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**Problems for a law curriculum in the 21st century**

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**Introduction**

Some time ago Professor Andrew Tettenborn wrote this complaint about legal education in England.<sup>1</sup> He referred to the answer given to a question which he had asked one of his top students who he described as having 'an impeccable degree, glowing testimonials and a plum posting in the bag'. The answer was:

'I haven't a clue: I suppose you just pick it up in practice'

Like the quiz show Jeopardy, Tettenborn invites the reader to guess what question he asked which invited this answer:

'A recondite issue about drafting syndicated loans'? No.

'Some obscure conundrum from the now moribund White Book [on English civil procedure]?' No.

The question he asked which attracted the answer that this is something that will be picked up in practice was 'What is the legal remedy if someone else has my car and I want it back'.

The general public might be astonished to learn that in a civil action this question which is apparently extremely simple conceals very difficult and deep questions involving hundreds of cases which consider the interaction between common law and equity, the historical approach to the torts of conversion and detinue, and the operation of the constructive trust.

The point I wish to make in this presentation is that in areas today where the law has tied itself in knots, untangling the knots is becoming increasingly difficult. Although the law is much liberated from the constraints of formal process a new problem is endemic. The problem is information overload.

In practice, the key guidance and development of the law in this country comes from the High Court of Australia. But that court can only hear and decide about 60 cases a year. It is our institutions of learning which perform a fundamental role in shaping how we understand and appreciate law. And the law curriculum is the foundation for the way in which that wisdom is developed.

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<sup>1</sup> A Tettenborn 'Review of S Gleeson, *Personal Property Law*' [1999] LMCLR 586.

There are a number of very important aspects of a law degree about which others will speak. My paper this evening will focus only upon the legal content of the law curriculum in terms of its doctrines and rules.

The provocative suggestion for debate that I will make is that the core role of a law school is not to teach students to learn or memorise hundreds of cases. Nor is it to teach our brightest students how carefully to distinguish any factual scenario before them from a decided case.

Instead, the most important role should be for students to read far fewer cases and instead to focus much more upon history, context, and theory. These three factors should instil what I suggest to be the most fundamental part of legal doctrine: an understanding of principle.

There are two reasons why this suggestion is provocative.

The first is that there are signs that the 21<sup>st</sup> century law curriculum is evolving in the opposite direction. The core list for many subjects has seen a proliferation of cases. We have also seen a proliferation of subjects, including compulsory subjects, as the volume of cases causes larger areas to fragment. These phenomena are not confined to law curricula. They are matched by identical developments in the practice of law.

The second reason why this suggestion is provocative is because of an underlying assumption that in many cases the application of reasoned principle can suggest a right answer. The rise and rise of critical legal theory casts a long shadow over this assumption. There is a place for the important contributions of critical legal theory and socio-legal studies but these contributions should not overshadow that there are many cases where the application of principled reasoning suggests a single, correct answer.

The suggestion that law schools should focus more upon factors such as history, context, and theory at the expense of the detail of cases and legislation also invites the immediate response of which cases, which legislation and even which subjects should be jettisoned. I do not propose to attempt to answer these questions of detail. Instead this paper aims to provide a framework for discussion. Let me start with a few remarks about the historical evolution of law in practice and the academic study of law.

## **Historical evolution of law in practice and of law in the academy**

### ***Evolution of legal procedure in practice***

In very broad terms, the procedure of the common law of England, which we inherited in Australia, evolved in a very similar manner to the threefold Roman law which preceded it by a number of centuries. It began with a rigid formality of procedure and moved to flexibility of procedure.

Barely two centuries ago if you were struck down in the street by someone else's carriage you would lose your action if your lawyer came to common law court with the wrong form. It was not unusual for a plaintiff to be non-suited in this way.

Although English courts applying rules of equity had more flexible procedures, major developments in the common law beginning in the Trinity term 1831 and Hilary term in 1832, and in 1852 and 1873 began to liberalise procedure. That liberalisation has continued in Australia to this day. Even in this court there have been significant and very recent reforms aimed at considerably increasing flexibility and liberalisation of procedure.

Justice is no longer seen as a game. Litigation is not an ambush. The principle of equality of arms, which is enshrined in many international instruments, is enhanced by open, transparent and flexible procedure.

### *The academy*

Unsurprisingly, the development of legal education and the teaching of the law evolved simultaneously with the evolution of legal procedure. I say that this is unsurprising because the notion of the legal academy being separate from the legal practitioner is a very recent phenomenon in the life of the law.

