizens and society at large.

How do we know what the point of law is? We must, as the theorists discussed previously would generally agree, engage in reasoned reflection on the social institutions and practices by which law is constituted. We must, in other words, pay close attention to the way that members of the community talk and think about the law. In so doing, we engage in what Neil MacCormick, describing Hart's methodology, called a *hermeneutic* exercise.[29] We are seeking to interpret social practices, paying attention to what Hart terms *the internal point of view* – namely, the meaning they hold for those who accept them as a guide for action, as opposed to detached external observers.[30] In other words, we are seeking to better understand what drives us as members of human communities.

What are the practical consequences of this picture? What, so to speak, is the point of reflecting on law's point? I will suggest shortly that this exercise has value for those contemplating a career in legal practice, both in terms of their approach to

---

24 Ibid 30.
25 Crowe (n 21) ch 9.
26 Ibid 88.
27 Ibid ch 10.
28 Other legal philosophers, by contrast, argue that the purpose of law is indeed to facilitate dominant social power structures. We will return to these perspectives later in this chapter.
29 Neil MacCormick, *HLA Hart* (Stanford University Press, 2nd ed, 2008) 53-54.
30 Hart (n 22) 89.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

their work and for wider existential reasons. However, for the purposes of the present section, I will focus on two kinds of practical consequences that flow from reflecting on law's purpose, according to some of the theorists referenced previously.

The first of these practical applications is drawn out by the work of Fuller. Fuller, as is well known, builds on his account of law's purpose to develop a theory of what he describes as 'the inner morality of law'.[31] Fuller describes eight principles of legality which must be observed, at least to some extent, if it is to be possible for law to fulfil its purpose.[32] For example, it is only possible for laws to effectively guide social action if they are publicised in advance. Otherwise, law's subjects will not know what it requires. For Fuller, then, an exploration of law's point enables us to recognise values which are inherent to the very concept of law and which must be honoured if law's purpose is to be fulfilled.

A second application can be drawn from the accounts of law's purpose advanced by natural law theorists. These authors, as we have seen, view law's purpose as promoting the common good. The notion of the common good, on this view, illuminates why it is that we have law in the first place. However, it also places limitations on both the content of law and the actions of legal officials. If the purpose of law is to advance the common good, then it would be perverse for either legal rules or legal officials to harm the common good. The natural law view of law's purpose therefore has the consequence that those who make and apply the law should strive to act in such a way as to bring the common good about.[33] However, to succeed in promoting the common good, they must first understand it.

The upshot of these theories, then, is that those whose role it is to shape and apply the law must not only have a technical grasp of legal doctrine, but also appreciate what law is for. Otherwise, they are in danger of developing law in a way that undermines its purpose. They may, like Fuller's hypothetical King Rex, ineptly undermine law's internal morality through the accretion of technical errors.[34] Or they may, by failing to direct their minds to the common good, not only fail to promote that end, but actively undermine it. Legal education has a role in play in guarding against these errors. It should encourage law students to reflect upon law's purpose, as well as its technical rules, lest the law students of today grow up to be the King Rexes or soulless legal technocrats of the future.

It is, for this reason, worthwhile for law students and academics, as well as lawyers and judges, to bring their mind explicitly to philosophical questions when engaging in research projects, giving advice or making decisions. These activities will often be guided implicitly by an understanding of law's objectives. However, unless these questions are brought expressly and carefully to mind – as legal philosophy encourages us to do – they may remain underdeveloped or disconnected from the substance of the activity in question. Legal philosophy, in this sense, helps us to ensure that our interactions with law in our lives do not become divorced from our underlying conception of law's purpose.

---

31 Fuller (n 1) 42.

32 Ibid 39.

33 For discussion, see Crowe (n 21) chs 11-12.

34 Fuller (n 1) 33-38.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

III The Point of Being a Lawyer

What is the point of being a lawyer? If you ask law students this question – in my experience, at least – you receive a variety of answers. Some students will openly aver the attractions of law's prestige as a profession, the expected pecuniary advantages it will bring them in due course, or the overriding role of their parents' advice in shaping their career choices. Others, however, will confess to a desire to help the vulnerable in the community or advance the cause of some important value, such as human rights or justice. Those choosing the latter responses are sometimes observed to cast a slightly self-conscious glance at their peers, as if to acknowledge the naivety of what they are about to say.

The more idealistic law students, however, are onto something. If we follow the broadly Aristotelian line of thought introduced at the start of this chapter, we might expect to find continuity between the point of being a lawyer, the point of the law in general and the point of human communities. According to the natural law perspective introduced previously, for example, human communities exist to further the common good of their members and law assists in that goal by coordinating social behaviour in accordance with shared rules. The point of being a lawyer, according to this perspective, is to play a particular role in maintaining a well-functioning legal system, bearing in mind the system's overarching objective of contributing constructively to the common good.

There is, however, a pitfall inherent in this picture. Lawyers, judges and other legal officials have defined roles to play within a legal system. These roles differ, for example, from those of legislators. According to the tripartite separation of powers, legislators make the law, judges interpret and apply the law, and the executive enforces the law. Lawyers, for their part, advise and represent the subjects of law when disputes arise, advocating their rights and interests before decision-makers.

This understanding of the roles played in the legal system by various actors has resulted in a conception of legal ethics as shaped by role morality. An ethical lawyer, on this view, is one who understands and performs the lawyer's role.[35] The lawyer's role, in turn, manifests itself in various duties owed to other actors in the legal system. For example, lawyers have a duty to the court and duties to their clients. They must represent their clients to the best of their ability, following instructions, respecting confidentiality and so on, while respecting their overarching duty not to subvert the legal process.

This picture is accurate, so far as it goes. Law, as discussed in the previous section, serves as a mechanism for social coordination. One way in which it does this is by implementing a kind of division of labour among the various legal actors. These defined roles instruct lawyers and legal officials how to do their share to maintain the legal system and thereby to promote the common good. However, it is important to note that, on this picture, the roles of legal actors do not exist for their own sake, but rather to serve the overarching objective of advancing the good of the community. It follows that when legal roles and the common good come into conflict, the common good must ultimately prevail.

---

35 For a helpful overview, see Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Various problems arise when law students or others are taught to observe the role morality of the legal system without paying heed to its underlying purpose. For example, it is widely believed that judges, when confronted with a clash between the law and justice, should stick to their role and apply the law as it stands, leaving any amendments in the hands of legislature.[36] In Australia, for instance, judges very rarely explicitly override or amend the law in the name of justice or morality. I have argued elsewhere, however, that this strong form of judicial deference rests on a mistake.[37] The role of a judge is, in the end, to promote the common good. If the law comes into conflict with the common good, then judges should bring them into dialogue to ensure that law fulfils its purpose.

Furthermore, judges should take account of the common good openly, rather than allowing it to covertly influence their judgments. Judges, like everyone else, are influenced by their moral views when making practical decisions.[38] If judges seek to hide the influence moral considerations have on their judgments, fearing that it will compromise their proper role, they may end up doing a disservice to Fuller's values of legality, by obscuring the true motivations for their decisions. We would end up with a legal system where judges decide for one set of reasons while purporting to be guided by another.

This kind of problem manifests itself in a different way when it comes to the role of a lawyer. The role of the lawyer is to represent their client, thereby contributing to the legal system. However, a problem arises when lawyers represent their clients in ways that conflict with the common good. For example, a defence barrister who aggressively and persistently questions the complainant in a rape trial, seeking to draw out minor inconsistencies in their testimony, while knowing that such fragmented testimony is a common symptom of trauma,[39] does not help the court discover the truth about the matter. Nor is such questioning necessary to provide the defendant with a fair and adequate opportunity to challenge the accusations made against them. Problems of this nature are prone to arise when role morality is elevated in legal ethics without attention to deeper values.

An overly myopic emphasis on role morality may also pose a threat to the well-being of lawyers and legal officials. Lawyers may get into the habit of compartmentalising their lives, playing one role at work and a very different one outside it. If

---

36 For academic defences of this perspective, see James Allan, 'An Unashamed Majoritarian' (2004) 27 *Dalhousie Law Journal* 537; James Allan, 'Human Rights: Can We Afford to Leave Them to Judges?' (2005) 16 *Commonwealth Judicial Journal* 4; Tom Campbell, 'Judicial Activism: Justice or Treason?' (2003) 10 *Otago Law Review* 307.

37 Crowe (n 21) ch 12.

38 For discussion, see Jonathan Crowe, 'The Role of Snap Judgements in Constitutional Deliberation: A Dialectical Equilibrium Model' in Ron Levy, Hoi Kong, Graeme Orr and Jeff King (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018); Jonathan Crowe, 'Not-So-Easy Cases' (2019) 40 *Statute Law Review* 75.

39 See, for example, Daisy A Segovia, Deryn Strange and Melanie KT Takarangi, 'Trauma Memories on Trial: Is Cross-Examination a Safeguard against Distorted Analogue Traumatic Memories?' (2017) 25 *Memory* 95; Annie Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

pressed, they may find it challenging to integrate the two perspectives. The attitude to one's career represented by the adage 'that's just my job' threatens to create a kind of normative dissonance between the goals a person embraces in their career and their deeper personal values. It is not far-fetched to suggest that this kind of dissonance may be a significant factor in the high rates of psychological distress reported by law students and lawyers.[40]

IV The Meaning of Life

The point made at the end of the previous section raises deeper existential questions. We have so far considered the point of law and of being a lawyer. What, we might boldly venture to ask, is the point of life in general? Does it bear any relation to these previous discussions? Even philosophers, who are supposed to be interested in such questions, have largely tended to avoid them. However, Aristotle had a relatively straightforward answer. The point of life is to pursue *eudaimonia*, variously translated as happiness or the good life.[41] The point of life, in short, is to live life well. So far, so good – but what exactly does that mean? There is hardly universal agreement on what constitutes a good life.

I will focus here on one family of views about the good life that I believe to be broadly on the right track. According to this outlook, people construct their own personal versions of the good life by choosing among an array of fundamental human goods. These goods are categorised differently by different theorists, but they plausibly include such values as health, friendship, knowledge, recreation and aesthetic experience.[42] People can choose how to pursue and prioritise these goods in their lives in order to construct a model of a flourishing life that suits their interests, priorities and character.

People can find meaning in life by exercising these choices between different manifestations of value and thereby defining what type of person they want to be. For this reason, I have argued previously that the pursuit of meaning by choosing among human goods is itself a fundamental human value.[43] It is important to emphasise that the choices open to people in constructing a meaningful and flourishing life are not limited to choosing to prioritise, say, friendship over knowledge at a particular point in time. Each of the basic forms of human value itself comes in many different forms defined by the social environment. A person can, for example, pursue the value of

40 A particularly influential study is Norm Kelk et al, *Courting the Blues: Attitudes towards Depression in Australian Law Students and Legal Practitioners* (Brain and Mind Research Institute, 2009). For further discussion, see Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum' (2011) 21 *Legal Education Review* 149; Wendy Larcombe and Katherine Fethers, 'Schooling the Blues: An Investigation of Factors Associated with Psychological Distress Among Law Students' (2013) 36 *University of New South Wales Law Journal* 390; Wendy Larcombe, Sue Finch and Rachel Sore, 'Who's Distressed? Not Only Law Students: Psychological Distress Levels in University Students Across Diverse Fields of Study' (2015) 37(2) *Sydney Law Review* 243.

41 Aristotle (n 10) bk 1, ch 7.

42 For discussion, see Crowe (n 21) ch 2.

43 Ibid 53-55.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

recreation in countless ways, forming connections with different subcommunities sharing the same interests.

The possibilities for self-definition offered by human goods are quite literally endless. In this respect, the picture of the good life just outlined resonates not only with Aristotle's vision of *eudaimonia*, but also with the emphasis placed by existentialist philosophers, such as Jean-Paul Sartre, on the indispensability of personal choice and responsibility in the pursuit of a meaningful existence.[44] The meaning of life, in a sense, is therefore for each person to create meaning in their own lives by purposefully shaping their life plans through interaction with the manifestations of human value.

The capacity for choice between different conceptions of a good life is, however, not unlimited. First, although the array of choices presented by human goods is extensive, there are also choices which do not make sense in this context. Some choices which do not correspond to any form of good are quite literally pointless, while others directly or indirectly set back the well-being of oneself or others. Sometimes, actions aimed at pursuing one or more of the goods may do so in unbalanced ways which pose a threat to well-being. Exercise, for example, is generally a valuable way of pursuing the good of health, but someone who becomes addicted to exercise may end up causing themselves harm.

I have suggested in other work that human well-being consists in pursuing the basic forms of value in a *balanced* and *integrated* way.[45] The notion of balance here captures the importance of not unreasonably prioritising particular forms of value at the expense of others. The notion of integration, meanwhile, represents the value in forming an overall picture of one's life that is consistent with the kind of person one wishes to be. A person's life might get out of balance, for example, if they spend all their time working and neglect their friends and family. Similarly, a person's life may lack integration if what they do at work cannot be easily reconciled with the values they prioritise in other contexts.

Plausibly, the high levels of psychological distress reported by law students and lawyers are not unrelated to these two challenges. Studying law is hard work and many legal workplaces expect their new recruits to demonstrate their commitment by working long hours. These threats to a balanced life are exacerbated if law students and lawyers find it difficult to reconcile their study or work with their personal values. The kind of compartmentalisation encouraged by some versions of role morality in legal practice risks entrenching a fragmented, rather than integrated, conception of one's life. Someone who finds themselves in this position may feel themselves drifting away from their core values.

Neglecting the opportunity to reflect upon purposes can therefore pose a threat to psychological, as well as existential, well-being. A person who lacks this opportunity may drift into a course of study and a career without a clear sense of what

---

44 For an overview, see Jonathan Crowe, 'The Authentic Judge: French Existentialism and the Judicial Role' (2019) 47 *Australian Bar Review* 41.

45 Jonathan Crowe, 'What is Wellness? The Role of Human Values' (2020) 45 *Alternative Law Journal* 261. See also Jonathan Crowe, 'Defining Wellness in Legal Education: A Reply to Kawamata' (2023) 48 *Alternative Law Journal* 140.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

they are doing. They may then find themselves in a situation where they struggle to balance their work with the things that make their life meaningful. They may also find that their work is at odds with the type of person they wish to be. Someone in this position may feel trapped, helpless or unmoored. They may struggle to confront existential questions such as 'Who am I really?' and 'What type of person do I want to be?' Like Friedrich Nietzsche's madman proclaiming the death of God, they 'feel the breath of empty space'.[46]

V Sceptical Responses

However, what if empty space is all there is? There are certainly those who would deny that law has any determinate or unified purpose – or that this purpose is a benign one. Brian Leiter, for example, has cast doubt on whether law has a definable function – or, indeed, any essential properties at all – because the roles it plays in social life are 'hostage to changing human ends and purposes'.[47] All we can say about the purpose of law and other human artifacts, on this view, is that they have the functions humans choose to impose on them from time to time. Leslie Green similarly cautions against defining law in terms of its functions for essentially this reason.[48] The ends law serves in different societies, he contends, are too multifaceted and diverse to make such an analysis illuminating.

Critical legal theorists of different stripes, for their part, would question the idea that law's function is benign. If law has a purpose, these critics might argue, it is to perpetuate dominant social power structures at the expense of the marginalised and vulnerable. Law, on this view, has functions such as maintaining capitalist class structures, upholding the patriarchy and perpetuating institutionalised racism. Any other purported function of law is a smokescreen designed to justify the existing social order. Law, stripped bare, is a machine for reproducing power. It legitimises the dominant order by cloaking it in the veneer of legitimacy afforded by concepts like the common good.

A few points can be made in response to these perspectives. First, if the purpose of law depends on what use humans make of it from time to time, then it is up to human communities to decide what function law should have. We can choose, if we wish, to work towards a vision of law that aligns with our understanding of the common good. We can, by this process, give law meaning, in the same way that we can give our individual lives meaning by choosing our personal projects. There is therefore no necessary inconsistency between the claim that law's purpose is contingent on changing human purposes and the purposive vision of life in the law articulated earlier in this chapter.

The important critiques of law advanced by various critical legal theories are also not necessarily at odds with the idea that law's purpose is to advance the common good. We might coherently acknowledge that law does often serve to perpetuate existing social power structures, while also going on to say that, to the extent that it

---

46 Friedrich Nietzsche, *The Gay Science* (Walter Kaufmann trans, Vintage, 1974) [125].

47 Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Scepticism' (2011) 31 *Oxford Journal of Legal Studies* 663, 666-667.

48 Leslie Green, 'The Functions of Law' (1998) 12 *Cogito* 117, 120-121.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

does this, it fails in its purpose of promoting human flourishing for all members of society. The purposive idea of law I have outlined, if developed in this way, becomes a powerful tool for challenging law's oppressive elements. It allows us to say, for example, that a law that fails in its purpose is not merely a bad law, but fails according to a standard internal to the concept of law itself.[49] This undermines its legality, as well as its justice.

It is, of course, important to acknowledge that purposive views of law have not always embraced this critical potential – and indeed have sometimes advanced socially regressive ideas under the cloak of concepts such as the common good. Finnis, for example, as well as being a leading contemporary proponent of natural law theory, is also well known for his homophobic and socially conservative positions.[50] However, there are also those who have embraced law's purpose in the name of social progress – such as Martin Luther King Jr, for example, whose writings have been characterised (along with those of other civil rights authors) as articulating a form of 'Black Natural Law'.[51]

VI Legal Philosophy, the Universe and Everything

We began this chapter by asking, 'What is the point of legal philosophy?' I suggested first that legal philosophy, at its best, is an opportunity to reflect upon the point of law. Law does not exist for no reason, but to serve the common good. I then connected this idea to the point of being a lawyer. A lawyer serves the legal system by playing a particular socially defined role. However, this role only make sense if it is placed in the context of law's purpose. A lawyer who plays their role without paying attention to this backdrop may be led down a path where the role conflicts with the ends it is supposed to serve. This risks creating normative dissonance both in the life of that lawyer and in the legal system more broadly.

I then talked about the meaning of life. I considered the view that life's meaning comes from engaging with an array of human goods in such a way as to construct a personal narrative about one's existence. Life's meaning comes from shaping the kind of person you wish to be. However, it is important to do this in a balanced and integrated manner. Otherwise, the shape of a person's life can end up posing a threat to their psychological and existential well-being. The neglect of purposes, in this context, can become not just a form of stupidity, as Nietzsche put it, but also a form of self-harm. I concluded by considering some sceptical and critical responses to the idea of law's purpose, showing how they can help to inform more nuanced and progressive versions of the purposive outlook.

---

49 Fuller (n 1) 42.

50 See, for example, John Finnis, 'The Rights and Wrongs of Abortion: A Reply to Judith Thomson' (1973) 2 *Philosophy and Public Affairs* 117; John Finnis, 'Law, Morality and "Sexual Orientation"' (1994) 69 *Notre Dame Law Review* 1049. For criticism, see Jonathan Crowe, 'Natural Law and Authoritarianism' in Richard Nate, Marko Trajkovic and Martha Egan, *Perspectives on Authoritarianism and Totalitarianism from Literature, Philosophy, Law and History* (Königshausen and Neumann, 2025).

51 Vincent Lloyd, 'Black Natural Law' in Jonathan Crowe and Constance Youngwon Lee (eds), *Research Handbook on Natural Law Theory* (Edward Elgar, 2019).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedy/

The opportunity to reflect on purposes is valuable. It is conducive to a meaningful and flourishing life. It may be possible to live a comfortable life without pondering such deeper questions – but such a life is risky, because it may produce an unbalanced or fragmented existence. The study of legal philosophy is an opportunity for law students and lawyers to put their lives in context. It is a chance to think about what they are doing and why they are doing it. This kind of reflection, if taken seriously, may lead them to make choices in life that enhance their pursuit of meaning and flourishing.

Sometimes, life becomes unhealthy. At such times, we need the resources to identify what is not working in our lives and make a change. This type of existential reflection is inherently difficult. Not all of us can be like Rainer Maria Rilke and realise by looking at a classical sculpture that 'you must change your life'.[52] It is easier, as David Bowie put it, to 'never leave the stream / of warm impermanence' rather than 'turn to face the strange'.[53] At difficult times like these, we need all the resources we can get. Legal philosophy may not save too many lives, but it can't hurt to have the habit of reflecting on purposes when you're not sure where your life is going. Drag yourself away from social media and read a bit of Fuller from time to time. As the toucan said about Guinness: it's good for you.

Further Reading

Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) chs 9-10

Jonathan Crowe, 'What is Wellness? The Role of Human Values' (2020) 45 *Alternative Law Journal* 261

Jonathan Crowe, *Legal Theory* (Thomson Reuters, 4th ed, 2024) ch 1

Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1964) ch 2

HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) ch 9

Martin Luther King Jr, 'Letter from Birmingham Jail' in *A Testament of Hope: The Essential Writings of Martin Luther King Jr* (James M Washington ed, Harper Collins, 1986)

Joseph Raz, *The Authority of Law* (Oxford University Press, 2nd ed, 2009) ch 2

52 Rainer Maria Rilke, 'Archaic Torso of Apollo' in *The New Poems: The Other Part* (Len Krisak trans, Boydell & Brewer, 2015) 173-174.

53 David Bowie, 'Changes', *Hunky Dory* (RCA Records, 1971).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Chapter 3

Comparative Law

Theunis Roux

I Overview

Does comparative law go 'beyond doctrine'? The answer depends in part on what is meant by that term. If we understand doctrine to encompass not just formal legal norms, but also the conventions of legal reasoning that support the interpretation of those norms,[1] we might be inclined to say, 'not necessarily'. For then there appears to be at least one version of comparative law that is very much doctrinal, viz, that version that involves the legal researcher, practising lawyer or judge referring to foreign law in the course of an argument about how a legal norm in their own legal system ought to be interpreted.[2] In this guise, comparative law is arguably a mode of doctrinal reasoning like any other. To be sure, the extent of its use and its doctrinal significance will vary from legal system to legal system. But, in principle, comparative law in this form is the same species of thing as arguing from precedent or applying the rules of statutory interpretation. It is a tool deployed in the quintessentially doctrinal exercise of making the law 'the best that it can be'.[3]

On another view, this conclusion leaves out a vital step. The meaning and import of a foreign legal norm cannot be ascertained by recourse to doctrine alone, even on the broad definition just given. That is because any reference to a foreign legal norm must necessarily be sensitive to the context in which it is embedded. Foreign legal norms, on this view, exist within clusters of shared meaning that must be understood in all their cultural distinctiveness if comparison is to be meaningful.[4] That being so, the comparative lawyer, even one who purports to be working within the interpretive practices of their own legal tradition, must perforce make use of other disciplines – including history, political science, and sociology – to contextualise

1 On this question, see Mátyás Bódig, *Legal Doctrinal Scholarship: Legal Theory and the Inner Workings of a Doctrinal Discipline* (Edward Elgar, 2021); Jason NE Varuhas, 'Mapping Doctrinal Methods' in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar, 2023) 70.

2 Susan Kiefel, 'The Significance of Comparative Law to Common Law Judges: An Australian Perspective' in Katharine Boele-Woelki and Diego P Fernández Arroyo (eds), *Current Issues of Comparative Law – Questions actuelles de droit compare* (Springer, 2019) 3, 9 (comparative law 'forms part of the judicial method, the purpose of which is to deepen one's understanding of our laws in order to answer a novel and difficult question').

3 Ronald Dworkin, *Law's Empire* (Belknap Press, 1986).

4 Pierre Legrand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

the norms to which they are referring. That interpretive step necessarily takes them beyond doctrine.

Or does it? If doctrine encompasses the reasoning methods through which the contextualisation of a foreign legal norm occurs, the key question, proponents of the first view might respond, is not whether the comparative lawyer must have recourse to other disciplines, but whether such recourse could still in some sense be said to be doctrinally controlled. Provided the perspective remains that of the legal-professional insider participating in the construction of doctrine, the mere fact that the comparative lawyer draws on other disciplines does not mean that they have ceased to reason doctrinally. What matters is the extent to which those other disciplines are subordinated to law's purposes. Law, after all, is a 'parasitic discipline' that invariably makes use of the conceptual frameworks of other disciplines.[5] If that is all that is happening when a comparative lawyer contextualises a foreign legal norm, it may be business as usual.

The resolution of these competing views hinges on questions about the legal-systemic role of the legal academic, legal practitioner and judge that can only be briefly addressed here.[6] It is easy to accept, for example, that a barrister's rough-and-ready enlistment of a foreign legal norm or a judge's cursory summary of an aspect of foreign law might be entirely doctrinal. Neither of these role players has the time to offer a fully worked-out contextualisation of the norm on which they are drawing. The legal academic doing comparative law, on the other hand, may have time for deeper reflection of this kind and perhaps even mastery of other disciplines. One of the functions legal academics have, after all, is to be vanguardists and systematisers – utilising their institutional advantage as non-practising lawyers to push the law to new insights. What counts as an acceptable reference to foreign law for the legal academic might therefore be different from the standard applied to a barrister or judge. At a certain point, the legal academic doing comparative law might so immerse themselves in the perspective of another discipline that it no longer makes sense to think of them as reasoning doctrinally.

Whatever view one takes of this threshold issue, doctrinally-oriented comparative law is clearly just one way in which comparative law can be pursued, and nowadays perhaps not even the most important one. In a world where a great deal of law is transnational or global,[7] the practice of comparative law is about much more than improving legal regulation within a single system. Rather, comparative law encompasses all the various ways in which, and the purposes for which, comparison between legal systems occurs. So, for example, comparative law might be used to support the drafting of an international treaty in terms of which signatory states agree to align their regulatory frameworks.[8] Or legal comparison might be pursued for its own sake, as an exercise in generating scholarly knowledge about the functioning of law and legal institutions under specified conditions. When comparative law is used

---

5 Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25 *Journal of Law & Society* 71.

6 See further, Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24 *Legal Education Review* 173.

7 Mathias Siems, *Comparative Law* (Cambridge University Press, 2nd ed, 2018) 310.

8 Ibid 5.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Chapter 17

Earth Jurisprudence

Costa Avgoustinos

I Introduction

Earth Jurisprudence was established in the early 2000s in response to looming ecological crises, such as climate change and mass extinction.[1] According to this legal theory, Western law is too 'anthropocentric' (human-centred) rather than 'ecocentric' (Earth-centred).[2] This means that it frames humans as distinct from, and superior to, nature, rather than enmeshed within, and reliant upon, nature. The result is a lack of importance placed on environmental protection in Western legal systems.[3] Earth Jurists highlight how serious ecological problems flow from this and explore what a more ecocentric legal system might look like.

While Earth Jurisprudence is studied worldwide, it has had a particularly strong foothold in Australia. Many of its leading scholars and texts have emerged domestically.[4] This chapter examines Earth Jurisprudence from an Australian perspective. In Part II, I critique the anthropocentric workings of the Australian legal system. This is followed, in Part III, by an analysis of Earth Jurists' various proposals for making this system more ecocentric.

II Anthropocentrism and Australian Law

The story of Australia's colonisation is one of a clash between ecocentric and anthropocentric cultures. First Nations societies, existing in Australia for more than 65,000 years, are ecocentric in character. They are premised on a belief that humans are physically and spiritually intertwined with nature.[5] The laws of First Nations

1 'Earth Jurisprudence' is also known as, or associated with, 'Wild Law', 'Earth Law', 'Ecological Law' and 'Ecological Jurisprudence'. For discussion of Earth Jurisprudence's origins see: Cormac Cullinan, 'A History of Wild Law' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 12.

2 Ibid 13.

3 Ibid.

4 See eg Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011); Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014); Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017).