In Roman law the teaching of law and the practice of law were inseparable. It is from Roman law that we derive our legal architecture. Although we do not often realise it, many practitioners and judges decide legal problems on a daily basis by applying concepts debated and resolved nearly 2000 years ago by Gaius, or Pomponius, or Sabinus, Labeo or Ulpian. The important point is that for centuries, English lawyers, like the Romans, did not recognise any rigid distinction between the teaching of the law and the practice of law. The law was the law. The jurists were both academics and practitioners. And the imprimatur of the Emperor<sup>2</sup> was fixed upon those jurists who were simply the most learned in the law.

It is also easy to forget that one of the reasons for many of the greatest legal advances and the reputation of the greatest judges of the law is rooted in their writings *outside* the courtroom. This list includes such judges as Glanville, Bracton, Littleton, Coke, Blackstone, Story, and Holmes. Joseph Story is a good example. He spent 34 years on the Supreme Court of the United States. He was appointed at the age of 32. His opinions on the Supreme Court were revolutionary but it was his prolific scholarship which first crossed the Atlantic and is that writing with which we are most familiar: his books on the conflict of laws, on equity, on agency, on partnership, on bills of exchange and, in the United States, his writing on Constitutional Law.

Measured in terms of the life of legal education, the modern law school is also very young. It is barely 150 years old. It only developed in Australia, North America and England from the mid-19th century.

The first North American law school, the Harvard Law School was established in 1815 although in 1829 there was only a single student enrolled. The law school first began to expand after Nathan Dane funded the first endowed chair, on the condition that it be occupied by Joseph Story.

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<sup>2</sup> The *ius publice respondendi*.

In Australia, the Sydney Law School was contemplated in the *Act to Incorporate and Endow the University of Sydney* which received Royal Assent on 1 October 1850, although until 1890 it was described as having a 'shadowy existence' with the main work being examining rather than teaching.<sup>3</sup>

Legal education at this time in the universities was moribund. Since Henry VIII had forbidden the study of the canon law, the core of legal education was the civil law. The Vinerian Professorship, the jewel of the English common law, first held in 1758 by William Blackstone the first English professor of the common law, had become a sinecure. From the appointment of Blackstone's successor, the disappointing Robert Chambers who left very soon afterwards for the Chief Justiceship of Bengal, until the appointment of AV Dicey in 1882, the Vinerian chair was marred by disappointment.<sup>4</sup> A string of brilliant successors to Dicey breathed life into the heart of common law teaching at Oxford (the latest appointment following Professor Andrew Ashworth's retirement has today been advertised).

From the beginning of modern legal education there was widespread dissatisfaction with the teaching of law for similar reasons to the problems with the practice of law. Legal teaching focused upon the complex forms and procedures of the common law, at the expense of an understanding of its nature and principles. As Patrick Polden explained, there was a growing desire amongst reformers for the study of Roman law and legal history 'as a way of introducing students to a wider set of principles'.<sup>5</sup> Lord Brougham said in 1844 that the students in the offices of the busiest pleaders 'acquire a practical and mechanical rather than a systematic knowledge of the law'.<sup>6</sup>

Law is no longer taught, or practised, with rigid formalism. Just as the 20<sup>th</sup> century saw a liberalisation of legal form in practice, so too legal teaching began to focus on principle. One of the founders of this new approach was Dean Langdell at the Harvard Law School who pioneered the teaching of legal principles by close study of the cases.

### **A major problem for legal education and legal practice today**

As the practice of the law has become less formal, and the teaching of law correspondingly focused upon principle, a new challenge has arisen for the teaching and practice of law today. This is the challenge of information overload. There are two particular manifestations. The first is a proliferation of case law. Related to this is the second issue: the increasing reductionalism and compartmentalisation of the law.

#### ***Information overload***

The late Peter Birks described information overload as the 'biggest problem facing the common law at the beginning of the new century'.<sup>7</sup> Historically the problem with legal information was the opposite. Much of the law of England was made at the

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<sup>3</sup> J Mackinolty and J Mackinolty *A Century Downtown : Sydney University's First 100 years* (1991) 19.

<sup>4</sup> H G Hanbury *The Vinerian Chair and Legal Education* (1958).

<sup>5</sup> P Polden 'The Education of Lawyers' in *The Oxford History of the laws of England* (Vol XI, 2010) 1180.

<sup>6</sup> H Brougham 'Legal Education' (1844) 1 LR 144-57, 148.