5 Irene Watson, 'Aboriginal Relationships to the Natural World: Colonial Protection of Human Rights and the Environment' (2018) 9(2) *Journal of Human Rights and the Environment* 119, 124-125.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

people reflect this belief, centred on a commitment to care for the land that cares for them.[6] As Christine Black has explained, and the editors' note in the Introduction, 'the Land is the source of Law'.[7]

British society, in contrast, was and is anthropocentric. Deeply rooted in Western thinking is the view that humans are nature's master.[8] This can be traced back to the Bible (in which God gifts the Earth to humans to rule over),[9] Ancient Greek philosophy (such as Plato equating nature with a *chaos* that humans must *tame*)[10] and the development of capitalism (which requires profits to be made through the environment's exploitation)[11] among other sources.[12]

Britain did not merely impose its anthropocentric worldview upon First Nations people when it began colonising Australia in 1788. It used this worldview to justify colonisation itself. *Terra nullius* was a European legal principle rooted in anthropocentric assumptions. It permitted colonisers to dispossess Indigenous people of land if they had not properly 'conquered' it through European-style agricultural practices as God supposedly intended.[13] British settlers, thus, employed *terra nullius* to seize First Nations' country, fracturing their societies in the process.

Britain went on to establish an anthropocentric legal system in Australia similar to its own. The Crown is framed as the overriding 'owner' of the continent and its ecosystems.[14] The Commonwealth and States pass laws on the Crown's behalf, geared towards extracting resources from these ecosystems to serve a capitalist economy.[15] This is aided by the legal conceptualisation of animals, trees, water and other natural entities as 'property'.[16] They are objects for humans to distribute, buy, sell or destroy in pursuit of perpetual economic growth. All the while, this legal system severely constricts First Nations people's ability to care for the environment through their ecocentric legal practices. Despite land rights and native title legislation being passed

---

6 Ibid 124.

7 Christine Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2010).

8 Nicole Graham, *Lawscape* (Routledge, 2011) 31 ('*Lawscape*').

9 Gloria L Schaab, 'Beyond Dominion and Stewardship' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 107.

10 Val Plumwood, *Feminism and the Mastery of Nature* (Routledge, 1993) 80-86, 94-97.

11 Peter Burdon, *Earth Jurisprudence: Private Property and the Environment* (Routledge, 2014) 31 ('*Earth*').

12 Peter Burdon, 'Ecological Law in the Anthropocene' (2020) 11 *Transnational Legal Theory* 33, 38 ('Anthropocene').

13 Emmerich de Vattel, *The Law of Nations; Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Merriam and Cook, first published 1758, 1844 ed) 98-100; Ulla Secher, 'The High Court and Recognition of Native Title: Distinguishing Between the Doctrines of Terra Nullius and "Desert and Uncultivated"' (2007) 11 *Sydney Law Review* 1, 7.

14 *Williams v Attorney-General for NSW* (1913) 16 CLR 404, 439.

15 Costa Avgoustinos, 'The Promethean Views of the Constitution's Framers' (forthcoming) ('Framers'); Michelle Maloney, 'Ecological Limits, Planetary Boundaries and Earth Jurisprudence' in Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 193, 205 ('Limits').

16 Burdon, *Earth* (n 11) ch 2.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

in more recent years, private property laws (among others) place large tracts of land out of reach for First Nations custodianship.[17]

Earth Jurists highlight the problems with this anthropocentric legal model. The pursuit of economic growth incentivises an ever-increasing ransacking of ecosystems with insufficient regard for their capacities to regenerate.[18] The 'objectification' of nature also leaves it vulnerable to abuse. Envisioning ecosystems as mere collections of raw materials for humans to plunder obscures their true value. To begin, ecosystems are life-support systems for humans.[19] If polluted and degraded, humans suffer in the short- and long-term, as climate change and other ecological crises make increasingly clear. The focus on humans' rights *to* nature also eclipses consideration of the rights *of* nature. Earth Jurists emphasise this ecocentric point: What about forests, rivers and other ecosystems' rights to survive and thrive for their own sake, not to mention the rights of animals living within them?[20]

Environmental laws have been belatedly added to the infrastructure of the Australian legal system to supposedly address such concerns. This field of law emerged around the 1970s when ecological degradation first gained mainstream attention.[21] Unfortunately, it has proven inadequate. As decades of independent reports reveal, the health of Australian ecosystems continues to decline.[22] Earth Jurist Ian Lowe recites some of the reasons why environmental laws have been unable to curb this trend.[23] To start with, legal battles in this area are often 'David and Goliath' struggles. Individuals or community groups have far less capacity to challenge the governments or corporations supporting the environmentally-destructive projects in question.[24]

Further, those seeking to protect nature are often required to satisfy a daunting standard of proof. As Lowe states, '[e]nviromental regulations usually assume that development will go ahead unless it can be proven beyond reasonable doubt that the [ecological] consequences would be unacceptable'.[25] This is particularly challenging when objectors must navigate complex scientific evidence to convince judges of the cumulative impacts of an individual project. Some judges, for example, have been unwilling to draw the connection between government approval of a single coal mine and its contributions to global temperature rises. The carbon emissions from this one

17 See eg Lisa Strelein (ed), *Dialogue about Land Justice: Papers from the National Native Title Conferences* (Aboriginal Studies Press, 2010); Heidi Norman, *What Do We Want? A Political History of Aboriginal Land Rights in New South Wales* (Aboriginal Studies Press, 2015).

18 See eg Maloney, 'Limits' (n 15).

19 Helen Kopnina et al, 'Anthropocentrism: More than Just a Misunderstood Problem' (2018) 31 *Journal of Agricultural and Environmental Ethics* 109, 112.

20 See discussion in: pt III(B).

21 John Cole, 'Environmental Law and Politics' (1981) 4(1) *University of New South Wales Law Journal* 55, 62.

22 Ian Lowe, 'Wild Law Embodies Values for a Sustainable Future' in Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 3, 4. For an example of such a report see: Graeme Samuel, 'Independent Review of the EPBC Act - Final Report' (Commonwealth of Australia, October 2020).

23 Lowe (n 22).

24 Ibid 4.

25 Ibid.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

mine are perceived as a mere 'drop in the ocean'.[26] Climate change, however, is a 'death by a thousand cuts' problem, meaning each new coal mine must be understood as a substantial threat in itself.[27] For these reasons and more, Lowe concludes that the field of environmental law has, at best, merely been able to slow down the pace of Australia's environmental decline. It has not been able to quell it.[28]

Earth Jurisprudence offers a holistic look at how Western legal systems treat nature. This analysis of Australia's legal system reveals serious shortcomings. It prioritises capitalist expansion at nature's expense. It was designed this way from the beginning to facilitate the mass extraction of Australia's natural bounty to enrich the British Empire. In 1856, assayer William Stanley Jevons captured the attitude of the time: 'while money is to be made, trees will never in Australia be spared for mere ornament'.[29] Environmental law, created more than a century later, has not managed to 'turn the tide'. This body of law has structural weaknesses that governments seem unwilling to fix, in fear of how effective environmental laws may hamper extractive industries.[30] As Michelle Maloney concludes, '[w]hile many environmental laws have been passed since the 1970s, they have been "tacked onto" a private property-based, pro-growth, human-centered legal system'.[31]

Earth Jurisprudence offers a strong critique of anthropocentrism, but scholars emphasise nuances are required in the discussion.[32] First, legal systems still need to serve humans and provide them with good, secure lives.[33] Second, not all humans are equally at fault, with rich extractive industry leaders, for example, more responsible for today's environmental challenges than members of impoverished communities.[34] Third, nature cannot be returned to some idealised pre-human state.[35] Humans have profoundly shaped and reshaped how ecosystems operate worldwide, so responding to ecological crises requires consideration of how human use and protection of nature can be achieved in tandem.[36]

---

26 Ibid 5; Jacqueline Peel, 'Issues in Climate Change Litigation' (2011) 1 *Carbon and Climate Law Review* 15, 16. For example see: *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-Op Ltd* [2012] QLC 13, [570].

27 Lowe (n 22) 5; Peel (n 26) 17.

28 Maloney and Burdon (eds) (n 4) xiv.

29 Diary entry by William Stanley Jevons, 9 March 1856 in Robert Collison Black and Rosamond Könekamp (eds), *Papers and Correspondence of William Stanley Jevons: Volume 1: Biography and Personal Journal* (MacMillan Press, 1972).

30 Danny Noonan, 'Imagining Different Futures through the Courts: A Social Movement Assessment of Existing and Potential New Approaches to Climate Change Litigation in Australia' (2018) 37 *University of Tasmania Law Review* 25, 40, 67-68.

31 Michelle Maloney, 'Practical Pathways to Ecological Law: Greenprints and a Bioregional, Regenerative Governance Approach For Australia' in Kirsten Anker et al (eds), *From Environmental to Ecological Law* (Routledge, 2021) 237, 240 ('Greenprints').

32 See eg Burdon, 'Anthropocene' (n 12); Kopnina et al (n 19).

33 Cullinan (n 1) 13.

34 Kopnina et al (n 19) 118; Matthius Petel, 'The Illusion of Harmony: Power, Politics, and Distributive Implications of Rights of Nature' (2024) 13(1) *Transnational Environmental Law* 12, 22-23.

35 Burdon, 'Anthropocene' (n 12) 40-41.

36 Ibid 40-41; Jérémie Gilbert et al, 'The Rights of Nature as a Legal Response to the Global Environmental Crisis? A Critical Review of International Law's 'Greening' Agenda' in

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

With these nuances in mind, let us consider some Earth Jurisprudence proposals for improving the Australian legal system.

III Ecocentrising Australian Law

Australian Earth Jurists explore the ways in which this country's legal system can be made more ecocentric. What follows is some of their key proposals. This includes discussion on points of disagreement among Earth Jurists and a reckoning with criticisms that these proposals have attracted.

A Respecting Ecological Limits

A common starting point in Earth Jurisprudence is acknowledging that human legal systems should operate in harmony with the ecosystems within which they exist.[37] Peter Burdon frames this as a play on natural law theory.[38] Human laws must respect the laws of physical nature as gleaned from environmental sciences.[39] This means that humans should not be passing laws that disregard nature's limits, thereby inviting ecological crises. Such harmful laws, Burdon argues, should be viewed as a 'corruption of law'.[40] Citizens would have a moral (though not necessarily legal) right to protest and disobey these laws.[41]

Maloney draws on the concept of 'planetary boundaries' to capture nature's limits with some specificity.[42] The Stockholm Resilience Institute identifies nine planetary boundaries (including 'biodiversity loss', 'ocean acidification' and 'climate change') within which humans must remain if they want to avoid creating dangerous, irreversible conditions for human and non-human life.[43] The 'climate change' boundary is breached, for instance, when the 'energy budget' is exhausted.[44] This is the amount of greenhouse gases that can be emitted before the risk of generating severe damage to the climate substantially increases. According to the Institute, six out of nine planetary boundaries have already been transgressed.[45]

Maloney proposes several ways the Australian legal system can better respect these planetary boundaries. This includes drawing on ideas from the degrowth movement (which examines how nations can transition away from economies relying on infinite growth) and Kate Raworth's 'Doughnut Economics' model (which captures

---

Daniëlla Dam-de Jong and Fabian Amtenbrink, *Netherlands Yearbook of International Law 2021* (TMC Asser Press, 2023) 47, 66.

37 See eg Nicole Graham, 'Owning the Earth' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 259, 259 ('Owning').

38 'The Theory of Earth Jurisprudence' (2012) 37 *Australian Journal of Legal Philosophy* 28 ('Theory').

39 Ibid 44. This is as opposed to, for example, moralistic views of what behaviour is 'natural' as gleaned from religious texts like other natural law theorists have asserted in the past.

40 Ibid 32.

41 Ibid 49.

42 Maloney, 'Greenprints' (n 31); Maloney, 'Limits' (n 15).

43 Katherine Richardson et al, 'Earth Beyond Six of Nine Planetary Boundaries' (2023) 9(37) *Science Advances*: 1-16.

44 Ibid 6.

45 Ibid.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

the 'sweet spot' between what societies must provide to meet citizens' needs and do to keep within planetary boundaries).[46] One particular avenue proposed by Maloney is 'Greenprints'.[47] This is a step-by-step program that helps Australian local communities and organisations, first, understand the need to live within planetary boundaries and, second, develop practical strategies for pursuing this global goal locally. This involves consideration of the local region's particular environmental features and what local planning laws and other regulations might need changing.

Maloney quotes the work of another Earth Jurist, Samuel Alexander, to explain why such a 'bottom up' approach may be fruitful.[48] Alexander believes there can be benefits in 'directing more of our energies toward building the new society at a grassroots level; building it beneath the legal structures of the existing society with the aim that one day new societal structures will emerge'.[49]

B Rights of Nature

The 'Rights of Nature' is a legal concept, popular in Earth Jurisprudence, that asserts that nature should be given legal rights to exist and thrive.[50] Humans are seen as part of an 'Earth Community' alongside animals, rivers, mountains, trees and every other natural entity on the planet.[51] These entities deserve rights because they have intrinsic value. That is, their value should not be solely dependent on how they serve humans. They deserve protection for their own sake.[52] Where the law recognises nature's rights, humans should be able to defend these rights in court as nature's guardians, similar to how adults act as guardians to protect children's rights in legal matters.

Several countries have Rights of Nature laws.[53] Ecuador and Bolivia recognise the Rights of Nature in their constitutions.[54] The Ecuadorian Constitution, for instance, states that nature 'has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes'.[55] It obliges the Ecuadorian government to respect nature's rights and entitles any member(s) of the public to take legal action on nature's behalf.[56] An

---

46 Maloney, 'Greenprints' (n 31) 242, 245, 248; Maloney, 'Limits' (n 15) 202; Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (Random House, 2017).

47 Maloney, 'Greenprints' (n 31).

48 Maloney, 'Limits' (n 15) 208.

49 Samuel Alexander, 'Wild Law from Below' in Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 31, 32.

50 Burdon (ed) (n 4) pt III(2).

51 For example see: Thomas Berry, 'Rights of the Earth: We Need a New Legal Framework Which Recognises the Rights of All Living Beings' in Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011) 227, 228-229.

52 Viktoria Kahui, Claire W Armstrong and Margrethe Aanesen, 'Comparative Analysis of Rights of Nature (RoN) Case Studies Worldwide: Features of Emergence and Design' (2024) 221 *Ecological Economics* 108193: 1-20, 2. Of course, the 'Rights of Nature' can still be justified in anthropocentric terms – for example, allowing ecosystems to be damaged may be a loss for future generations of humans.

53 Ibid.

54 Ibid 3.

55 Constitution of Ecuador (2008) Art 71.

56 Constitution of Ecuador (2008) Arts 10, 71-74.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

example of this was seen in 2021. Ecuador's Constitutional Court revoked permits to mine in the cloud forest region, *Los Cedros*, because it would upset fragile ecosystems and harm endangered bears, monkeys and frogs.[57]

The Ecuadorian constitution is an example of a 'public guardianship' model where anyone in the community may defend the rights of nature as a whole.[58] Other countries have adopted a 'legal personhood' Rights of Nature model where specific guardians are appointed to defend the rights of a specific environmental site, such as a river, forest or lagoon.[59] This site is deemed a 'legal person' akin to how a corporation has this status despite not being human. Aotearoa New Zealand was the first nation to grant 'legal personhood' to an environmental site. In 2014, it passed legislation that recognised Te Urewera as a legal person with its own *mana* (authority) and *mauri* (life force) as part of an agreement with Māori *iwi* (tribes) to settle Crown violations of the principles of the Treaty of Waitangi.[60] Aotearoa New Zealand followed this up by recognising the Whanganui River as a legal person in 2016.[61] Since then, Bangladesh, Canada, Colombia, India and Spain have granted legal personhood to environmental sites in their respective territories.[62]

Some Earth Jurists raise concerns regarding the Rights of Nature. To begin, a danger exists when these rights are left vague. If judges must fill in the details later, they might be swayed by corporations or others to dilute these rights' potential for environmental protection.[63] As Peter Burdon and Claire Williams warn, '[o]ne need only look at the way the term "sustainability" has been appropriated by big business to understand the risk.'[64] For this reason, it might be better if environmental legislation more directly outlined humans' (specific) *duties* to nature rather than nature's (general) *rights*.[65] Brendan Sydes raises another concern in the Australian context.[66] This country has no bill of rights and lacks the strong rights-based culture of other nations. The Australian legal system, therefore, might not be fertile ground to sustain fundamental rights of nature.[67]

Despite such concerns, Australia has made some steps towards the Rights of Nature:

- Victoria passed legislation in 2017 to protect the Yarra River (*Birrarung*), in consultation with First Nations Traditional Owners, recognising the river

57 *Sentencia (Case No 1149-19-JP/20),* Constitutional Court of Ecuador, 10 November 2021.
58 Kahui, Armstrong and Aanesen (n 52) 3.
59 Ibid 3.
60 *Te Urewera Act 2014* (NZ).
61 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ).
62 Kahui, Armstrong and Aanesen (n 52) 4.
63 Peter Burdon and Claire Williams, 'Rights of Nature: A Critique' in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar, 2022) 164, 173.
64 Ibid citing Adrian Parr, *Hijacking Sustainability* (MIT Press, 2012).
65 Geoffrey Garver, 'Are Rights of Nature Radical Enough for Ecological Law?' in Kirsten Anker et al (eds), *From Environmental to Ecological Law* (Routledge, 2021) 90, 94; Gilbert et al (n 36) 65.
66 Brendan Sydes, 'The Challenges of Putting Wild Law into Practice: Reflections on the Australian Environmental Defender's Office Movement' in Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 58, 64.
67 For an Aboriginal critique of the Rights of Nature see pt II(E).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

as 'one living and integrated natural entity'.[68] This legislation, however, does not confer legal rights upon the river.[69]

- Victoria created a body corporate, the Victorian Environment Water Holder, to serve as guardian of the state's water supply, making decisions on its use and long-term protection. In this situation, the water's guardian is a 'legal person', not the water itself. Viktoria Kahui, Claire W Armstrong and Margrethe Aanesen categorise this as an 'indirect' form of legal personhood.[70]
- In Western Australia, First Nations Traditional Owners of the Fitzroy River (*Martuwarra*) developed the Fitzroy River Declaration.[71] This agreement recognised the river as a 'living ancestral being' with a 'right to life'.[72] A campaign is ongoing for this position to be embraced in state or federal law and for the river to be granted 'legal personhood'.[73]
- In 2021, the Blue Mountains City Council recognised nature's intrinsic value in its *Blue Mountains Community Strategic Plan 2035*. The council has committed to adding Rights of Nature principles into its operations (including when assessing environmental impacts of development proposals under Part 5 of the *Environmental Planning and Assessment Act 1979* (NSW)) making it the first government in Australia to do so.[74]

While none of these measures compare to what has been achieved in Aotearoa New Zealand and elsewhere, they indicate a growing interest in the Rights of Nature across Australia.

C Animal Rights

A more ecocentric legal system would likely improve animal wellbeing. Earth Jurisprudence challenges the view of animals as 'objects' or 'property'.[75] It recognises them as beings with intrinsic value. This leads Earth Jurists to advocate for greater legal protections for animals and their habitats. The Ecuadorian Constitutional

---

68 *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 1.

69 Francine Rochford, '"Rights of Nature" in a Water Market' in Daniel P Corrigan and Markku Oksanen (eds), *Rights of Nature: A Re-Examination* (Routledge, 2021) 51, 61.

70 Kahui, Armstrong and Aanesen (n 52) 4.

71 Fitzroy River Declaration 2016 <https://ecojurisprudence.org/wp-content/uploads/2022/07/fitzroy-river-declaration.pdf>.

72 Ibid. As Michelle Mei Ling Lim, Anne Poelina and Donna Bagnall note, '[t]his is the first time in Australia that … the inherent rights of nature have been explicitly recognised in a negotiated instrument': 'Can the Fitzroy River Declaration Ensure the Realisation of the First Law of the River and Secure Sustainable and Equitable Futures for the West Kimberley?' (2017) 32(1) *Australian Environment Review* 18, 18.

73 See discussion in: Lim, Poelina and Bagnall (n 72); pt II(E).

74 Blue Mountains City Council, *Rights of Nature* (Web Page) <https://bmcc.nsw.gov.au/rights-of-nature>.

75 Melissa Hamblin, 'Wild Law and Domesticated Animals: A Wild Law Approach to the Regulation of Farming Industries in Australia' (Wild Law Conference, Griffith University, 16-18 September 2011); Steven White, 'Wild Law and Animal Law: Some Commonalities and Differences' in Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014) 247; Glenn Wright, 'Animal Law and Earth Jurisprudence: A Comparative Analysis of the Status of Animals in Two Emerging Discourses' (2013) 9 *Australian Animal Protection Law Journal* 5.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Court's ruling discussed above regarding *Los Cedros* offers a real-world illustration of this. The Rights of Nature entrenched in that nation's constitution were used to protect endangered species in this forest region.[76] Melissa Hamblin provides another example in her examination of animal farming.[77] She asserts that an Earth Jurisprudence approach requires agricultural industries to stop prioritising human profit-making over animal rights, inviting stronger animal protection laws. This approach also pushes for a holistic consideration of the ways in which animal farming causes broader environmental damage in terms of climate change, biodiversity loss from land clearing and more.[78]

Some details on Earth Jurisprudence's position on animal rights, however, remain unclear. Earth Jurists tend to view environmental matters from the macro-level, seeking to preserve the 'place' of animals in larger ecosystems.[79] This leads to a relatively straightforward position regarding wild animals (that is, their habitats should be legally protected) but less so regarding other animals.[80] For example, should Earth Jurists support the killing of invasive species, such as rabbits in national parks, to maintain these environments or defend the right to life of these 'pests'? This ties into unanswered questions in Earth Jurisprudence about the extent to which its interest is protecting individual animals rather than species of animals collectively.[81] Further, Glenn Wright queries Hamblin's position on farm animals.[82] Hamblin seems to accept that their 'place' is within agricultural industries to be used, and killed, as resources for humans. Wright counters that this might be viewing animals in harmful anthropocentric terms and, again, not providing enough consideration of individual animals' rights.[83]

Answers to these questions may emerge as Earth Jurisprudence develops further. Wright notes, however, that many of the issues raised above have been a source of disagreement between environmentalists and animal rights advocates for decades and are not easily resolved.[84] These tensions seem to be reflected in the legal sphere when comparing Earth Jurisprudence and Animal Law (a legal discipline established in the 1990s seeking a radical rethink of animal rights). Nevertheless, many scholars in both disciplines take a pragmatic approach.[85] They hold the view that improvements in animal protection laws are best sought incrementally, and substantial common ground can be built upon in that pursuit. For example, both disciplines reject the legal view of animals as mere property and, tying in with the

76 See discussion in pt III(B).
77 Hamblin (n 75).
78 White (n 75) 257.
79 Wright (n 75) 16-17.
80 Ibid 17.
81 Ibid 16, 23; Sophie Riley, 'Listening to Nature's Voice: Invasive Species, Earth Jurisprudence and Compassionate Conservation' (2019) 22 *Asia Pacific Journal of Environmental Law* 117, 129.
82 Wright (n 75) 17-18. See also White (n 75) 256.
83 Wright (n 75) 17-18. A similar debate was raised in the Federal Court regarding whether sheep in the live export trade are deemed members of the 'environment' (so that live export protesters could argue the defence of 'environmental protection': *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* (2007) 243 ALR 356; *Trade Practices Act 1974* (Cth), s 45DD(3). For discussion see: White (n 75) 257-258.
84 Wright (n 75) 22-23.
85 Ibid 24.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

discussion above, generally support efforts worldwide to see animals granted legal personhood.[86] These efforts have gained traction in recent years with an Argentinian court in 2016 being the first to recognise an animal as a legal person – a chimpanzee named Cecilia released from poor conditions in a zoo via a writ of habeas corpus.[87] While interest in this argument seems to be growing internationally, Australia appears far away from embracing such a position.

D Judicial Interpretation

Some progress can be made towards a more ecocentric Australian legal system through judicial interpretation. That is, judges could give more consideration to ecocentric perspectives when interpreting existing laws. This is not to suggest that judges break or ignore the law. It is an acknowledgment that judges often have discretion when interpreting open-ended legislation or precedent. Some Earth Jurists encourage judges to be aware of their own (unconscious) anthropocentric assumptions in such situations.[88] This is akin to warnings in feminist jurisprudence and critical race theory against judges drawing on (unconscious) sexist and racist assumptions respectively.[89]

I have written elsewhere, for example, on how the Australian Constitution could be interpreted in a more ecocentric manner to establish an 'Implied Right to a Healthy Environment' (or 'Ecological Limitation').[90] The High Court has found implied in the document that Australian governments cannot take actions that unduly harm the long-term structural integrity of the Australian constitutional system.[91] This has led to the establishment of the implied freedom of political communication, *Melbourne Corporation* limitation, and other constitutional implications restraining government power. If judges accept that the Australian constitutional system exists within the ecosystem (rather than an anthropocentric view, out of step with reality, that sees human social structures as somehow separate from 'nature'), this well-established precedent on constitutional implications may lead the Court to interpret the Constitution as implicitly forbidding government action fuelling climate change, such as government approval of new coal mines.[92] This is because the Australian constitutional system cannot adequately serve future generations if the ecosystem within which it is built collapses.

The Wild Law and Anthropocene Judgment Projects highlight how anthropocentric ideas have crept into judicial decision-making in the past.[93] Inspired by feminist

86 See eg Berry (n 51) 229; David R Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (ECW Press, 2017) ch 4.

87 Macarena Montes Franceschini, 'Animal Personhood: The Quest for Recognition' (2021) 17 *Animal & Natural Resource Law Review* 93.

88 Rogers and Maloney (eds) (n 4) 3.

89 Ibid 3; See eg Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision-Making* (Routledge, 2021) 3.

90 Costa Avgoustinos, 'Climate Change and the *Constitution*: The Case for the Ecological Limitation' (2023) 49(1) *Monash University Law Review* 267 ('Climate').

91 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135; Avgoustinos, 'Climate' (n 90) 7.

92 Avgoustinos, 'Climate' (n 90) 13-18.

93 Rogers and Maloney (eds) (n 4); Nicole Rogers and Michelle Maloney (eds), *The Anthropocene Judgments Project: Futureproofing the Common Law* (Routledge, 2023).

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

judgment projects, Earth Jurists rewrite existing judicial decisions to demonstrate how more ecocentric judgments are possible. Stephen Summerhayes, for instance, rewrites *Mabo v Queensland (No 2)* from a more ecocentric and First Nations perspective.[94] As a 'fictitious eighth member' of the High Court, Summerhayes does not grant Mr Mabo 'native title'.[95] He recognises 'Country' as a legal person with an 'ecological title'. 'Country' captures a First Nations view of a landscape's 'physical, biological, spiritual, cultural and experiential elements'.[96] An 'ecological title' is a legal construct, like 'native title', that Summerhayes posits does not fracture existing common law principles but develops them to address new situations as intended.[97] This title recognises the Meriam people as the custodians and constructive trustees of Mer Island. It grants them the right to enjoy the land and duty to maintain it in accordance with their traditional laws and customs.

Such retellings are provocative. They challenge readers to confront their own anthropocentric assumptions among those embedded in the law as they consider what might be possible in the realm of judicial decision-making.