<sup>7</sup> P Birks 'Preface' to *English Private Law* (2000) xxix.

dining tables of the Temples and of Lincoln's Inn. Reasons for decision were short, and sweet. In some courts reasons were barely given at all. In Book 3, Chapter 4, Blackstone wrote of the courts of piepoudre in the fairs and markets, the most 'expeditious court of justice known to the law of England'. According to Sir Edward Coke, the 'powder on the feet' was a reference to justice being done as speedily as dust can fall on the foot.

Less than a century ago the most brilliant judges could still deliver ex-tempore judgments in all, or nearly all, of the cases they heard. In the late 19th century Sir George Jessel delivered thousands of decisions as a first instance judge. Every single one of them was ex tempore. Even in the mid-20th century this was still possible. Lord Denning, while a first instance judge, took the same approach. In his biographical entry on Lord Denning, Lord Goff said that at the conclusion of each case Lord Denning invariably gave an unreserved decision:

'scarcely seeming to refer to his sparse notes. And hardly a gap used to separate one case from another. It was always: 'Next case please'

The same is no longer true. Like the Commercial and Managed Cases list in this court, the Commercial Court in England was established as a division of Queen's Bench with one of the goals being expediency. The judges sit in business suits. Cases are tightly managed. But in a recent case with which I was involved as counsel prior to leaving England, involving a dispute between two warring Russian oligarchs over billions of pounds, the litigation took years to reach a hearing. Submissions ran to thousands of pages. Hundreds of cases were cited. The standard delay between close of evidence and written submissions (which are then followed by oral submissions)<sup>8</sup> was stretched over a month, with further reply submissions in following weeks before oral closings. The judgment, which is reserved, will run to hundreds of pages.

I do not know of a single judge in any Australian Federal or Supreme Court who delivers all, or even most, of his or her decisions ex-tempore. The sheer proliferation of information and respect for rules of precedent makes this impossible. The distinction between reported and unreported decisions has reduced nearly to vanishing point. The quick ex tempore decision included, if at all, only in the dusty annals of a court library is almost entirely a thing of the past.

There are numerous reasons for this.

One reason is that some lawyers, perhaps fearful of the weight of authority, will plead every imaginable issue which could potentially arise in a case. There is an apocryphal story of the counsel who appeared before a timid English judge and explained that he had three submissions to make. One was compelling and probably irrefutable. A second was difficult, and might fall either way. A third was fairly weak. The judge asked 'Which is which?' To which the counsel replies 'That is for Your Lordship to decide'.

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<sup>8</sup> See Commercial Court Guide, J 11.1. This document is memorised by all successful commercial barristers as I learned, the hard way, from my former pupilmaster who also kindly corrected the reference to the Guide in this footnote.

Many trial judges, myself included, believe that consideration should usually be given to all issues raised by counsel. As the issues pleaded in a case proliferate, judgments grow longer, and longer. The Right Hon Dame Mary Arden,<sup>9</sup> has recently argued in support of those who believe that where possible judgments of higher courts should 'be directed to *all* those who may subsequently wish to find out about the law applied in the case, including readers who are not lawyers at all'. Sometimes this will mean shorter, more succinct judgments. But on other occasions the explication of underlying premises and motivations for decision will be harder, it will take more time and occupy more space.

Matters are also complicated because the sheer proliferation of authority sometimes means that, more and more often, an outlying precedent can be found for almost any proposition of law. Unless those appearing in the courts can take a stand against an outlying authority, or on a point where principle is clear, even the most basic of assumptions may sometimes be open to question.

This is not to say that these assumptions should not sometimes be challenged. But a first instance trial is not the place to do so. It will sometimes be the case that propositions which a generation ago were thought to be sacrosanct can be challenged on appeals, usually to the High Court of Australia. This may be the case for a client with deep pockets, who engages counsel with a creative intellect and the time to scour the proliferation and availability of foreign authority. In 2008, in a case with which I later became involved, I watched the forensically brilliant team of Laurence Rabinowitz and Richard Handyside explain to Mr Justice David Steel which of the numerous issues before him involved law which he was bound to follow. They explained that those issues were being raised only to be put to one side for when, or if, the case was eventually heard by the Supreme Court of the United Kingdom. Ironically, when that case reached the Supreme Court it was the submissions from the opposing side, filed shortly before the case settled and on the eve of the 80<sup>th</sup> anniversary of *Donoghue v Stevenson*, which bore the fingerprints of one powerful academic voice who had deprecated the reasoning in that decision of that great Australian, Lord Atkin.