E First Nations Law

Efforts are ongoing to address the divide between First Nations and non-First Nations legal systems in Australia. Solutions may be found through treaty-making and/or changes to common law, legislation and the Constitution. How ever it is achieved, bridging this gap requires at least some embrace of ecocentric lawmaking. This is because, as discussed in Part II, First Nations laws are inherently ecocentric. They are anchored in the view that humans are interconnected with nature as its caretaker, not disconnected from nature as its master.

Making space for First Nations ecocentric legal perspectives might be aided by implementing some Earth Jurisprudence proposals already discussed. For instance, the Rights of Nature has potential to assist in this regard as can be seen from Traditional Owners' pursuit of the conceptualisation of the Fitzroy River as a legal person.[98] Indeed, First Nations people in Aotearoa New Zealand, Ecuador and elsewhere have often been at the forefront of Rights of Nature campaigns.[99] Summerhayes' rethinking of native title also illustrates how First Nations and Earth Jurisprudence perspectives intersect.[100]

---

94 (1992) 175 CLR 1; Stephen Summerhayes, 'Reimagining Aboriginal Land Rights: Crown, Country and Custodians, *Mabo v Queensland (No 2)*' in Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017) 219.

95 Summerhayes (n 94) 222.

96 Ibid 227.

97 Ibid 236.

98 See discussion in pt II(B); Erin O'Donnell et al, 'Stop Burying the Lede: The Essential Role of Indigenous Law(s) in Creating Rights of Nature' (2020) 9(3) *Transnational Environmental Law* 403.

99 Kahui, Armstrong and Aanesen (n 52) 5.

100 See discussion in pt II.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Other options proposed by Earth Jurists could help bridge the gap. Nicole Graham, for example, suggests that Australia incorporate First Nations understandings of 'ownership' in real property law.[101] Graham quotes Eualeyai Elder, Paul Behrendt:

> Ownership [of land] for the white people is something in a piece of paper. We have a different system. … Our affinity with the land is like the bonding between a parent and child. You have responsibilities and obligations to look after and care for a child. You can speak for a child. But you don't own a child.[102]

In such a system, one would not have a 'right' to do whatever they wish with the land in their possession. They would have a responsibility to serve as its guardian to ensure it is kept in good condition for future generations and the sake of the Earth itself.

While Aboriginal legal perspectives have informed Earth Jurisprudence's development in Australia, concerns have been raised about their compatibility. Regarding the Fitzroy River, some Traditional Owners are uneasy with its spiritual ancestral creator, *Yoongoorrookoo*, being framed as a legal person in Western law.[103] Isolating a specific ecological site to grant it legal personhood may also conflict with Aboriginal visions of everything in nature being deeply interrelated.[104] This isolation might even place a wedge between First Nations people and their land if nature's rights are formulated in a manner that ignores their responsibility to access country to carry out custodial obligations.[105] In short, these critics warn against Earth Jurisprudence becoming 'a new tool of colonisation'.[106] As Erin O'Donnell et al explain, 'a pluralist, truly transformative ecological jurisprudence' can only be attained 'by recognizing, and empowering, Indigenous leadership as part of an ongoing co-design and co-management approach, one that includes a genuine interaction with Indigenous cultures, languages, and ontologies.'[107]

F International Law

Earth Jurists' critique of international law also warrants discussion. Environments, and environmental problems, transcend national boundaries,[108] but anthropocentrism permeates international law as it does Western nations' domestic law.[109] This can be seen in the conceptualisation of state sovereignty, a key tenet of international law. The UN General Assembly recognises that each state has an 'inalienable right … to freely dispose of their natural wealth and resources in accordance with their

---

101 Graham, 'Owning' (n 37).
102 Ibid 263 quoting Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes* (Federation Press, 2008) 89.
103 O'Donnell et al (n 98) 425.
104 Virginia Marshall, 'Removing the Veil from the 'Rights of Nature': The Dichotomy between First Nations Customary Rights and Environmental Legal Personhood' (2019) 45(2) *Australian Feminist Law Journal* 233, 238.
105 Ibid 242; O'Donnell et al (n 98) 425.
106 Marshall (n 104) 234; O'Donnell et al (n 98) 426-427.
107 O'Donnell et al (n 98) 427.
108 Gilbert et al (n 36) 67.
109 See eg ibid 56.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

national interests'.[110] The crafting of this vision of state sovereignty is historically rooted in the Western colonial views of nature discussed in Part II.[111] A nation's ownership of land permits it to exploit that land. This principle of sovereignty does not recognise any human responsibilities to nature, let alone the rights of nature itself.[112] Thus, if Brazil wants to log the Amazon, for example, it is generally entitled to do so.[113] This is despite any other nation's concerns regarding the depletion of this natural wonder and vital 'carbon sink' upon which the entire world relies to curb climate change.[114]

International laws protecting the environment operate within a framework of 'sustainable development'.[115] This framework attempts to chart how less developed nations can 'develop' in less ecologically destructive ways than Western nations did when they industrialised. It assumes that economic growth and environmental protection can be pursued simultaneously.[116] Putting to one side criticisms that this framework does not adequately address economic inequalities between developed and less-developed nations as intended,[117] it also garners criticism that it does not adequately address environmental problems. The concept of sustainable development still treats nature as little more than a collection of resources for human consumption. It normalises a capitalist Western pro-growth model of society that too readily justifies extensive environmental damage.[118] Ultimately, the problems with international environmental law echo those of domestic environmental law.[119] It, too, is a relatively weak body of law belatedly "tacked on" to a legal system designed to maximise nature's exploitation.[120]

---

110 General Assembly Resolution 1803 (XVII) of 14 December 1962, Permanent Sovereignty Over Natural Resources, ST/HR/1/Rev.6 (vol 1, part 1) 2002, 81-83.

111 Gilbert et al (n 36) 51.

112 Ibid 52.

113 As Cristina Espinosa explains, the main international law limit on state sovereignty rights over their own natural resources is 'a nonbinding core principle of environmental responsibility enshrined in international agreements like the Stockholm (1972) and Rio (1992) Declarations': 'The Advocacy of the Previously Inconceivable: A Discourse Analysis of the Universal Declaration of the Rights of Mother Earth at Rio+20' (2014) 23 *Journal of Environment and Development* 391, 392.

114 Emma Bryce, 'Why Is the Amazon So Important for Climate Change?', *Scientific American* (online, 20 February 2023) <www.scientificamerican.com/article/why-is-the-amazon-so-important-for-climate-change1>. 'Carbon sinks' are natural sites that absorb and store mass amounts of carbon. This helps keep these greenhouse gases from contributing to climate change: Will Steffen and Lesley Hughes, 'The Critical Decade 2013: Climate Change Science, Risks and Responses' (Climate Commission, 2013) 88.

115 Gilbert et al (n 36) 52.

116 Ibid 53.

117 See eg Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27 *Leiden Journal of International Law* 573, 588-591.

118 Gilbert et al (n 36) 53.

119 See discussion in: pt II.

120 See n 31. For discussion on how less developed nations' needs and ecological needs can be addressed simultaneously outside of a 'sustainable development' paradigm see for example: Raworth (n 46); Jason Hickel, *Less is More: How Degrowth will Save the World* (Windmill Books, 2020); Jason Hickel, 'Is It Possible to Achieve a Good Life for All within Planetary Boundaries?' 40(1) *Third World Quarterly* 18; Naomi Klein, *This Changes Everything: Capitalism vs the Climate* (Allen Lane, 2014) 409-418.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

In response to these shortcomings, Earth Jurists propose ways forward for a greener international law. One example is for 'ecocide' to be recognised as an international crime, alongside genocide, war crimes and others.[121] Ecocide has been defined as 'unlawful or wonton acts' likely to cause severe environmental damage, such as mass oil spills and deforestation projects.[122] If established, it would be the only international crime not solely predicated on evidence of human harm.[123] The proposal has had various champions over the years, pre-dating the emergence of Earth Jurisprudence. These include US biologist Arthur W Galston, who coined the term in 1970 to describe the hazardous effects of Agent Orange in Vietnam (which subsequently became the first of several nations to recognise 'ecocide' in its domestic law).[124] Ecocide was considered for inclusion as an international crime during the establishment of the International Criminal Court ('ICC') in 1998 but ultimately rejected.[125] Calls for its inclusion in the ICC's jurisdiction continue, with the late Pope Francis and French President Emmanuel Macron among recent supporters.[126]

Some Earth Jurists envision the Rights of Nature to be applied to the Earth in its entirety. In 2010, for example, the *Universal Declaration on the Rights of Mother Earth* was presented to the UN General Assembly by a conference hosted by Bolivia that represented 35,000 people from 140 countries.[127] The Declaration seeks for international law to acknowledge the Earth as 'an indivisible, living community of interrelated and interdependent beings' with a right to thrive.[128]

This would require a rethinking of state sovereignty. Klaus Bosselmann proposes that state governments be conceptualised as trustees of the natural resources within their borders (with nations sharing a trusteeship over natural sites beyond those borders such as Antarctica, deep seabeds and the atmosphere).[129] This would impose international law obligations on all states to ensure the proper maintenance of their natural environments with attention paid to how these environments interconnect across the Earth. Former Aotearoa New Zealand Prime Minister Jacinda Ardern signalled her support for such a vision in her address to the UN General Assembly in

---

121 Valeria Luz Puleo, 'A New International Crime of Ecocide?' (2022) 6 *University of Bologna Law Review* 163. Its most prominent advocate in Earth Jurisprudence is Scottish barrister Polly Higgins, the founder of the Earth Law Alliance (<https://earthlawyers.org>): *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Planet* (Shepheard Walwyn, 2015).

122 Philippe Sands et al, 'Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text' (Stop Ecocide Foundation, 2021).

123 Josie Fishchels, 'How 165 Words Could Make Mass Environmental Destruction An International Crime', *NPR* (online, 27 June 2021) <www.npr.org/2021/06/27/1010402568>.

124 Milena Sterio, 'Crimes against the Environment, Ecocide, and the International Criminal Court' (2024) 56 *Case Western Reserve Journal of International Law* 223, 225, 233; 'History', *Ecocide Law* (Web Page) <https://ecocidelaw.com/history>.

125 Sterio (n 124) 226.

126 Ibid 224.

127 Gilbert et al (n 36) 55.

128 Ibid 56.

129 Klaus Bosselmann, *Earth Governance Trusteeship of the Global Commons* (Edward Elgar, 2015); Klaus Bosselmann, 'Saving the Earth for Future Generations: Some Reflections' (2024) 54 *Environmental Law and Policy* 101. Some Earth Jurists advocate for such sites of 'common heritage' to be granted legal personhood: Gilbert et al (n 36) 58.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

2019, drawing on the Māori concept of *kaitiakitanga* that sees humans as guardians of the Earth.[130]

IV Conclusion

Jurisprudence is the study of how law governs relationships. In Western societies, this has primarily meant relationships among humans. The eternal, complex, critical relationship between humans and nature has too often been sidelined. Anthropocentric thinking, deeply embedded in Western law, has historically treated nature as something 'over there', outside of society's walls, that humans can take from, then ignore, as they wish.[131] This type of thinking is why problems like climate change fester. As the saying goes, however, 'Mother Nature bats last'.[132] Humans can no longer ignore the ecological crises mounting.

Earth Jurisprudence is a call for Western lawyers to give the human/nature relationship the attention it has long required. While it challenges Australians to reconsider their legal system's anthropocentric foundations, it also presents us with an opportunity. It offers insights on how the Australian legal system can do much-needed, overdue work to move towards a society in which humans live good lives within ecological limits, the gap between First Nations and non-First Nations people is addressed and proper consideration is granted to the non-human subjects facing existential threats on this continent that we share, from endangered koalas to the fast-diminishing Great Barrier Reef. We too readily avert our gaze from these problems. Earth Jurisprudence offers a space to confront them.

Further Reading

Kirsten Anker et al (eds), *From Environmental to Ecological Law* (Routledge, 2021)

Costa Avgoustinos, 'Climate Change and the *Constitution*: The Case for the Ecological Limitation' (2023) 49(1) *Monash University Law Review* 267

Peter Burdon, *The Anthropocene: New Trajectories in Law* (Routledge, 2023)

Peter Burdon (ed), *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press, 2011)

Julia Dehm and Usha Natarajan (eds), *Locating Nature: Making and Unmaking International Law* (Cambridge University Press, 2022)

Nicole Graham, *Lawscape* (Routledge, 2011)

Viktoria Kahui, Claire W Armstrong, Margrethe Aanesen, 'Comparative Analysis of Rights of Nature (RoN) Case Studies Worldwide: Features of Emergence and Design' (2024) 221 *Ecological Economics* 108193: 1-20

Michelle Maloney and Peter Burdon (eds), *Wild Law – In Practice* (Routledge, 2014)

130 'New Zealand National Statement to United Nations General Assembly 2019' (Speech delivered at the United Nations General Assembly, 25 September 2019).

131 Bob Tostevin, *The Promethean Illusion: The Western Belief in Human Mastery of Nature* (McFarland, 2010) 5.

132 Klein (n 120) 174.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017)

Irene Watson, 'Aboriginal Relationships to the Natural World: Colonial Protection of Human Rights and the Environment' (2018) 9(2) *Journal of Human Rights and the Environment* 119

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

persistence of the common law's exemption for marital rape.[4] Similarly, scholars interested in understanding how laws are received, enacted and experienced might turn to qualitative legal methods to interview administrators or social workers,[5] because we know 'law in the books' can be quite different than 'law in action'. These are just two of the many approaches that a student or scholar might wish to take. As in the hard sciences, answering different questions requires different tools (methodologies). Just as a microscope won't track the movement of comets across the heavens, and a telescope cannot provide insight into cellular division, the doctrinal method in law is a tool that is extremely valuable on some occasions but near useless in others. The point is that a researcher should be guided by their research question and choose the best methodology (or mixture of methodologies) that will help them find the answers they seek.

The second reason why students should look beyond doctrine is to gain a better appreciation of what law can – and cannot – achieve. For many, particularly marginalised communities, the law holds both great promise and real peril. We have seen, for example, how decolonial legal scholarship highlights how putatively supportive legal change that benefits Aboriginal and Torres Strait Islander peoples might merely obscure the continuation of settler colonialism.[6] Marxist legal methodologies offer similar critique of capitalism and class. These critiques can overlap. In *Western Australia v Ward*, McHugh J remarked:

> Marx thought that law was a body of rules that upheld what the dominant class in a particular society called its rights. But you do not have to be a Marxist to recognise that at least on occasions the dominant class in a society will use its power to disregard the rights of a class or classes with less power. On any view, that is what the dominant classes in Australian society did – and in the eyes of many still do – to the Aboriginal people.[7]

Alternative and critical legal methodologies can highlight the paradox of law, challenging liberal legal reforms that see law as a progressive instrument of social change.

Third, looking beyond doctrine can also build critical and sceptical thinking. Doctrinal legal research generally 'proceeds on the basis that the law can be found without [inquiry] into meaning or origins'.[8] This reflects its internal or insider perspective. As the contributors to this volume suggest, however, many of the most interesting and important revelations occur when we interrogate the justifications for the existence of a particular legal rule and consider the impact of changing it. For example, we easily might show that the doctrine of *terra nullius* was both legally

---

4 See eg Rebecca Ryan, 'The Sex Right: A Legal History of the Martial Rape Exemption' (1995) 20(4) *Law and Social Inquiry* 941.

5 See discussion in ch 5. See also Simon Halliday et al, 'Street-Level Bureaucracy, Interprofessional Relations, and Coping Mechanisms: A Study of Criminal Justice Social Workers in the Sentencing Process' (2009) 31(4) *Law and Policy* 405.

6 See discussion in ch 12. See also Stephen Young, 'Native Title as Displaced Mediator' (2021) 44(4) *UNSW Law Journal* 1739.

7 (2002) 213 CLR 1, 231 [529]

8 Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2nd ed, 2017) 16, 22.

Get FULL Ebook order By email at palemonking@gmail.com or Telegram at https://t.me/megharedddy/

unsound and its effects deeply harmful, but then go on to examine, through a critical lens, how well the doctrine of native title has worked as a replacement. If legal history teaches us anything, it is that *no* legal doctrine is inevitable and immutable: tradition and continuity can easily mask law's contingency and constant change.[9] If we understand that law is contingent and that it looks the way it does for certain reasons, we can imagine it being different. And, most importantly, we can identify a path to make that difference a reality.

Fourth, understanding the doctrinal method as just one of many possible ways of 'doing law' helps a student think more about what exactly it is they are learning in law school. As discussed in the Introduction, the doctrinal method so permeates legal education in Australia that it can seem like the be all and end all of legal research and analysis. But understanding that other methodologies are available is a little like a painter realising there's more than one colour of paint to brush onto the canvas. A law student who understands and is open to the possibilities of alternative and critical methodologies can take more active control of their own education and orient themselves towards a career or research program that better suits their own interests and goals.

These four reasons—and there are surely others that could be adduced—have hopefully persuaded you of the value of going 'Beyond Doctrine' and to take law seriously but not uncritically.

Including the multitude of approaches covered in this collection would not have been possible without the time and effort of the individual chapter authors, and we are deeply grateful for their respective contributions. We would also appreciate hearing of your experiences as a reader of the book, along with any suggestions you have for improvement of future editions.

Harry Hobbs

Jeremy Patrick

February 2025

9 See discussion in ch 1.

Law Beyond Doctrine

Throughout their studies, law students face the same, often difficult, question. In classes across the country, countless lecturers and seminar instructors will ask their students, 'what is the law?'. Answering that question requires an appreciation of the doctrinal legal method. It requires locating appropriate legal sources, distilling their meaning, and developing a persuasive argument informed by those sources. This can be difficult and challenging work. Richard Posner notes:

> The messy work product of the judges and legislators requires a good deal of tidying up, of synthesis, analysis, restatement, and critique. These are intellectually demanding tasks, requiring vast knowledge and the ability … to organize dispersed, fragmentary, prolix, and rebarbative material.[1]

Mastering this method is not only of 'inestimable importance to the legal system'[2] but critical to becoming an effective lawyer. As the contributors to this volume attest, however, the doctrinal method is only one way to engage with the law. It is our hope that this volume encourages students – and practising lawyers – to look beyond doctrine.

Each of the chapters in this collection offer reasons why law students and lawyers should embrace alternative and critical approaches to law. In this afterword, we leave you with four of these reasons.

First, the doctrinal method cannot provide all the answers to the questions we might have. Doctrinal scholarship is often described as adopting an 'internal' lens.[3] This means that it is written by 'insiders' for other 'insiders'. Doctrinal scholars identify primary legal sources and then seek to analyse and systematise those sources to identify legal rules. This method aims to explain and elucidate the law largely for the benefit of legal actors, be they judges, lawyers or academics. Of course, as Posner notes, this is important. When the question is 'what is the law?', then the traditional doctrinal method is well suited to providing answers. However, as many of the authors in this collection have identified, this method is *not* helpful if we are interested in *different* questions. Identifying what the legislature intended when it passed a certain Act cannot tell us whether the statute was *effective* in achieving its purpose. Tracing the development of a legal rule across multiple cases will not be able to tell us how that rule impacts different segments of society or whether it is fair or just.

For questions like these, questions about the effects law has in and on society, alternative methodologies are required. Students interested in exploring how and why a particular legal rule emerged and crystallised in the first place might turn to critical legal methods. For example, feminist legal scholars have offered searing critique of the

---

1 Richard Posner, 'In Memoriam: Bernard D Meltzer (1914–2007)' (2007) 74(2) *University of Chicago Law Review* 435, 437.

2 Ibid.

3 See eg Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83.

Index

Aboriginal and Torres Strait Islander Commission (ATSIC) 198–9
Aboriginal and Torres Strait Islander peoples
  anthropological studies of 209
  children in 'out-of-home-care' system 196
  Country 212–13
  customary laws 196
  ecocentric nature of 271–2
  kinship 213
  knowledge-based societies 209
  law *see* Aboriginal legal traditions; Indigenous law
  prison population, percentage of 196
  rights, denial of 16
  Voice referendum 17
  wage theft, settlements of claims 28
Aboriginal Legal Traditions 208–20
  ceremonies and rituals 215
  collective decision-making 215–16, 219
  Country 212–13
  dispute resolution 215–18
  elders 214, 217
  Kartinyeri v Commonwealth case 218, 219
  kinship 213
  nature of 209, 210–11
  people and Country relationality 212–13
  restorative justice 216–18
  social norms, law as 211–12
  yarning circles 216
Academics 1–2, 46
ACCC v ABB Transmission and Distribution (No 2) 119
Accreditation of law schools 9
Admission
  articled clerkships 4, 5
  articles and examination, by 7
  Board for barristers admissions 5
  Board for solicitors admissions 5
  practical legal training pre-admission requirement 8
  Supreme Courts, conferred by 9
  Supreme Court judges examination of candidates 5
  university graduates, percentages of 7
Admissions Board
  Bar exam 5
  creation 5
  requirements for admission 5
  University of Sydney and 5–6
Alexander, Samuel 276
Alfred, Taiaiake 203
Allison, Fiona 98
Alternative dispute resolution training 14
American Law and Economics Association 113
American Law and Economics Review 113
Anderson, Matthew
  Law and the Humanities: An Introduction 60, 61, 62, 63
Animal rights and habitat protection 278–80
Anleu, Sharyn Roach 89, 102
Anthony, Dr Dorothea 170, 189–207
Anthony, Thalia 154–73
Anzaldúa, Gloria 238
Aotearoa New Zealand
  Council of Legal Education 16
  legal personhood of environmental sites 277
  Tikanga Māori study, compulsory 16
Appleby, Gabrielle 103
Applied legal history 27, 28
Apprenticeship model of education 4–6
  articles and examination, admission by 7
  Australia, in 4–5, 7
Archard, David 247
Aristotle 34, 35, 40, 48, 142
Arrow, Keith 113

Articled clerkships 4, 5
criticisms of 8
New South Wales abolition of requirement 8
percentage of admissions by 7
Artificial intelligence (AI)
AI engines 19
courses on 14
legal research, impacts on 88–9
Asia-Pacific Law and Economics Review 114
Attorney-General 5
Attwood, Bain 197
Australia Acts 53, 54
Australian and New Zealand Law and History Society 23
Australian Feminist Judgments Project (AFJP) 184–8
methodology 187
Phillips v The Queen 186
Wildlife Whitsunday case 185–6
Australian Feminist Law Journal 180
Australian Journal of Law and Society 66
Australian Law and Economics Association (AustLEA) 114
Australian Law Reform Commission
judicial impartiality report 33
'Recognition of Aboriginal Customary Laws' 196
recommendations, consideration of impacts of 117
Without Fear or Favour: Judicial Impartiality and the Law of Bias 101
Australian National University
Centre for Law and Economics (CLE) 114
Australian Research Council (ARC)
Discovery grant 114
Future Fellowship grant 114
Australian Survey of Social Attitudes 101, 102
Avery, Scott 260–1
Avgoustinos, Costa 271–85

Baldwin, John 94
Balkin, Jack 240
Barker, David 6
Barker, George 114
Barnett, Katy 102
Barristers and Solicitors Admission Board 9
Barristers Admission Board 5
Barristers Admissions Act 1848 (Imp) 5
Admissions Board 5
requirements for admission under 5
Barry, Redmond 6
Bartie, Susan 8
Bartlett, Katherine 179
Bauman, Zygmunt 240
Beattie, William 84
Becker, Gary 113
Becker, Howard 78
Beckett, Angharad 257, 258
Behrendt, Larissa 24, 166, 172, 182, 219
Behrendt, Paul 282
Behrendt review, 2010 15
Bell, Derrick 157, 158, 171
'The Spice Traders' 161–2
Belt, Rabia 256–7
Bennett, Gordon
Possession Island (1991) 68
Bhabha, Homi K 238
Biber, Katherine 73
Biculturalism 58
Birth certificates
changing gender, requirements 231–2
gender recording on 229–31
limited gender categories 232–3
Black, Christine F 3, 24, 67, 182, 272
Black Natural Law 43
Blackham, Alysia 75, 93–105
Blak Sovereign Movement 198
Blum, Walter 110–1
Bogdan, Robert 76
Bosselmann, Klaus 284
Bottomley, Anne 181
Bradley, Debra 216
Braithwaite, John 216
Breton, Albert 121
Brophy, Al 27, 28
Brown, Brené 75
Daring Greatly 88
Brown v Board of Education 158
Bryce, James 52–3
American Commonwealth 52
Burdon, Peter 275, 277

Burns, Kylie 86
Butler, Judith 183, 221, 238
Buzzacott v Hill 200

Cabrera, Nolan 171
Calabresi, Guido 111, 113
  Future of Law and Economics 107
  tort theory 111
Campbell, John 33
Canada
  cultural competency training for lawyers 16
  Feminist Judgments Project 184
  Truth and Reconciliation Commission (TRC) 16
  Women's Court of Canada 184–5
Cane, Peter 93
Canon law 4
Case method 142–3, 144, 146
Castles, Alex
  An Australian Legal History 21
Césaire, Aimé 193
Chalmers, Shane
  The Routledge Handbook of International Law and the Humanities 61, 64, 65, 71
Charlesworth, Hilary
  'Feminist Approaches to International Law' 180
Chen, Dr Ben 114
Chesterman, Michael 7, 14
Child 'best interests' standard 246–7, 248, 249, 250
Chinkin, Christine
  'Feminist Approaches to International Law' 180
Christie v Qantas Airways Ltd 100
Civil procedure
  distributive justice in 117
  law and economics, application to 117–18
Clark, Anna 24
Clough, Beverly 269
Coase, Ronald
  'The Problem of Social Cost' 110, 111
Cobbett, Pitt 6, 7
Cognitive biases 107–8
  confirmation bias 108
  short-term bias 108
  sunk costs fallacy 108
Cohen, Felix 142, 145–6
Colonisation
  early colonial period 50, 52
  impacts on Aboriginal law 3–4, 24–5
  imposition of a single. exclusive legal system 51
  initial colonial encounter 50, 51
  law, role in 23–4
Common law
  Australian as part of imperial 53
  impact of arrival on Indigenous laws 24–5
  importation into Australia 4
  precedent 20
Comparative constitutional law 48–9
  geopolitical changes and 49
Comparative law
  Australia, in *see* Comparative law in Australia
  comparative constitutional law 48–9
  comparative legal studies compared 47–8, 56–7
  cultural specificity of law 55–6
  decolonial comparative law 49, 57–8
  doctrinally-orientated 45, 46, 47
  foreign legal norms, contextualisation 45–6
  functionalist approach 56
  history 48–9
  other modes of legal comparison 47
  uses 46–7
Comparative law in Australia
  1980s onwards 50, 54–5
  Constitution of Australia, drafting 52
  early colonial period 50, 52
  federation period 50, 52–3
  federation to the 1980s 50, 53
  Indigenous comparative law 50–1
  initial colonial encounter 50, 51
  periods of 50
Competition law
  economic concepts, reliance on 118
  law and economics, application to 118–20
  legislation 118
  object of 118
  optimal penalty theory 119
  recoupment analysis 120
Connolly, William 87