As the courts find themselves in the conundrum of information overload, so too do the universities. When I taught the law of torts at the University of Oxford, the vast bulk of the cases on the syllabus in 2004 bore almost no resemblance to those on the syllabus in 2011. One aspect was, however, common. That is the dominance in the syllabus of one imperial tort, from dozens of others. It is often despaired that there is no other alternative. It is said that even the teaching of the tort of negligence requires a student to learn each of the different components of an action for negligence: duty, breach, causation, scope of liability for consequences, damages. And each of these areas requires an understanding of the different approaches in different streams of case law. To this must be added the mass of statute law: consumer protection, occupier's liability, competition legislation. And if there is any time to draw breath at the end of the course, there might just be time to gasp the question of how the different streams of statute and common law might interrelate in a particular area?

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<sup>9</sup> M Arden 'Judgment Writing: Are Shorter Judgments Achievable' (2012) 128 LQR 515, 517.

## ***Subject-creep***

There is a related problem to the mass of case law. This is the issue of subject-creep. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,<sup>10</sup> Lord Devlin said that

What *Donoghue v Stevenson* did may be described either as the widening of an old category or as the creation of a new and similar one ... An existing category grows as instances of its application multiply until the time comes when the cell divides.

In almost every subject, the cell has divided again, and again, and again. More and more subjects now lay claim to be of fundamental importance. Many Australian lawyers take it as an item of faith that a student cannot obtain an adequate legal education without formal instruction in contract law, criminal law, torts, company law, civil procedure, evidence, equity, trusts, real property, administrative law, and constitutional law. To this long list there are numerous subjects that also lay claim to be of fundamental, and increasing, importance: human rights law, employment law, public international law, private international law, trade practices law, and jurisprudence to name just a few.

Even to *this* very long list there are some glaring omissions. Apart from the historical learning instilled in the proper teaching of a course on equity, it is often thought that with the proliferation of modern law there is rarely time or place for a detailed historical instruction as part of a particular subject in a law degree. I am told of two rare exceptions in the course in Roman law that Justice Emmett teaches at the Universities of Sydney and New South Wales and the course in legal history just established at the University of Sydney by a group of barristers at Banco chambers. The short point is that the legal curriculum has become so wide that there is little room for elective subjects and it is becoming increasingly difficult for students to see how the components of the law interrelate.

Again, this corresponds with identical developments in practice. At least at first instance, it is becoming rare to see a barrister appear on one day in an employment case, on another in a criminal case, and on a third in a constitutional law case. Despite strong and hopeful attempts to hold back the tide, including in this jurisdiction, the judiciary is also becoming more and more specialised.

### **Two philosophies and two possible directions**

There are two possible alternatives to the twin problems of information overload and subject creep. Both are motivated by those who proclaim the essential truth of a particular philosophy of law. The leaders are often charismatic, passionate, and in search of a fundamental truth underlying the law.

One conception of law is that it is an instrument of consequentialism.

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<sup>10</sup> [1963] UKHL 4; [1964] AC 465 at 524-525.

Perhaps the best known example of this is the view prevalent in the United States that law generally serves the goals of economics. The proponents of this view include two of the most brilliant judges in the United States.

On this approach the information overload and subject creep issues need not be a concern. The practitioner has the benefit of Restatements of the Law published by the American Law Institute. I now participate in that work which involves, quite literally, the reconciliation of thousands of cases across 50 states and federal jurisdictions.

But, the mass of cases need not trouble the law schools where the study of principle can focus on underlying conceptions of the law as drawn from economics. The cases are merely illustrations of the economic approach, either correctly or incorrectly decided. On the economic conception of law, the best lawyer, to adapt from one of Holmes' musings, is the trained economist. Without specialist training the law, on this conception, is thought to be incomprehensible.

Another fundamental conception of the law which can lead to a particular approach to teaching unconstrained by information overload is that law is a function only of corrective justice.

The concept of corrective justice has been used in numerous different senses since Aristotle. But many of the conceptions of corrective justice share the view that the law contains an inner logic which ought not to be polluted by using the parties to a dispute as instruments of social change or by adjudicating the dispute by reference to any concern beyond the rights of the parties themselves. Again, on this view, the proliferation of case law need not be a difficulty. The natural tenets of the law can be derived by the process of reasoning, a dimension of 'fit' with the cases might properly focus on the fit with results of cases; the reasoning moulded to fit the dimension of 'justification' which assumes great importance.