Constitution of Australia
Commonwealth powers, expansion of 121
comparative law, use in drafting 52
decolonialism and 197–8
economic analysis 120–3
Constitutional law
'excise', interpretation of meaning 122–3
interstate trade 122
law and economics, application to 120–3
Contingency of legal constructs 26
Controlling authorities, concept 1
Cossins, Annie 186
Council of Australian Law Deans (CALD) 15
Court decisions
quantitative empirical research applied to 102
Court records 26
Court reporting in newspapers 26
Cover, Robert 251
Cowley, Matthew 171
Crawley, Karen 70, 71
Crenshaw, Kimberlé 157, 158, 159–60, 163, 183
'#sayhername' 162
#SayHerName: The Lives That Should've Been 162
Critical approaches to law, 1960s 13–14
Critical Indigenous Theory 165–6, 168
Critical judgment writing 168
Critical Legal Studies movement 14, 79, 148, 151, 168
Critical legal theorists 42–3
Critical race theory (CRT) 154–73, 183
activism 172
affirmative action 163–4
change, as a movement for 163–4
'colour blind' laws 156
Critical Indigenous Theory 165–6
CRT writings and storytelling 161–2
emergence 156
First Nations people of Australia and 164–8, 172
formal equality and 154–5
identity politics and 169–70
Indigenous Judgment Project 167–8
intersectionality with gender and class 159–60
key tenets 155
liberal reforms and interests of whites 158
nature of 154
normalcy of whiteness 157–8
political intersectionality 160
Racial Capitalism 168 171
racism, entrenchment in legal system 156
representational intersectionality 160
right-wing criticisms of 168–9
social construct of race 156–8
structural injustice, lack of focus on 170
structural intersectionality 160
Crooms, Lisa 160, 170
Cross, Cassandra 81
Crowe, Jonathan 32–44
Cubillo, Eddie 17
Cultural specificity of law 55–6
Curriculum
Indigenous content 15–17
legal history, absence 21
role of judiciary and profession in setting 4–6, 7, 10–11, 14

Dagan, Hanoch 18
Databases, online 19
Davies, Margaret 181, 183
Davis, Gwynn 94
Davis, Megan 24
Dawkins, John 9
De Lauretis, Teresa 222
De Laveleye, Victor 109
Decolonial comparative law 49, 57–8
Decolonialism 189–207, 288
Australian Constitution and 197–8
case decisions 199–201
change, moving towards 203–4
commercial interest and private enterprise 205
decolonial theory 189
decolonisation post-World War Two 191–2
demands, diverse 206
genocide cases, pursuit of 200–1
government policy 201–2
Intervention legislation (NT), 2007 199
key proponents 193–5

legal systems, impact 195–7
legislation and 198–9
meaning 189–91
New International Economic Order 192
recognition, moving towards 202–3
Timber Creek case 195
UN Declaration on Decolonization 192
UN Declaration on the Rights of Indigenous Peoples (UNDRIP) 192
Welcome to Country 201
Degener, Theresia 258
DeGraffenreid v General Motors 159
Del Mar, Maksymilian
Legal Theory and the Humanities 61, 62
The Oxford Handbook of Law and Humanities 60, 65
Delgado, Richard 157, 158
Critical Race Theory 163, 170
Dent, Chris 86
Derrida, Jacques 240, 241
DeVault, Marjorie 76
Dicey, Albert Venn 52
Disability Royal Commission 264
Disability studies 254–70
access to justice 267–8
Australia, in 261–8
Center for Independent Living (CIL) movement 256
co-design concept 266–7
critical disability studies 260 –1
cultural disability studies movement 259–61
emergence 254
human rights model of disability 257–9
inclusive equality concept 262–5
mission statement 254–5
NDIS reforms 266–7
'nothing about us without us' 266
overview 255–61
Purvis v New South Wales (Department of Education and Training) 262–3, 264
social model of disability 255–7
streams of research 261
substitute decision-making 265
supported decision-making 265
tensions 268–70
UN Convention on the Rights of Persons with Disabilities 257–8
value 254
Dixon, Owen 115
Dixon, Rosalind 114
From Free to Fair Markets 114
Dobinson, Ian 76
Doctrinal legal scholarship 245–6, 287, 289
Doctrinal method of research 17–18, 288
Doctrine of coverture 22
Dolin, Kieran 239
Donohue, Ashlee 167
Dorfman, Doron 268
Dorsett, Shaunnagh 19–31
Douglas, Heather 167, 174–88
Douzinas, Costas 62, 71
Dowse, Leanne 267
Duetscher, Isaac 127
Duggan, Lisa 225
Dunbar, Norman 7
Duncan, Nigel 17, 96
Duncanson, Ian 23
Duxbury, Neil 142, 143
Dworkin, Ronald 33

Earth jurisprudence 271–85
animal rights and habitat protection 278–80
Anthropocene Judgment Projects 280–1
anthropocentrism 271–5
Australia's legal system and 274
'ecocide', crime of 284
ecological limits, respecting 275–6
emergence 271
environmental laws, inadequacy 273, 274
First Nations legal perspectives 281–2
international law 282–5
legal interpretation, ecocentric 280–1
proceedings, imbalance in resources of parties 273
Rights of Nature concept 276–8
Stockholm Resilience Institute 275
Emens, Elizabeth 268
Empirical research, meaning 93–4

Engels, Frederick 126, 135, 139
Ludwig Feuerbach and the End of German Classical Philosophy 130
The Conditions of the Working Class in England 130–1
The Origin of the Family, Private Property and the State 126
Engineer's case 53
England and Wales
Feminist Judgment Project 184, 185
Environmental legal history 23
Epstein, Lee 94, 96, 97
European Union
harmonising laws of member states 48

Fair, Bryan K
Notes of a Racial Caste Baby, Colorblindness and the End of Affirmative Action 161
Fanon, Frantz 194, 195, 197, 203, 238
Federation
comparative law 50, 52–3
competitive federalism 121
Feminist approaches to law, 1970s 14, 177
Feminist legal scholarship 2, 79, 179
collaborative practice 180
contributions of scholars 181
feminist legal history 23
feminist legislation project 187–8
Indigenous and non-Indigenous, encounters between 182–3
Indigenous practitioners 181–2
interdisciplinarity 180
judgments project *see* Australian Feminist Judgments Project (AFJP)
Feminist Legal Studies 180
Feminist legal theory
development 177–8
diversity of technique 181
feminist jurisprudence 178–9
feminist texts, emergence of 176
focus of 188
judgments project *see* Australian Feminist Judgments Project (AFJP)
nature of 174
teaching 181
'women at law' 175–6
feminists@law 180
Finkelstein, V 258
Finnis, John 35, 36, 43
Flanagan, Tom 204
Flick, Uwe 77
Flynn, Eilionóir 255
Foley, Gary 24
Foreign legal norms
contextualisation 45–6
doctrinal approach 45
imported, status of 54
Formal equality 154–5
Australian examples of impact 154–5
discriminatory impact on racialised peoples 155
Formalist conception of law 18
Former colonies
constitutional hybridisation 58
'legalised revolution' in 58
Fortner, Michael Javen 164, 170, 171
Foucault, Michel 241
Frank, Cathrine 62
Law and the Humanities: An Introduction 60, 61, 62, 63
Frank, Jerome 146–7
Law and the Modern Mind 146
Freemen, Alan 157
Freeman, Cathy 202
Freiere, Paulo 190
Friedman, Lawrence M 79
Frug, Mary Jo 179, 240
Fuller, Lon 34, 35, 44, 151
eight principles of legality 37
'inner morality of law' 37

Galanter, Marc 79
Galston, Arthur W 284
Gearey, Adam 62, 71
Genn, Hazel 93
Genovese, Ann 67, 68, 71, 174–88
Genovese, Emma 226
Gerwitz, Paul 239
Gibson-Graham, JK 223
Giddens, Thomas 70, 71
Gillick case 242–51
best interests standard 246–7, 248, 249, 250

gender-affirming hormone use by young people 243–4
Gillick competence 243, 244, 246, 249, 250
rationality 247–9
Re Alex 244, 246
Ginibi, Ruby Langford 66
Global legal practice 14
Global South 49, 57
Godden, Lee 185–6
Goldsworthy, Daniel 9–10
Goodrich, Peter 239
Legal Theory and the Humanities 61, 62
Graham, Mary 212
Graham, Nicole 282
Gray, Kirsten 168
Graycar, Regina 179
The Hidden Gender of Law 180
Green, Leslie 42

Hamblin, Melissa 279
Hardy, Tess 103
Hargrave, John 5–6
Harris, Cheryl 157
Hart, HLA 33, 35, 36, 151
Head, Michael 125–40
Evgeny Pashukanis: A Critical Reappraisal 127–8
High Court of Australia 33
doctrinal comparative law 53
Engineer's case 53
quantitative analysis of citation practices 102, 116
structured proportionality 54–5
Hill Collins, Patricia 157, 160, 163
Black Feminist Thought 160
Intersectionality as Critical Social Theory 160
Hirschl, Ran 48
Hobbs, Harry 1–18, 19, 75–91
Holden, Richard 114
From Free to Fair Markets 114
Holmes Jr, Oliver Wendell 144–5
The Common Law 144
'The Path of Law' article, *Harvard Law Review* 144–5
Howe, Adrian 179
Howe, John 103
Huggins, Jackie 167
Hunter, Rosemary 184
Hutchinson, Alan
Is Killing People Right? 149
Hutchinson, Terry 17, 75–91, 96

Ibbetson, David 20
ILAC method of problem-solving 1
Implied immunity of instrumentalities 53
Imtoual, Alia 216
Indigenous comparative law 50–1
Indigenous content in curriculum 15–17
implementation challenges 15–16
objectives 15
Indigenous Cultural Competence for Legal Academics Program 16
Indigenous Judgment Project 167, 219
Indigenous law
see also Aboriginal legal traditions
common law, impact 24–5, 51
status and place 16, 25, 51
Indigenous understandings of law 2–3
autonomy 3
Elders as guardians 3
land as a source 3
passing on, methods 3
public laws 3
relationality 3
respect 3
secret laws 3
sources of 3
Ingelby, Richard 84
Inns of Court 4
International Congress of Comparative Law, 1900 48
Intervention legislation (NT), 2007 199
IRAC method of problem-solving 1
Jacobs, Keith 87
Jaworskyj, Michael 126
Jevons, William Stanley 274
Johns, Francis 76
Judgment projects
Anthropocene Judgment Projects 280–1
Australian Feminist Judgments Project (AFJP) 184–8
Indigenous Judgment Project 167

Judiciary, Australian 2
extraneous factors affecting judgments 142
legal education, role in 5, 6, 10, 14
legalistic 18
moral views and decision-making 39, 150
quantitative empirical research applied to 102–3
role of 39

Kalman, Laura 141, 143
Kalven, Harry 110–1
Kameniar, Barbara 216
Kanter, Arlene 256, 264
Kaplow, Louis 113
Kapur, Ratna 183
Karpin, Isabel 263
Kearns, Thomas 239
Kendall, Keith 119
Kennedy, Randall 168
Kenyon, Andrew 86
Kercher, Bruce 25
Kiefel, Susan 54
King Jr, Martin Luther 43
King, Michael 248
Kinoshi, Shino 24
Kirby, Michael 73, 116
Kirk, Jerome 76
Kirkby, Coel 50
Kirkby, Diane 23
Kritzer, Herbert 93, 94–5
Kruger v Commonwealth 200
Kwaymullina, Ambelin 15, 213

La Trobe University
Legal Studies department 14, 23
Lambert, José 242
Landes, William 113
Langden, Christopher Columbus 142–3, 144, 146
Langton, Marcia 181, 210–11
Law
conventional understanding of 1
'open' system 2
purpose of 34–7
social construct, as 2
Law Admissions Consultative Committee (LACC) Report, 1992 11–12
'Priestley 11' core areas of knowledge 11–12, 14
Law and economics
American Law and Economics Association 113
American Law and Economics Review 113
Australia, in 106, 114–23
Australian Law and Economics Association (AustLEA) 114
civil procedure, application to 117–18
Coase Theorem 110–11
cognitive biases 107–8
competition law, application to 118–20
constitutional law, application to 120–3
development of 109–12
economic analysis of law distinction 107
economics as a field 107
efficiency as criterion of economic decision-making 108–9
judicial decision-making, application to 115–17
Kaldor-Hicks method 108
law school courses on 115
macroeconomics 107
meaning 106
microeconomics 107–8
optimal penalty theory 119
rational choice theory 107
recoupment analysis 120
United States, in 112–13
Law and humanities scholarship
Australia, in 65–9
Australian Journal of Law and Society 66
critical jurisprudences underpinning 63, 71
critical register 71
cultural legal studies 65, 67, 70
disciplines forming 59–60, 70
edited collections 60–2
formal legal practice, relevance to 73
humanist methodologies used to develop legal methodologies 63–4
Indigenous perspectives 67
inter-disciplinary nature 62, 70–2

journals 64–5, 66
law and aesthetics 70
law and art 68, 70, 72
law and image 70
law and literature 62–7, 73
law and the visual 70
law-ways of First Peoples 68
Law Text Culture 66
legal geography 71
methodologies 61
normative register 71
resistance to 72
socio-legal studies and 70–1
thematic collections 62
visual jurisprudence 68
Law and morality 150
Law and the Humanities: An Introduction 60
'Law of the land' 4
Law office history 27–8
Law students
PhDs, completion statistics 96
'practice-ready' 1, 12
psychological distress 41
Law Text Culture 66
Lawrence, Charles 157, 158
Lawson, Anna 257, 258
Lawyer
balance 41
duties 38
integration 41
natural law perspective 38
personal values 40, 41
psychological distress, levels of 41
purpose of being 38–40
role of 38, 39, 40
Lee, Taryn 219
Leeming, Mark 28, 29
Leff, Arthur 111
Legal changes 26
Legal education
Medieval Europe, in 13
practice-based 7, 10–11, 14
'practice-ready' graduates 1, 12
social liberalism 11
tension between academic and practical approaches 9–10
Legal history
applied legal history 27, 28
courts use of 28–30
doctrinal or institution history 21
importance of 23, 30–1
Indigenous perspectives 24
interdisciplinarity 19, 21, 23
law office history 27–8
law school curriculum, absence 21
'presentist history' 27–8
scholarship area, growth 21
social history and 22–3
sources 19, 26–7
study of 19
what it is 19
Legal interpretation 251–2
discursive analysis 242
doctrinal method 238, 241, 243
ecocentric 280–1
formalistic approach 239
postmodern and poststructural analysis 236–7, 239–43
Legal philosophy
court decisions, informing 33
law reform, impacting 33
nature of 33
point of 32, 33, 34, 44
tool to enhance legal scholarship 32
Legal positivism 35
Legal processes
quantitative empirical research applied to 102
Legal profession
emergence 4
legal education, role in 4–6, 7, 10–11, 14
quantitative empirical research applied to 102
Legal Profession Admission Board (NSW)
Diploma in Law 9
Legal realism
aim of 141
Australia, in 148–9
case method and 142–3, 144, 146
criticisms and critiques 151–2
development 142–3
impact 151
R v Brown, analysis of applying 149–50
Legal realists
Cohen, Felix 142, 145–6
collective title, use of 142
Frank, Jerome 146–7
Holmes Jr, Oliver Wendell 144–5
Llewellyn, Karl 142, 147–8
mood rather than 'movement' 141, 142, 145

Legal realists (*cont*)
pedagogical approach 141
scope of analysis 142
unifying factor 144
Legal research 1
AI, impacts 19, 88–9
choice of methodology and the researcher's worldview 78
doctrinal method 17, 95
empirical research, meaning 93–4
how and why 28
online databases 19
qualitative *see* Qualitative legal research
quantitative *see* Quantitative empirical legal studies
training in 17
Legal scholarship 2
doctrinal method 17
Legrand, Pierre 49, 55, 56
Leiboff, Marett 62, 70
Leiter, Brian 42, 151
Lenin, Vladimir 126
The State and Revolution 126, 131, 135, 139
Lentner, Gabriel 104
LePlay, Frederic 78
Liberal constitutionalism 48, 49
Liberal democracy, challenges to 49
Liberal education, law as part of 13–14
Liberal reforms
convergence with interests of whites 158
Life, point of 40–2
balance 41
choosing a model of life 40–1, 43
integration 41
Lindgren, Kevin 7
Llewellyn, Karl 142, 147–8
The Bramble Bush 147
Loban, Heron 187
LoPucki, Lynn 95
Lorde, Audre 184, 238
Lowe, Ian 273
Luxemberg, Rosa 126
Lynch, Andrew 102

Mabo, Eddie Koiki 199
Mabo v Queensland (No 2) 25, 51, 199–200, 281
McCausland, Ruth 267
MacCormick, Neil 36
McCutcheon, Jani 72
McGaughey, Fiona 72
Mack, Kathy 89, 102
Mackinnon, Catharine A 179
McKinnon, Crystal 67
MacNeil, William P 65, 72
MacPherson v Coal & Allied Mining Services Pty Ltd [No 2] 100–1
Macquarie University 14, 25
McQuire, Amy 167, 173
McRuer, Robert 238, 256
McVeigh, Shaun 62, 67, 68, 71
Majury, Diana 184
Makarrata Commission 196
Maker, Yvette 269
Maldonado-Torres, Nelson 194, 206
Maloney, Michelle 274, 275–6
Manderson, Desmond 61, 68
'Desert Island Discs' 72
Manne, Henry 113
Markus, Andrew 197
Martin, Andrew 94, 96, 97
Martin, Linda 4, 5–6
Martin Report on the Future of Tertiary Education, 1964 8, 95
Marx, Karl 125, 126, 139
Capital 126
Civil War in France 134
Critique of Hegel's Philosophy of Right 126
Critique of the Gotha Program 125, 134
Preface to A Contribution to the Critique of Political Economy 129–30
The Eighteenth Brumaire of Louis Napoleon 132
Marxist theory of law 288
see also Soviet Revolution, 1917
1871 Paris Commune 132, 134, 139
capitalist democracy and the ruling class 132–3, 139
class character of the State 130–2
dictatorship of the proletariat 134, 135–6
exclusion from law courses 125
global mass protests, rise 136
historical material analysis 129–30

importance of 125
law and the capitalist mode of production 130
revolution, necessity for reform by 132–3
right to protest *see* Right to protest
role of law 126
socialist revolution, tasks of 139
Western emulation of some reforms of Soviet Revolution 128
Mason, Anthony 115, 116, 122
Mataja, Victor 109
Matsuda, Mari 157, 158, 183, 187
Maynard, Fred 208
Maynard, John 23
Mazel, Odette 234
Mbembe, Achille 238
Meyler, Bernadette
The Oxford Handbook of Law and Humanities 60, 61, 65
Mignolo, Walter 194
Learning to Unlearn 195
Miller, Marc 76
Minnow, Martha 179
Mitchell, Matthew 236–52
Montesquieu
The Spirit of the Laws 48
Mor, Sagit 254, 265
Moreton-Robinson, Aileen 165–6, 182, 238
Morgan, Jenny 179
The Hidden Gender of Law 180
Morgan, Wayne 234
Mossman, Mary Jane 179

Naffine, Ngaire 179
Napolean, Val 209
Native Title Act Case 54
Native title rights 25, 51
pastoral leases 29–30
Natural law theory 35
common good, law to promote 37
minimum content of natural law 35
New South Wales Bar
admission before the *Barristers Admissions Act 1848* (Imp) 5
Newman, Daniel 61
Ng, Wendy 114
Ngurrara Canvas II, 1997 68
Nulyarimma v Thompson 200

O'Connell, Karen 263
O'Donnell, Erin 282
O'Donovan, Darren 254–70
O'Donovan, Katherine 179
O'Hara, Claerwen 221–35
Optimal penalty theory 119
O'Shane, Pat 182
Otto, Diane 182–3
The Oxford Handbook of Law and Humanities 59–60, 61, 65
Oxford University
Chair in Historical and Comparative Jurisprudence 48

Pahuja, Sundhya 61
The Routledge Handbook of International Law and the Humanities 61, 64, 65, 71
Paradies, Yin 169
Pastoral leases 29–30
Patrick, Jeremy 1–18, 19
Pearce report, 1980s 95
Pearson, Noel 24
Pervan, Flynn 236–52
Petch, Simon 66
Peters, Timothy 70, 71
Pether, Penelope 66–7, 72
'Comparative Constitutional Epics' 67
Petrow, Stefan 21
Philippopoulos-Mihalopoulos, Andreas 62
Phillips, Jim 26
Pigou, Arthur
'The Economics of Welfare' 110
Piper, Christine 248
Posner, Richard 109, 111–12, 113, 287
Economic Analysis of Law 111, 123
Postcolonial jurisprudence 183, 191
Postmodernism and poststructuralism 236–52
determinacy of legal language methods 246
gender-affirming hormone, use by young people *see Gillick* case
legal interpretation and 236–7, 239–43, 251–2

Posner, Richard (*cont*)
neutrality of the law, challenging 249–51
overview 237–8
rationality 247–9
scholars 238
Pound, Roscoe 151
Practical legal training pre-admission requirement 8
Precedent 20
concept 1
'Priestley 11' core areas of knowledge 11–12, 14
Puar, Jasbir K 238
Public law, doctrinal 2
Purpose of law 34–7
acceptable social conduct, marking 36
benign purpose perspective 42
changing human conditions, contingent on 42
coordinate society for the common good 35, 36, 43
critical legal theorists perspective 42–3
diversity of theories 35–6
exclusionary reasons, providing 35–6
order social action 34
social justice, role in 43

Qualitative legal research
artificial intelligence, impacts 88–9
case study method 78, 80, 87
characteristics 76–7
'Court Appearances via Video Link for Young People in Detention in Queensland' example 89–91
culturally safe research 83
data collection methods 80
descriptive research questions 80
development 78–9
document analysis 80, 85
content analysis 86
discourse analysis 86–7
sources 85
ethics 81
grounded theory 88
initial research question, formulating 80
interviews 80, 82–3
semi-structured 82, 83
structured 82–3
unstructured 82, 83
Law and Society movement 79
meaning 76, 77–8
methods of undertaking 79–81
normative research questions 80
participant observation 80, 83–4
purposeful sampling 80–1
quantitative research contrasted 77–8
snowball sampling 81
Quantitative empirical legal studies
Australia, in 94–6
case law, use in 99–101
deductive nature of 97–8
descriptive analysis 97
emergence 94–6
empirical research, meaning 93–4
explanatory analysis 97, 104
judges, lack of empirical literacy 100–1, 104
law reform, use in 101
legal data, limited or lack of 98–9
legal scholarship, use in 102–3
objectivity of data 98
observational data 96–7
quality of research conducted 104
surveys 101, 102
United States, in 94–5
Queer legal theory 18, 183, 221–35
aim 223
birth certificates, gender recording on 229–31
changing gender, requirements 231–2
emergence 221–2
homonormativity 225
nature of 221
polyamory 227, 228
queering law 234
respectability politics 225
same-sex marriage laws 224–6
sexuality-related discrimination 227
sexuality-related law reform 224–5
Quijano, Aníbal 194

R v Ballard 25, 26
R v Boatman 25
R v Brown
legal realism analysis 149–50
R v Murrell 25–6

Ramshaw, Sara 64
Raworth, Kate 275–6
Raz, Joseph 35–6
Reconciliation Action Plans 201
Reserved state powers doctrine 53
Richards, Kelly 81
Richardson, Ivor 116
Right to protest
  anti-protest laws, extensions of 137
  emergency powers to restrict 137–8
  global mass protest, rise 136
  Marxist analysis of 138–9
  penalties for protesting, increases 137
  police powers to shut down 137
  violent suppression of protests 137
Rights of Nature concept 276–8
  Australia, in 277–8
Rilke, Rainer Maria 44
Robinson, Cederic
  Black Marxism 171
Robinson, Zoë 102
Roles in the legal system 38, 46
  role morality 38, 39
Roman law 4
Roux, Theunis 45–58
Royal Commission into Deaths in Custody 210
Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 254
Rule of law 1
Rush, Peter 68

Said, Edward 238
Same-sex marriage laws 224–6
Sandberg, Russell 26, 61
Sanderson, Douglas 204
Sarat, Austin 239
  Law and the Humanities: An Introduction 60, 61, 62, 63
Sartre, Jean-Paul 41
Sedgwick, Eve Kosofsky 183, 221, 227–8, 234
Sexual assault laws 2
Shakespeare, Tom
  Disability Rights and Wrongs Revisited 259–60
Sharp, Cassandra 70
Sherwin, Richard 73
Skivenes, Marit 247
Smart, Carol
  Feminism and the Power of the Law 178
Smyth, Russell 102
Social history 22–3
Social science, empirical 56
Socio-legal studies 70–1, 79
Solicitors Admission Board 5
Soviet Revolution, 1917 139
  Criminal Code of 1919 128–9
  New Economic Policy, 1921 139–40
  social, political and legal reforms 127–8
  Stalinist regime 126, 129, 140
  Western emulation of some reforms of 128
Spivak, Gayatri Chakravorty 238, 240
Steele, Linda 269
Stefanic, Jean
  Critical Race Theory 163, 170
Stern, Simon
  The Oxford Handbook of Law and Humanities 60, 61, 65
Stewart, James Gilchrist 141–52
Stolen generations 200
Stone, Deborah 269
Structured proportionality 54–5
Stryker, Susan 238
Summerhayes, Stephen 281
Supreme Court of New South Wales 5
Supreme Court of Victoria 6
Sutherland, Carolyn 100
Suttner, Guy 106–24
Sydes, Brendan 277

Táíwò, Olúfémi 206
Tasmanian Dam Case 121
Taylor, Stephen 76
Terra nullius 25, 51, 199–200, 203, 272, 288
Thompson, EP 22
Thornton, Margaret 10, 72, 179, 263
  Dissonance and Distrust 82, 181
  'Feminist Jurisprudence: Illusion or Reality?' 178
Thorpe, Lidia 200
Thorpe, Robbie 200–1

Tlostanova, Madina 194
Learning to Unlearn 195
Tomlins, Christopher 20, 23, 71
Trade schools, law schools as 10–13
Tremain, Shelly 259
Trotsky, Leon 126, 129, 139, 140
revolution, necessity for 132
Terrorism and Communism 132–3
Twining, William 143
'Pericles and the Plumber' lecture 9

UN Convention on the Rights of Persons with Disabilities 257–8
United States
Bill of Rights 52
constitutional interpretation 27
law as a post-graduate degree 13
University law schools
1960s-1980s emergence of new 8, 9
1960s critical approaches to law 13–14
accreditation from admissions boards 9
adjuncts to profession, as 7
curriculum, role of judiciary and profession 4–6, 7, 10–11, 14
Dean 6
emergence 4, 6
expositional and lecture-based 7
full-time teachers 7
internationalising curriculum 14
part-time practitioner teachers 6
proximity to legal district 7
University of Adelaide Law School 6
University of Melbourne 6
Competition Law & Economics Network 114
University of New South Wales Law & Economics Initiative 114
UNSW Law Journal 115
University of Queensland Law School 6
University of Sydney
academic legal tuition 6
Faculty of Law 5
incorporation 5
University of Tasmania Law School 6
University of Western Australia Law School 6

Vagrancy 22
Venzke, Ingo 242
The Voice referendum 198

Waldron, Jeremy 204
Ware, Linda 259
Watego, Chelsea 167, 168, 172, 197
Another Day in the Colony 172
Watson, Alan 55, 56
Watson, Irene 67, 167, 181, 182, 187, 192, 209, 210
Watson, Nicholas 260
Watson, Nicole 164, 182, 187
Aboriginal Women, Law and Critical Race Theory: Storytelling From The Margins 166
Indigenous Judgment Project 167
Webley, Lisa 85
Weisbrot, David 7, 14
Wellisz, Stanislaw 111
White, James Boyd
The Legal Imagination 62
The Wik Peoples v Queensland 29–30
Wildemuth, Barbara 82
Williams, Claire 277
Williams, George 102
Williams, Patricia A 183
Wilson, Kristopher 208–20
Wittgenstein, Ludwig 87
WorkChoices Case 121
Wright, Glen 279
Wright, Shelley
'Feminist Approaches to International Law' 180

Young, Alison 73

Zhang, Yan 82