Although the problem of information overload is a new one, the different philosophical approaches and their effect on teaching is not. Jeremy Bentham had attended the lectures of Blackstone in 1763 and developed a contempt for the teaching of the common law without reference to a basic deontological goal which he considered to be that the whole province of jurisprudence is to achieve the greatest good for the greatest number. Bentham still graces the cloisters of the Main Building at University College London banefully frowning at the many UCL private law theorists inspired by natural law (whether they realise it or not).

This is not the appropriate forum to venture a philosophical view or conception of law or adjudication. It suffices to say that if it is accepted that the manner of teaching and the mode of adjudication are inextricably linked then both of these single conceptions of law have some difficulty as teaching pedagogies in Australia. The first does not reflect the practice of the courts in this country where principles and rules of private law are not generally decided by economic doctrine or any other single social theory. Nor is the second an accurate description of the manner in which cases are argued, or decided. Even apart from the importance of broader considerations of policy in many cases, seriously considered obiter dicta cannot simply be jettisoned at the altar of the preferred corrective theory. But the second approach does emphasise the importance of principle.

## Other solutions

In this paper I have outlined a problem and I have doubted two possible solutions based on particular philosophies of law.

To those with a Civilian mindset a different solution lies in codification. It is sometimes said that the greatest legal system ever devised began and ended with a code. But the power of a code to direct principled thinking depends greatly on the eloquence and the brilliance of the draftspersons and those upon whose shoulders they stand.

Codes also have a tendency to grow. The French have more than 40 Codes. The German Civil Code, the *Bürgerliches Gesetzbuch*, consists of more than 2000 primary sections. And although the Code from which the prosperity of Roman law allegedly began, the XII Tables, was said by Cicero to be known to children by heart, the *Digest* required a heavily cribbed accompaniment, the *Institutes*, for the student to navigate the law.

Another solution, historically tried but failed, is the teaching and practice of law purely by broad principles. In the 18<sup>th</sup> century the maxims of equity were taught in this way. In the middle of that century an anonymous Middle Temple publication listed 345 Common Law Maxims of both common law and equity including 'Equity is Part of the Law of England' and 'Equity Favours Younger Children'.<sup>11</sup> At common law few maxims remain today. Those that do survive such as *ex turpi causa non oritur actio* generate more heat than light.<sup>12</sup> And in equity it is almost universally acknowledged that the principles embodied in the equitable maxims often conflict.<sup>13</sup>

A third solution is revisiting the law curriculum. The late Professor Peter Birks, sometime Secretary and President of the Society for Legal Scholars, emphasised the importance of teaching and understanding the law by a focus on the manner in which its component parts inter-relate. Whether or not Birks was right to attempt to structure the modern law by developing the framework so brilliantly conceived by Gaius in the second century of the Common Era, Birks' work directed attention to questions such as:

- (1) what subjects do we need to teach to give students an understanding of how the nature of law and of adjudication?
- (2) What are the boundaries of those subjects?
- (3) What is the manner in which the subjects should be taught?

I have only focussed in this presentation upon the third of these questions. I began with an example concerning personal property. I have had the benefit this term of assisting Dr Eric Heenan, a Western Australian barrister, with the teaching of his

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<sup>11</sup> A Gentleman of the Middle Temple *The Grounds and Rudiments of Law and Equity* (1749).

<sup>12</sup> *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm)* [2009] UKHL 39; [2009] 3 WLR 455, 511 [178] (Lord Walker).

<sup>13</sup> In the latest edition of *Snell's Equity* I advocate the abolition of explicit reliance upon equitable maxims in decision making altogether due to the price they exact in confusion and uncertainty in adjudication.

course on personal property at the University of Western Australia. His teaching is heavily Socratic. It consists of (1) a handful of important cases each week, (2) using those key cases to span vast tracts of law, and it (3) involves a large dose of legal history, and numerous questions of theory. It is hard for me to conceive a better experience. And maybe, just maybe, this will translate into practice.

My final anecdote concerns an appeal to the House of Lords in 1997. The parties were represented by the finest and most brilliant solicitors and counsel. One Queen's Counsel, who is no longer in practice, refused to argue a point on which his client had succeeded in the Court of Appeal. He said that the point was simply contrary to principle. The story was told to me with a deep frown. The example is extreme but this type of conduct and the focus on principle might just be the only way through the minefield of information overload which we now encounter.